

THE LAW OF SPECIFIC RELIEF

Tagore Law Lectures, 1906.

THE LAW
OF
SPECIFIC RELIEF
IN
BRITISH INDIA

BY
SATISH CHANDRA BANERJI, M.A., LL.D.,
PREMCHAND ROYCHAND STUDENT, UNIVERSITY OF CALCUTTA; FELLOW, UNIVERSITY OF
ALLAHABAD; ADVOCATE, HIGH COURT, N.-W. P.; SOMETIME MEMBER OF THE
LEGISLATIVE COUNCIL, ETC., ETC.

SECOND EDITION

REVISED BY
SURENDRA NATH SEN, M.A., LL.D.,
ADVOCATE, HIGH COURT, ALLAHABAD,

WITH FOREWORD BY
SIR ASUTOSH MOOKERJEE, Kt., C.S.I.,
ONE OF HIS MAJESTY'S JUDGES OF THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Calcutta :
R. CAMBRAY & Co.
1917.

[All rights reserved.]

PUBLISHED BY T. D. KERR
Trading in the name of
R. CAMBRAY & Co.,
Law Publishers and Booksellers,
9, Hastings Street,
CALCUTTA.

B63097

Printed by
Apurva Krishna Bose,
at the Indian Press,
ALLAHABAD.



INSCRIBED

to the memory of

MY FATHER,

Abinash Chandra Banerji,

(1846-1892),

FORMERLY JUDGE, SMALL CAUSE COURT, AGRA, AND THE FIRST COMMENTATOR
IN INDIA ON THE SPECIFIC RELIEF ACT.

He is not dead whose noble life
Leads thine on high.

To live in hearts we leave behind
Is not to die.

FOREWORD.

THE author of this work, which has now attained the position of a classic in Indian legal literature, was a lawyer and a scholar of consummate ability. The University of Calcutta as well as the University of Allahabad are justly proud of his academic achievements which were of the highest order. A Premchand Roychand Student of the former and a Doctor of Laws of the latter, he established a claim that he had no peer among his contemporaries in either University. In 1906, he was a candidate for the Tagore Professorship in the University of Calcutta and, though he had to count amongst his competitors at least one distinguished scholar, who has since attained the highest rank in the profession, his success was a foregone conclusion. The judgment of those who advocated his appointment was amply justified by the result. The monumental work, which has now reached its second edition, was, on its first publication, acclaimed in legal circles as a triumph of erudition and research, while the accuracy and lucidity of the exposition of legal principles which throughout characterized the work marked it out as a contribution of enduring value. It has stood the test of criticism remarkably well, and lawyers, who have had recourse to its pages frequently, have not discovered in it any serious flaw or error. Dr. Satischandra Banerjee passed away in the plenitude of his powers and in the midst of many-sided activities of unquestionable value to his community; and the work before us cannot fail to convince an impartial reader how great has been the loss to legal literature by reason of his untimely death.

ASUTOSH MOOKERJEE.

PREFACE TO THE SECOND EDITION.

THE first edition of the Law of Specific Relief in British India appeared in 1909; the author's lamented death occurred in June, 1915. In the interval between these two dates all available copies of the book were exhausted. Timely notice was given by the publishers, but the author was then too busy to turn his immediate attention to meet the call. The revision, however, had been begun when death intervened to interrupt the work. It thus became our duty—a duty of love and reverence—to carry out the wish of the dear departed. His incomplete notes were there, and we entrusted them to Dr. Surendra Nath Sen, M.A., LL.D., Advocate, High Court, Allahabad, to complete the unfinished labours of his late friend. Dr. Sen entered upon his task as a labour of love, and we cannot sufficiently thank him for the excellent manner in which he accomplished it, in spite of his multifarious professional engagements. Our thanks are also due to Babu Sarat Chandra Chaudhri, M.A., LL.B., and Babu Kenaram Mukerji, B.A., B.Sc., LL.B., for having looked through the proof-sheets while the book was passing through the press. To Babu Kenaram Mukerji we owe the arranging of the Table of Cases and the Index to the present edition. Sir Asutosh Mookerjee, Kt., C.S.I., M.A., D.L., F.R.A.S., F.R.S.E., etc., etc., Judge, High Court, Calcutta, has placed us under a deep debt of obligation by contributing a "Foreword" to this edition.

It was the wish of the author to change the form of lectures to that of a homogeneous treatise in the style of the well-known classics on this subject in England and America; but in view of the circumstances narrated above that plan unfortunately could not be carried into effect, and the original character of the book has been preserved. The eight years which have elapsed since the first appearance of the book have witnessed a continuous and ever-expanding stream of case-law upon the questions which fall within the purview of this treatise. The principles here expounded have received fresh illustration; new light has been shed on many a dark

corner. Consequently, such changes only have been made as were called for in order to keep abreast of the new condition of things that has come into existence as the result thereof.

In conclusion, a word of explanation is necessary for the delay in bringing out the present edition. The gentlemen who very kindly devoted time and labour to its preparation have had to do the work in the intervals of their daily avocations. Progress was necessarily slow under the circumstances and the printing had to be put off from time to time in order to suit their convenience. We trust the generous public will excuse the delay.

SURESH CHANDRA BANERJI.

INDU BHUSHAN BANERJI.

PREFACE TO THE FIRST EDITION.

IN publishing these Lectures I have preferred to retain the form in which they were delivered at the University Senate House in Calcutta, in October and December, 1906. The text, however, has been carefully revised and some new matter added ; the footnotes especially have been amplified. I have not departed from my original plan of explaining the principles instead of merely digesting the cases. But I believe the practising lawyer will find that all Indian cases which are relevant have been here referred to. No case has been rejected simply because it is the decision of an uncharted court or does not find a place in the official reports. English cases have been freely cited and American cases have not been ignored. The musassil lawyer in this country generally fights shy of foreign decisions, and not so very long ago even in some of the High Courts the citation of English precedents was not always appreciated. But with increasing knowledge matters have now improved, though the American case-law, unfortunately, yet remains a *terra incognita* for most of us. Now, it may be frankly conceded that neither English nor American decisions are binding upon the Indian Courts. But the Specific Relief Act is admittedly based on doctrines of equity jurisprudence which were originally developed in England and are now administered equally by English and American Courts, and some of its provisions have been bodily extracted from the draft Civil Code of New York. The guidance afforded by the decisions of these foreign courts in interpreting and applying the provisions of the Indian Act is therefore of peculiarly valuable character. It is scarcely necessary to emphasize that the essential principles of equity know of no local or temporal conditions, and that no genuine student of law, or of any other subject of study, for the matter of that, can object to light because it comes from one quarter rather than another.

In citing foreign decisions I have, for the benefit of students, frequently added references to some of the many

volumes of Selections of Cases which have been published in America and England. The ordinary practice of the Indian student of law to study statutes and text-books and neglect leading cases is, in my humble opinion, not at all to be commended.

I regret very much the delay which has occurred in the publication of these lectures. This is principally owing to repeated and protracted attacks of illness which I suffered from while the book was passing through the press. This fact also accounts for the inordinate length of "Corrections and Additions." I have, however, tried to make amends by reprinting, by way of appendix, the provisions of the Acts of Indian Legislature passed in 1908, which bear upon the subject-matter of these lectures. With the object of making the book complete and self-contained, I have also reprinted at the end the Specific Relief Act, with brief annotations and such supplementary matter as is likely to be found useful.

My obligations to previous writers I have endeavoured to acknowledge in the footnotes. But I do not think they fully disclose the immense debt of gratitude I owe to Sir Edward Fry, Sir Frederick Pollock, and John Norton Pomeroy, without a careful and constant study of whose well-known works I do not think I could have written much of what is to be found in the following pages. For references to the decisions of some of the unchartered superior courts in British India I am indebted to Mr T. V. Sanjiva Row's excellent compilations. My brother, Sj. Sushil Chandra Banerji, B.A., LL.B., of the Provincial Civil Service, has helped me to prepare the Index, and with his assistance my friend, Sj. Jagabandhu Phani, M.A., Vakil, High Court, has prepared the Table of Cases cited. My friend, Sj. Sarat Chandra Chaudhuri, M.A., LL.B., Vakil, High Court, helped me to prepare part of the manuscript for the press. To these gentlemen I desire to express my thanks.

September, 1909.

S. C. B.

TABLE OF CONTENTS.

	PAGE.
Table of cases cited	i
List of abbreviations	1

LECTURE I.

INTRODUCTORY.

'Specific Relief' explained	1
Rights and obligations	3
Early forms of liability	4
Forms of specific relief	4
Torts	6
Damages and restitution	7
Contracts	8
Specific performance, primary remedy	13
Money compensation	16
Equity jurisdiction in England	18
Limitation of doctrine of specific performance	19
Executory and executed contracts	21
Voidable and void agreements	23
Rescission of contracts	24
Cancellation of instruments	24
Rectification of instruments	25
Declaratory decrees	26
Injunction	27
Receivers	29
Other forms of specific relief	30
Discretion	31
British Indian Codes	32
Specific Relief Act	34

LECTURE II.

POSSESSION.

Possession explained and analysed	35
<i>Corpus</i> and <i>animus</i>	37
Physical and legal possession	40
Mediate and immediate possession	40
Actual and formal possession	41
Symbolical possession	41
Joint possession	42
Possession and ownership	47
Possession as evidence of title	48
Possession as title	49
Possessory suits in India,	
after six months of dispossession	53
within six months of dispossession	56

	PAGE.
Juridical possession of plaintiff	59
Constructive possession	61
Partial dispossession	62
Dispossession otherwise than in due course of law	62
Immoveable property	63
Incorporeal rights	63
Defences inadmissible	66
Decree under S. R. A., s. 9	66
Wrongful transfer of moveable property	68
Wrongful detention of moveable property	68
Fiduciary relation	70
Damages inadequate or impracticable	72
<i>Pretium affectionis</i>	72
Rare and unique moveables... ..	73
Written instruments, recovery of	74
Decree and execution	74

LECTURE III.

CONTRACTS ENFORCEABLE.

Specific performance or reparation	76
Agreements other than contracts	76
Jurisdiction of specific performance	78
Historical grounds for restricting jurisdiction	80
Extent of jurisdiction	82
(i) Execution of trusts	83
(ii) Damages inadequate	87
Contract relating to chattels unique	88
not easily available	90
of limited supply	91
necessary	92
Moveable and immoveable property	95
Contract relating to immoveable property,	
sale	98
lease	98
mortgage	99
compromise	99
Vendor and purchaser, mutual rights of	101
Award	103
Building contracts	106
Railway cases	109
Trackage and operating contract	111
Contracts savouring of realty	114
Building schemes	115
Penalty for non-performance of contract	116
Optional contract	117
(iii) Damages impracticable	119
Negative agreements	120
Contracts of deferred performance	121
relating to patents	123
separation	124
expectancies	125
Sale or lease by party with imperfect title	126
valid upon third party's concurrence	127
of encumbered property	128
Insolvency of defendant	129
Contracts for personal acts or proceedings	130
Expansion of equitable remedies	131
Land acquisition cases	131

LECTURE IV.

PAGE,

CONTRACTS NOT ENFORCEABLE.

Void agreements	...	...	...	...	133
Mistake	...	...	...	...	133
Consideration and object of contract	...	...	...	...	135
Illegality	...	...	...	...	136
Immorality	...	...	...	...	139
Public policy	...	...	...	...	139
regarding (i) external relations of state	...	...	...	...	141
(ii) internal government	...	...	...	...	141
champerty and maintenance	...	...	...	...	142
oust of Court's jurisdiction	...	...	...	...	143
arbitration	...	...	...	...	145
(iii) legal duties of individuals	...	...	...	...	148
(iv) freedom of individual action	...	...	...	...	148
restraint of marriage	...	...	...	...	149
trade	...	...	...	...	149
goodwill of business	...	...	...	...	152
wager and gambling	...	...	...	...	152
doctrine not to be extended	...	...	...	...	153
Equitable considerations against specific performance of lawful	...	...	...	...	154
contracts :	...	...	...	...	154
(a) adequacy of money compensation	...	...	...	...	155
ordinary chattels	...	...	...	...	155
loans	...	...	...	...	157
(b) inability to render or enforce decree	...	...	...	...	160
personal qualification or volition	...	...	...	...	161
reference to valuers	...	...	...	...	164
contract running into numerous details	...	...	...	...	165
works Court cannot superintend	...	...	...	...	166
contract to build or repair	...	...	...	...	166
continuous contract	...	...	...	...	168
revocable contract	...	...	...	...	169
foreign contract	...	...	...	...	171
contract not enforceable in entirety	...	...	...	...	172
Partial performance with compensation	...	...	...	...	173
in favour of vendor of land	...	...	...	...	174
when refused	...	...	...	...	177
vendee	...	...	...	...	178
when refused	...	...	...	...	179
Stipulation regarding compensation	...	...	...	...	183

LECTURE V.

DEFENCES TO ACTION FOR SPECIFIC PERFORMANCE.

Classification of defences	...	...	...	...	184
Discretion	...	...	...	...	185
Legal Defences :	...	...	...	...	...
(a) agreement not formed	...	...	...	...	189
acceptance qualified	...	...	...	...	192
essential terms absent	...	...	...	...	195
(b) agreement not valid	...	...	...	...	199
parties incompetent, absolutely or relatively	...	...	...	...	199
illegality	...	...	...	...	203
<i>ultra vires</i>	...	...	...	...	204
breach of trust	...	...	...	...	208
want of consideration	...	...	...	...	210
coercion	...	...	...	...	211

	PAGE.
undue influence	213
<i>pardanishin</i> ladies	214
unconscionable bargains	216
fraud	217
(i) representation untrue	218
(ii) " of fact	218
by conduct	220
obligation to speak	221-9
<i>caveat emptor</i>	229
(iii) " of material fact	231
(iv) " by party or agent	231
(v) " false to maker's knowledge or belief	232
(vi) " made in same transaction... ..	233
(vii) " material inducement to contract	234
means of discovering truth... ..	234
(viii) " not false to contractee's knowledge... ..	239
varieties of	239
puffing at auctions	240
upon public	244
misrepresentation	241
personal bar to specific performance	242
damage or injury	243
specific performance with variation	244
parol evidence	247

LECTURE VI.

DEFENCES (*continued*).

Legal Defences :	
(c) contract not enforceable	249
Statute of Frauds, s. 4	249
part performance, doctrine of	250
Indian Registration Act, ss. 17, 49	254
fraud	256
trust	257
part performance in Indian Courts	258
bar of limitation... ..	260
material alteration of document	261
(d) contract discharged	263
waiver or abandonment	264
novation	265
non-fulfilment of condition in contingent contract	267
time of the essence of contract	269
rescission	274
impossibility of performance	274
equitable conversion, doctrine of... ..	278
Indian law	280
<i>res perit domino</i>	281
benefit of fire insurance	284
insolvency of promisor	285
(e) no breach of contract	286
Equitable Defences :	286
(a) contract uncertain	288
reasonable certainty	289
interpretation of vague and general expressions	292
(b) contract unfair	293
contingency	295
unequal position of parties	297
prejudice to third party	299
inconvenience to the public	300

	PAGE.
(c) contract hard	301
limitations of the doctrine	303
inequality in inception of contract	306
operation	307
forfeiture	308
benefit to plaintiff	312
change of conditions	312
subsequent hardship	313

LECTURE VII.

DEFENCES (concluded).

Equitable Defences :

(d) consideration inadequate	316
evidence of fraud	317
undue advantage	318
failure of consideration	321
(e) mistake	323
mutual	324
unilateral, plaintiff's	325
defendant's	325
non-disclosure by plaintiff	333
material	336
as to quantity	336
quality	337
of law	338
specific performance with variation	344
(f) mutuality wanting	347
of obligation and remedy	350
time when test	351
contracts terminable, unilateral, optional	352-3
(g) Court unable to enforce part of contract	353
contracts entire and divisible	356
(h) title to property sold or let wanting or doubtful	357
marketable title	359
doubtful	360
defective	362
(i) defendant unable to perform contract	364
vendor and purchaser	365
alternative contracts	366
(j) plaintiff's conduct inequitable	367
acts of omission and commission	368
ambiguous agreements	370
non-fulfilment of representations	372
omission of stipulation	374
laches	375
limitation	376
when delay excused	380

LECTURE VIII.

MATTERS INCIDENTAL AND OF PRACTICE.

Executed agreements	382
Award	382
Settlements	383
Contract of marriage	385
Covenants, restrictive	385-94

	PAGE.
Adjective law	394
<i>Forum</i>	394
Parties: plaintiff	397
defendant	408
Pleadings: plaint	414
damages as alternative or additional remedy	416
case of vendor and purchaser	420
deposit	425
indemnity	427
election of remedies	427
alternative relief: rescission and cancellation	427
additional relief: rectification	428
written statement	429
limitation	429
Decree	431
execution of	432
Court-fee	433

LECTURE IX.

RECTIFICATION, RESCISSION AND CANCELLATION.

A. Rectification of instruments	434
<i>Ratio</i>	436
Prior complete agreement	438
deliberation and choice	438-9
Mistake, of law	439
mutual	440
unilateral	441
Fraud	442
Evidence	443
Marriage settlements	446
Executed documents	446
Discretion	447
Enforcement after rectification	449
Limitation	450
B. Rescission of contracts	450
contracts, terminable	452
voidable	453
misrepresentation	453
fraud	455
undue influence	457
coercion	457
conduct of party	457
executed conveyance	459
affirmance	460
rights of innocent strangers	460
void	461
mistake	461
unlawful	465
party not <i>in pari delicto</i>	466
breach after decree	468
Restitution	470
by compensation	472
Laches	474
Discretion	475
<i>Onus probandi</i>	476
C. Cancellation of instruments	476
conditions	476-7
<i>quia timet</i>	478
extent of jurisdiction	479

TABLE OF CONTENTS.

xix

	PAGE.
discretion ...	480
deed void <i>ex facie</i> ...	480
plaintiff's present interest ...	482
partial cancellation ...	482
limitation ...	484
compensation ...	485
Relief against fraudulent or mistaken cancellation ...	486

LECTURE X.

DECLARATORY DECREES.

Former law in India ...	487
Present law ...	488
Bills in equity in England ...	489
Statutes in the United States ...	489
<i>Status</i> ...	490
Title, cloud upon ...	491
Conditions of relief: ...	492
(i) present interest of plaintiff ...	493
titles which may or may not be declared ...	493-507
Hindu reversioner, near and remote ...	499-504
(ii) hostility of defendant ...	507
(iii) inability to seek further relief ...	509
when further relief should be claimed ...	510-6
what further relief may be claimed ...	517-9
Discretion of Court ...	519
decree futile ...	520
inexpedient ...	522
object of suit different ...	523
no fear of real injury ...	524
more appropriate remedy available ...	526
threatened cloud ...	528
appeal ...	530
Amendment of plaint ...	530
Limitation ...	533

LECTURE XI.

MANDAMUS : RECEIVERS.

A. English writ of <i>mandamus</i> ...	535
Constitutional powers conferred upon Presidency High Courts ...	536
Procedure ...	537
Public bodies, discretion of ...	539, 542
Other legal remedy available ...	540
Corporation : <i>ultra vires</i> ...	540
Specific legal right of applicant ...	543
Suits outside Presidency towns ...	544
B. Receivers, appointment of ...	544
Pending suit ...	545
Court, jurisdiction of ...	545
discretion of ...	546-50
Temporary injunction compared ...	547
Property <i>in medio</i> ...	551
Life-tenancy ...	551
Joint property ...	551

	PAGE.
Partnership concerns	552
Mortgage suits	553
Remedies of other creditors	555
Trust property	556
Title suits	556
Suits for specific performance of contracts	557
Receiver, his position	558
effect of appointment of	561
suits against	562
by	564
his rights and powers	566
to take possession	567
grant leases	570
sell or mortgage	571
enter into contracts	571
recover costs and remuneration	572
his duties and liabilities	573
to pass accounts	574
answer for default or negligence	575
act impartially	577
Discharge of receiver	577-9
Removal of receiver	579
Sureties	580
Practice under Act XIV of 1882	581-3
V of 1908	583
Appointment when made	583
Who may be appointed	584
Order of appointment	584
Collateral attack	585
Retirement <i>pendente lite</i>	586

LECTURE XII.

INJUNCTIONS.

Obligation, preventive relief	588
Injunctions classified	588-90
Temporary or interlocutory injunctions, restrictive	590
Civil Procedure Code	591
<i>lis pendens</i>	593
wrongful sale in execution of decree	593
discretion	595-8
Temporary injunctions, mandatory	598
Perpetual injunctions, restrictive	601
<i>Prima facie</i> right	602
Legislative bars	604
absence of interest in plaintiff	605
unfair or dishonest conduct to plaintiff	605
delay and acquiescence	606
other equally efficacious remedy available	607
act of state or legislature	610-1
proceedings in Civil or Criminal Courts	612-4
Breach of contract	614
negative stipulation	615
coupled with affirmative agreement	619
doctrine of <i>Lumley v. Wagner</i>	620-8
Fiduciary relation	628
Tort: (a) affecting right to property	630
general principles	631-2
trespass	633
waste	636

TABLE OF CONTENTS.

xxi

	PAGE.
nuisance	639
disturbance of easement	642
infringement of patent, copyright	644
invasion of trademark, tradename	645
literary property	646
right of privacy	647
(b) not affecting right of property	648-50
Perpetual injunctions, mandatory	650
extent of jurisdiction	650-7
between co-sharers	654
breach of contract	655
delay and acquiescence	657
discretion	659
hardship to defendant	660
damages practicable and certain	661
nature and extent of injury	662-4
result of trial	664
public benefit	665
plaintiff's motives	666
Points of procedure	668
Limitation	668
Conclusion	669

APPENDICES.

A. Proceedings in Council	1
B. Statement of Objects and Reasons	13
C. Specific Relief Act	17
D. Rules framed by Calcutta and Bombay High Courts	172
E. Indian Contract Act	174
F. Code of Civil Procedure	176
G. Indian Limitation Act	192
H. Indian Registration Act	195
I. Indian Court-fees Act	198

Index	201
--------------	-----

TABLE OF CASES CITED.

[The numbers in italics refer to pages of the Appendices.]

	PAGE.
Aaron's Reef <i>v.</i> Twiss, [1896] A. C., 273, 279	236
Aba <i>v.</i> Parvatrao, 18 Bom., 46	168
Abadhaut <i>v.</i> Kaniz, 18 I. C., 239	415
Abaji Sitaram <i>v.</i> Trimbak Municipality, 28 Bom., 66	265
Abbas Ali <i>v.</i> Mohammad Khan, Sel. Ca., 243	61
<i>v.</i> Pir Buksh, 132 P. R., 1879	119
Abbott <i>v.</i> Allen, 2 John Ch., 519	478
<i>v.</i> Sworder, 4 DeG. and Sm., 448	318, 321
Abdool Ali <i>v.</i> Abdoor Ruhman, 21 W. R., 429	33
Abdool Hoosain <i>v.</i> Goolam Hosain, 7 Bom. L. R., 742	263, 290
Abdool Hakim <i>v.</i> Doorga Proshad, 5 Cal., 4	143
Abdul <i>v.</i> Bhagwan, 29 All., 64	648
<i>v.</i> Emile, 16 All., 69	648-9, 161
<i>v.</i> Gonesh, 12 Cal., 323	160, 161
<i>v.</i> Kirparam, 16 Bom., 186	113
<i>v.</i> Mahommed, 3 Bom., L. R., 220...	662
<i>v.</i> Narayan, 21 I. C., 35	161
<i>v.</i> Ram, 38 Cal., 687	653, 162
<i>v.</i> Sahib, 13 I. C., 947	130
Abdul Alla <i>v.</i> Abdul Bacha, 6 Bom., 5	61, 63, 144, 152
Abdul Hamid <i>v.</i> Sarbuland, 73 P. R., 1902	54
Abdul Kadar <i>v.</i> Mahomed, 15 Mad., 15	510, 516, 531
Abdul Karim <i>v.</i> Sahib Jan, 5 P. R., 1908	529, 130
Abdul Rahman <i>v.</i> Jadunandan, 13 C. L. J., 344	201
Abdulla <i>v.</i> Muhammadu, 14 P. R. 1895	121
Abdullah <i>v.</i> Abdur, 18 All., 322	233
Abdullah Khan <i>v.</i> Banke Lal, 33 All., 79, F. B.	595
<i>v.</i> Janki, 16 All., 303	159
Abdul Majid <i>v.</i> Boida Nath, 6 C. W. N., 314	408, 430, 90, 98
Abdul Rahman <i>v.</i> Sukhdayal Singh, 2 A. L. J. R., 507	408
Abdul Wahid <i>v.</i> Nuran, 11 Cal., 597	499
Abdur <i>v.</i> Nagasarupu, [1912] M. W. N., 1004	378, 429, 71
Abdurrahman <i>v.</i> Mahomed, 14 Bom., 586	645
Aberaman Iron Works <i>v.</i> Wickens, 4 Ch., 101; 5 Eq., 485	176, 331
Aberdeen <i>v.</i> Chitty, 3 Y. and C., 379	550
Abernethy <i>v.</i> Hutchinson, 1 H. and Tw., 28	647
Abhoy Churn Pal <i>v.</i> Kally Pershad Chatterjee, 5 Cal., 949	497, 119
Abid <i>v.</i> Asuda, 6 I. C., 696	129
Abinash Mazumdar <i>v.</i> Harinath Shaha, 32 Cal., 62	501, 502, 521
Abrahall <i>v.</i> Bubb, Freem. C. C., 53	636
Abraham <i>v.</i> Ordway, 158 U. S., 416	377
Adair <i>v.</i> McDonald, 42 Ga., 506	448
Addakkalam <i>v.</i> Theethan, 12 Mad., 505	255, 26
Adam <i>v.</i> Isha, 1 C. W. N., 76	153
Adams <i>v.</i> Baker, 24 Nev., 162	449
<i>v.</i> Broke, 1 Y. and C. Ch., 627	82
<i>v.</i> Great North Scotland Railway, [1891] A. C., 41	104
<i>v.</i> Messenger, 147 Mass., 185	91, 96, 111, 123, 163, 168

	PAGE.
Adams v. Newbigging, 13 A. C., 308	462
34 Ch. D., 583	109
v. Ursile, 1 Ch., 229	640
v. Weare, 1 Bro. C. C., 567	303, 304
and Kensington Vestry, re, 27 Ch. D., 394	22
Adderley v. Dixon, 1 Sim. and St., 607, 607	83, 96, 101, 121
Addington v. McDonnell, 63 N. C., 389	313
Adhibai v. Cursandas, 11 Bom., 199	147, 69, 70
Adi Deo Narayan Singh v. Dukharan Singh, 5 All., 532	500, 508, 132
Adler v. Sullivan, 115 Alabama, 582	495
Admr. Gen. v. Aghore Nath, 29 Cal., 420	357
v. Bhagwan, 15 C. W. N., 758	515
v. Dasai, 9 M. L. T., 300	564
Admr. Gen. of Bengal v. Juggeswar, 3 Cal., 192	94
v. Prem Lal Mullik, 22 Cal., 788, 1015, P. C.	348, 400, 559, 578
Advocate-General v. Gangji, 19 Bom., 152	150
v. Ismail, 12 Bom. L. R., 274	642, 650, 162
v. Punjabi, 18 Bom., 551	450
Ætna Ins. Co. v. Brannon, 2 L. R. A., N. S., 548	450
Aflalo v. Lawrence, [1904] A. C., 17	620
A—G v. London County Council, 1 Ch., 781	206
Aga v. Peltzer, [1903] L. B. R., 113	668
Agar v. Macklew, 2 Sim. and St., 418	145, 164
Ager v. Peninsular Co., 26 Ch. D., 637	668
Aghore Nath v. Ram Churn, 23 Cal., 805	513, 119
Agin v. Mohan, 7 C. W. N., 314	124
Agnew v. Southern Ave. Land Co., 204 Pa. St., 752	292
Agra Bank v. Barry, 7 H. L., 135	409
Ahmad Sujad v. Taree Rai, 7 Cal., 343	530
Ahmed v. Adjein, 2 Cal., 323	429
v. Ajudhia, 13 All., 537, F. B.	30
v. Shatty, 5 L. B. R., 135	546, 554
v. Poker, 15 I. C., 945	153
Ahmedabad Municipality v. Manilal, 19 Bom., 212	161
Ahmedbhoi v. Balkrishna, 19 Bom., 391	23, 91, 149, 168
v. Petit, 13 Bom., L. R., 544	360, 397, 76, 83
Ainslie v. Medlycott, 9 Ves., 13	233
Ainsworth v. Bently, 14 W. R., (Eng.) 630	610
v. Munoskong Club, 17 L. R. A., N. S., 1236	609, 151
Aisa v. Bidhu, 17 C. L. J., 30	513, 129
Aisha Bibi v. Muhammad Sadiq, 5 P. R., 1891	385
Aiyasami v. District Board, Tanjore, 31 Mad., 117	165
Ajapa v. Ramalingam, 24 M. L. J. R., 658	556
Ajit Singh v. Bijai Bahadur Singh, 11 Cal., 61, P. C.	486, 115
Ajudhia v. Parmeshar, 18 All., 340	125
Ajudhia Prasad v. Balmukund, 8 All., 354	527
v. Lalman, 25 All., 38	153
Akasi v. Jutagir, 6 I. C., 166	118
Akbar v. Prem Singh, 2 P. R., 1885	88
v. Sheoratan, 1 All., 373	119
v. Turaban, 5 A. L. J. R., 640	513, 532, 533
Akbarali v. Abdul, [1893] Bom. P. J., 538	160
Akhil v. Akhil, 15 C. W. N., 715	32
Akilandammal v. Mudali, 6 Mad. H. C. R., 112	160
Akhil Proddhan v. Manmatha, 18 C. L. J., 616	534
Akula Paradesi v. Dhelli Jagannadha Row, 28 Mad., 157	565, 586
Ala Bakhsh v. Gulam, [1899] P. R., No. 13	54
Alagappa v. Sivaramasundara, 19 Mad., 211	66, 88
Alam Khan v. Yasin Khan, 17 Bom., 755	113
Albany City Savings Inst. v. Bardick, 87 N. Y., 40	443
Albert Mills Co. v. Shivji, 9 Bom. H. C., 438	137, 139
Alden v. Latimer, [1894] 2 Ch., 437	644
Alderley v. Shrewsbury, 19 Eq., 616	660

TABLE OF CASES CITED.

iii

	PAGE.
Aldous v. Cornwell, 3 Q. B., 573	262
Alexander v. Crosbie, [1855] Ll. and G., 145	445
Alexander v. Mills, 6 Ch., 124	361
Ali v. Pachubibi, 5 Bom. L. R., 264	51, 34
Ali Mardan v. Muul. Com. Kohat, 50 P. L. R., 1905	165
Allaguppa v. Nazamut, 4 L. B. R., 263	527, 117, 128
Allah v. Budha, 52 P. R., 1904	109
Allbright v. Allbright, 91 N. C., 220	556
Allcard v. Skinner, 36 Ch. D., 145, 183	213, 214, 217, 22
v. Walker, 2 Ch., 369	339, 435, 462
Allen's Estate, 1 Watts and Serg., 383	253
Allen v. Hammond, 11 Peters, 63	462, 478
v. Harding, 2 Eq., Ab. 17, pl. 6	106
v. Martin, 20 Eq., 462	634
v. Lloyd, 12 Ch. D., 447	584
Allgood v. M. Q. D. Ry. Co., 33 Ch. D., 571	591
Ally v. Deschamps, 13 Ves., 224	381
Alokeshi Dassi v. Hara Chand, 24 Cal., 897	425, 59, 97
Altman v. Royal Co., 3 Ch. D., 288	616
Alton v. First Nat. Bank, 157 Mass., 341	339
Alven v. Bond, 1 Fl. and Kelly., 196	575
Amanat Bibi v. Luchman Persad, 14 Cal., 308, P. C.	448, 100
Amanoollah v. Mahomed, 22 W. R., 442	83
Amarnath v. Achan Kuar, 14 All., 420, 426	214
Amar Nath v. Raj Nath, 18 All., 453	582
Ambica v. Galstaun, 13 C. W. N., 326	59, 85
Ameeroonnissa v. Ashrufoonnissa, 14 M. I. A., 433	21
Amer v. Nathu, 7 A. L. J. R., 887	200, 432, 46
American Co. v. Grossman, 57 Fed. R., 1021	120
American Waltham Watch Co. v. U. S. Watch Co., 173 Mass., 85	645
Amerman v. Deane, 132 N. Y., 355	616
Amin v. Sant, [1913] P. R. No. 18	113, 129, 130
Amir v. Attarunnissa, 75 P. R., 1896	113
Amir Ali v. Inderjit Koer, 9 B. L. R., 460, P. C.	120, 144
Amir Dulhin v. Administrator General of Bengal, 23 Cal., 351	590, 595, 144, 163
Amir Khan v. Amir Jan, 3 C. W. N., 5	142
Amirudin v. Mahamad Jamal, 15 Bom., 685	59, 60, 32
Amjad v. Kunku, 9 B. L. R., Ap., 28	124
Amma v. Udit, 31 All., 68, P. C.	59, 64
Ammacannu v. Ranganatha, 15 M. L. J. R., 392	504
Amnu v. Ramkrishna, 2 Mad., 226	32
Amrit v. Roop, 2 N. W. P. H. C., 459	123
Amsterdam Knitting Co. v. Dean, 162 N. Y., 278	641
Anakaran v. Saidamadath, 2 Mad., 179	61
Anand v. Court of Wards, 8 I. A., 14 P. C.	505
v. Ganesh, 40 Cal., 678	134
Ananda v. Daije, 36 Cal., 726	131
v. Parbati, 4 C. L. J., 698	655
Anandrav v. Shankar, 7 Bom., 523	153
Anant v. Gopal, 19 Bom., 269	153
Anant Bahadur Singh v. Raghunath Kuar, 8 Cal., 769, P. C.	499, 502, 530, 119, 126
Anant Das v. Ashburner and Co., 1 All., 267	120, 143, 144
Anantnath v. Macintosh, 6 B. L. R., 571	590, 634
Anarullah Shaikh v. Koylash Chunder Bose, 8 Cal., 118	436, 00, 102
Anath Nath v. Galstaun, 35 Cal., 661	644, 162
Anderson v. Anderson, 9 Ir. Eq. R., 23	575
v. Anderson, 9 L. R. A., N. S., 229	406
v. Hardut, 9 C. W. N., 443	652, 160
Andi v. Thatha, 10 Mad., 347	129
Andrew v. Aitken, 22 Ch. D., 218	227, 455
Andrews v. Andrews, 81 Me., 337	450
v. Mockford, 1 Q. B., 372	233
v. Sullivan, 43 Am. Dec., 53	103

	PAGE.
<i>Angel v. Smith</i> , 9 Ves., 335 ...	559
<i>Angier v. Webber</i> , 14 Allen, 211 ...	120
<i>Anglo-Danubian Co. v. Rogerson</i> , 4 Eq., 3 ...	114
<i>Annasami v. Ramasami</i> , 22 I. C., 39 ...	82
<i>Annoda Mohun v. Bhuban Mohini</i> , 28 Cal., 546 ...	214
<i>Anon v. Lindsay</i> , 15 Ves., 91... ..	566
<i>v.</i> 12 Ves., 4	566
<i>v.</i> 6 Ves., 4	566
<i>v.</i> 6 Ves., 24 (cited)	301
<i>v.</i> 6 Madd., 10	629, 156
<i>Anonymous</i> , 1 Ves., 476	664
<i>Anshutz's appeal</i> , 34 Pa. St., 375	409
<i>Anstis Re</i> , 31 Ch. D., 596	39
<i>Anthony v. Dupont</i> , 4 Mad., 217	67, 37
<i>Antn Singh v. Mandil Singh</i> , 15 All., 412	43
<i>Anuknl v. Sasodhar</i> , 2 C. L. J., 16	534
<i>Anyaba v. Daji</i> , 20 Bom., 202	118, 120
<i>Apaji v. Apa</i> , 26 Bom., 735	632, 154, 155
<i>Appa Pillai v. Ranga Pillai</i> , 6 Mad., 71	211
<i>Appa Row v. Venkayamma</i> , 19 M. L. J. R., 106	91
<i>Appasamy v. Jotha</i> , 22 Mad., 448	554, 572
<i>Appayya v. Purvalu</i> , 14 I. C., 267	152
<i>Appleby v. Myers</i> , 2 C. P., 651	276
<i>Re</i> , 3 Ch., 422	479
<i>Appovier v. Rama Subba Ayyan</i> , 11 M. I. A., 75	43, 200
<i>Appu v. Perumal</i> , 23 M. L. J. R., 118	129, 131
<i>v.</i> Raman, 14 Mad., 425	613, 143, 163, 164
<i>Ara v. Puthen</i> , 1 M. L. J. R., 227	130
<i>Arbil and Class's Contract</i> , <i>Re</i> , 1 Ch., 691	453
<i>Arbuthnot v. Norton</i> , 5 Moo. P. C., 219	142
<i>Archbold v. Scully</i> , 9 H. L. C., 360	377, 378
<i>Archer v. Stone</i> , 78 L. T., 34	231, 336
<i>Ardeshir v. Sirdar</i> , 10 Bom. L. R., 1146	26
<i>Ardesir v. Vajesing</i> , 25 Bom., 593	322
<i>Arjan v. Ganesh</i> , [1913] 303 P. L. R.,	643
<i>Armour v. Connolly</i> , 49 Atl., 1117	167
<i>Armoury v. Delamirie</i> , 1 Sm. L.C., 343	49, 70
<i>Arnold v. Arnold</i> , 14 Ch. D., 270	175, 178, 51
<i>Arnott v. Whitby Urban Council</i> , 73 J. P., 64	162
<i>Arrington v. Liscon</i> , 34 Calif., 365	494
<i>Arthur v. Griswold</i> , 55 N.Y., 400, 410	218
<i>Arumugam v. Perriyannan</i> , 25 W. R., 81, P.C.	50
<i>Arundell v. Phipps</i> , 10 Ves., 139	73, 592
<i>Ascough v. Johnson</i> , 2 Vern., 66	126
<i>Ashburner v. Sewell</i> , 3 Ch., 405	454
<i>Ashburton v. Pape</i> , 2 Ch., 469	156
<i>Ashbury Ry. Co. v. Riche</i> , 7 H. L., 653	206, 541, 543
<i>Ashby v. Hincks</i> , 58 L.T., 557	637
<i>v.</i> Wilson, 1 Ch., 66	392
<i>Asher v. Whitlock</i> , 1 Q.B., 1, 6	50, 51, 56, 29, 35
<i>Ashgar Ali v. Delroos Banoo Begum</i> , 3 Cal., 324	214
<i>Asiat v. Sadat</i> , 26 I. C., 368	101
<i>Ashik v. Mazhar</i> , 2 O. C., 79	122
<i>Ashmore v. Cox</i> , 1 Q. B., 436	275
<i>Ashrufoonissa v. Stewart</i> , 7 W.R., 303	61
<i>Ashton v. Corrigan</i> , 13 Eq., 76	99
<i>v.</i> Madhabmoni, 11 C. L. J., 489... ..	561, 565
<i>Aspden v. Seddon</i> , 10 Ch. App., 394	118
<i>Astlay v. Weldon</i> , 2 Bos. & Pul., 346, 352	118
<i>Aston v. Aston</i> , 1 Ves. Sr., 264	637
<i>v.</i> Herson, 2 M. & K., 390	563
<i>Atarjan v. Ashak</i> , 4 C. W. N., 788	655
<i>Athikarath v. Erathanikat</i> , 21 Mad., 42	475, 533, 127
<i>Atiman v. Reasut</i> , 10 C. W. N., 1917	35

TABLE OF CASES CITED.

V

	PAGE.
Atkinson v. Denby, 6 H. & N., 778	466
v. Ritchie, 10 East., 530	138
v. Smith, 14 M. & W., 695	357
Atlas Shoe Co. v. Bechard, 10 L. R. A., N. S., 245	453
Atma v. Sheobaran, 2 A.W.N., 58	69
Atmaram v. Umedram, 25 Bom., 616	262
Attorney General v. Acton Local Board, 22 Ch. D., 221	660, 661
v. Algonquin Club, 153 Mass., 447	617
v. Birmingham, 1 K. & J., 528	642, 665
v. Bradford Navigation Co., 35 L. J. Ch., 619	659
v. Brighton, [1900] 1 Ch., 276	642
v. Brunning, 8 H. L. C., 243	278
v. Cole, [1900] 1 Ch., 205	640
v. Doughty, 2 Ves. Sr., 455	665
v. Eastlake, 11 Hare, 205	658
v. Ely, 6 Eq., 106	652
v. Fitzsimmons, 35 Am. L. Reg., 100	608, 614
v. G. J. Canal Co., 78 L. J. Ch., 681	657
v. G. N. Ry. Co., 4 DeG. & S., 75	608
v. G. N. Ry. Co., 1 Dr. & S., 154	630
v. Gr. East. Co., 6 Ch., 572	642
v. Great Eastern Ry. Co., 5 A. C., 478	541
v. Great Eastern Ry. Co., 11 Ch. D., 480	542
v. Hunter, 1 Dever, Eq., 12	642, 665
v. Liverpool Corporation, 1 My. & Cr., 171	629
v. London & N. W. Ry. Co., 1 Q. B., 78	543
v. Manchester (Corp'n of), [1893] 3 Ch., 87	642, 662
v. Mid-Kent Ry. Co., [1868] 2 Ch., 104	655
v. Nichol, 16 Ves., 338	642
v. Richards, 2 Ans., 603	642
v. Scott, 1 K.B., 404	642
v. Sheffield Gas Co., 3 De. G.M. & G., 304	608
v. Shrewsbury Co. 21 Ch.D., 732	663
v. Sitwell, 1 Y. & C., 559	445
v. Wimbledon House Estate Co., 73 L. J. Ch., 593	656
Attood v. Small, 2 Cl. and F., 232, 447	234
Atwood v. Fisk, 101 Mass., 363	203, 465
Aubin v. Holt, 2 K. and J., 66	122, 152, 203
Auchterlonie v. Bill, 4 Mad. H. C. R., 77	170
Auseri Lal v. Maneshar Baksh Singh, 10 C. W. N., 149; 28 All., 570, P.C.	217, 306
Ansterbury v. Corp. of Oldham, 29 Ch. D., 750	386, 393
Avadh Sarju v. Sita Ram, 1 A. L. J. R., 329	404, 77
Avery v. Griffin, 6 Eq., 606	348, 365
Ayers v. South Australian Banking Company, 3 P. C., 548	205
Ayerst v. Jenkins, 16 Eq., 275	139, 467
Aynsley v. Glover, 18 Eq., 544	596, 609, 643
Ayyaparaju v. Secy. of State, 37 Mad., 298	495
Azimdad v. Ghansham, 1 A. L. J. R., 20	33
Azimudin v. Ziaulnisa, 6 Bom., 309	104
Azizan v. Matuk, 21 Cal., 437	163
Azuf v. Ameerubibi, 18 Mad., 163	648

B

B. A. Tobacco Co. v. Maboob, 7 I. C., 279	156, 645
Baban Mayacha v. Nagu Shrivucha, 2 Bom., 19	65, 36, 143, 153
Babcock v. Lawson, 4 Q. B. D., 400	460
Babshetti v. Venkataramana, 3 Bom., 154	68, 74
Bachun v. Dewan, 11 W. R., 376	124
Back v. Stacey, 2 C. & P., 466	643
Bacon v. Jones, 4 My. and Cr., 433	600
Bacuram v. Madhab, 40 Cal., 565	90

	PAGE.
Badal Singh v. Birch, 15 Cal., 762	545, 559
Baddam v. Dhanpat Singh, 1 C. W. N., 429	38
Badger v. Boardman, 16 Gray., 539	386
Badische A. S. Fabrik v. Isler, 1 Ch., 605	394
v. Levinstein, 24 Ch. D., 156	645
v. Maneckji, 17 Bom., 584	645
Badley v. Parker, 2 B. and C., 37	356
Badri v. Mulloo, 8 O. C., 330	497, 119, 153
Badrud-din v. Abdul, 12 P. R., 1888	119
Baehr v. Clark, 83 Iowa., 313	460
Baglehole v. Walters, 3 Camp., 154	224, 456
Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902]	
1 Ch., 146	406
Bahadur v. Jiwan, 27 P. R., 1899	125
Bahadur Singh v. Mohor Singh, 24 All., 94, P. C.	500
Babar v. Inayat, 26 P. L. R., 1905	152
Bai Anope v. Mulchand Girdhar, 9 Bom., 355	519, 131
Bai Bhikaji v. Perajshah, 17 Bom. L. R., 1040	652
Bai Jina v. Jina Kalia, 31 Bom., 336	385
Bai Mani v. Khimchand, 10 Bom. L. R., 1037	583
Bai Shri v. Agarsinghji, 34 Bom., 676	163
Bajjnath v. Lachman, 7 All., 888	131
v. Micank, 11 I. C., 742	433
v. Pattu, 30 All., 125	112
v. Sashirama, 12 C. L. J., 183	124
Baiju v. Bulak, 24 Cal., 385	149, 159, 168
Baikanta v. Kalicharan, 9 C. W. N., 222	534
Baikunt v. Hukam, 55 P. R., 1877	130, 131
Baikuntha v. 2 Shibdas, 2 C. L. J., 321	209, 408, 55
Bailey v. Holborn, 1 Ch., 598	161
Baillie's case, re, [1898] 1 Ch., 110	461
Baily v. Clark, [1902] 1 Ch., 649	641
v. De Crespigny, 4 Q. B., 180	138, 275
v. Ogdens, 3 Johns, 399	253
v. Piper, 18 Eq., 653	338
v. Taylor, 1 R. and My., 73	664
v. Thurston, 1 K. B., 137	286
Bain v. Byrne, 63 P. R., 1874	65, 97
v. Fothergill, 7 H. L., 158	420, 55
Bainbridge v. Smith, 41 Ch. D., 462	162
v. Blair, 3 Beav., 421	578
Baines v. Geary, 35 Ch. D., 154	624
Baird v. Wells, 44 Ch. D., 661	210, 630
Bajrangi v. Manokarnika, 30 All., 1, P. C.	501, 120
Bakat Ram v. Kharsitji, 27 Bom., 560	484, 113
Baker v. Cartwright, 10 C. B., N. S., 124	226
v. Sebright, 13 Ch. D., 179	637, 156
Bakht v. Isa, [1911] 62 P. W. R.	547
Bakhtawar v. Bhuban, 17 C. L. J., 468	128
Bakshish v. Narain, 70 P. R., 1877	121
Bal v. Sardarsang, 13 Bom. L. R., 905	604, 632, 166, 167
Bala v. Maharu, 20 Bom., 788	161
Bala Prasad v. Kanoo, 14 I. C., 507	101
Balaji Narayan v. Ramchandra Gobind, 19 Bom., 660	566, 572, 136
v. Sakharan, 16 C. P. L. R., 41	31
Balakrishnadas v. Gobind, 5 N. L. R., 67	151
Balaram v. Mangta Dass, 24 Cal., 941	22
Balbhadar v. Jawahir, 9 O. C., 346	113
Balbhadra v. Bhawani, 34 Cal., 853	112
v. Najiban, 4 C. L. J., 370	642, 160
Bald Eagle Valley R. Co. v. Nittany Valley R. Co., 171 Pa., 284	394
Saldeo v. Miller, 31 Cal., 667	55
v. Prag, 11 A. L. J., 137	90
v. Shamsher, 23 I. C., 809	121

TABLE OF CASES CITED.

vii

	PAGE.
Baldeo Das v. Mangni Ram, 20 A. W. N., 7	62, 34
Baldwin v. Salter, 8 Paige Ch., 473	380
v. Society for Diffusion of Useful Knowledge, 9 Sim., 393	162
Balfe v. Blake, 1 I. Ch., R., 365	575
Balgobind v. Lutafat, 7 W. R., 142	61
v. Narain, 15 All., 339, P. C.	201
v. Ram Kumar, 6 All., 431	502
Balkishan v. Madan, 29 All., 303	216
v. Legge, 22 All., 149, P. C.	197, 254, 444
Ball v. Coggs, 1 Bro. P. C., 144	122, 161
v. Storie, 1 S. and S., 210	332
Balla v. Chunni, 10 A. L. J. R., 498	72
Balls v. Strutt, 1 Hare, 146	629, 156
Balmakund v. Dalu, 21 A. W. N., 157	415
Balmano v. Lumley, 1 V. and B., 224	181, 427
Balraj Kuar v. Jagat Pal, 26 All., 393, P. C.	539, 18
Balram v. Bairagi, 12 C. P. L. R., 52	34
Baluk v. Dadu, [1910] P. R., No. 70	486
Balthazar v. Burma E. & T. Co., 17 I. C., 916	562
Balvanta Appaji v. Bira, 25 Bom., 56	425, 57
Balvantrao v. Sprott, 23 Bom., 761	163
Banarsi v. Ram Narain, 30 All., 105	112
Banda Ali v. Banspat Singh, 4 All., 352	212
Bande v. Gokul, 34 All., 172	532, 129, 167
Bandu v. Naba, 15 Bom., 238	58, 35
Banee v. Ram, 10 W. R., 316	161
Banke Behari v. Pokhe Ram, 25 All., 48	395
Bank of Africa v. Cohen, 2 Ch., 129	201
Bank of Bengal v. Akhoy, 6 C. W. N., 365	74
v. Dinonath Roy, 8 Cal., 166	5, 538, 539, 27, 133, 140
Bombay v. Suleman, 19 C. W. N., 825, P. C.	538, 544
Dayton v. Kusworm, 88 Wis., 188	212, 474
Hindustan v. Smith, 36 L. J., C. P., 241	263
New Zealand v. Simpson, [1900] A. C., 182	197
Bankart v. Houghton, 27 Beav., 425	659
Banku v. Harendra, 15 C. W. N., 54	562, 563, 564
v. Krishto, 30 Cal., 433	112, 113
Banne v. Rajab, 85 P. R., 1879	112
Banoo v. Abed Ali, 32 Bom., 172	499
Bansidhar v. Government of Bengal, 9 B. L. R., 264, P. C.	266
v. Sant Lal, 10 All., 133	365
Banta v. Vreeland, 15 N. J. Eq., 105	486
Bapanna v. Bapanna, 6 I. C., 443	123
Barclay v. Messenger, 43 L. J. Ch., 448	271
Barkat v. Jagat, [1912] P. W. R., 249	117, 121
Barker v. Cox, 4 Ch. D., 464	179
v. Hodgson, 3 M. & S., 267	138
v. Monk, 33 Beav., 419	320
v. Walters, 8 Beav., 92	474
Barkhurda v. Munawar, 7 I. C., 568	380
Barkworth v. Young, 4 Drew., 1	350, 307
Barlow v. Govindram, 24 Cal., 364	645, 151
Barnard v. Cave, 26 Beav., 253	346
v. Macy, 11 Indiana, 536	413
Barnes v. Teague, 1 Jones, Eq., 277	250
v. Wood, 8 Eq., 424	179, 180
Barnhart v. Greenshields, 9 Moo. P. C., 18	23
Baroda v. Rushmani, 20 C. L. J., 113	574, 136
Barot v. Barot, 25 Bom., 26	524
Barr v. Gibson, 4 M. & W., 390	322
Barret v. Blagrove, 6 Ves., 104	659, 160
Barrow v. Richard, 8 Paige, 351	392
Barry v. Croskey, 2 J. & H., 1	234
Barsati v. Chamru, 4 A. L. J. R., 715	507, 649

	PAGE.
<i>Basanta v. Mahabir</i> , 35 All., 273	50
<i>Basanta Kumari v. Mohesh</i> , 18 C. W. N., 328	47
<i>Barton v. Barbour</i> , 104 U. S., 126	563
<i>Barwick v. English Joint Stock Bank</i> , 2 Ex., 259	231, 456
<i>Basavayya v. Abbas</i> , 24 Mad., 20	510, 514, 516
<i>Bascomb v. Backwith</i> , 8 Eq., 100	221, 230
<i>Basdeo v. Damodaranund</i> , 1 A. L. J. R., 44	506, 119
<i>Bashiruddin v. Surjakumar</i> , 12 C. W. N., 716	263
<i>Baslingapa v. Virupaxapa</i> , 5 Bom. L. R., 392	459
<i>Bass v. Clively</i> , Tamil, 80	286
<i>v. Grogory</i> , 25 Q. B. D., 481	644
<i>Bassa Chatagir v. Matandmal</i> , 8 I. C., 215	60
<i>Bassett v. Nosworthy</i> , 2 Wh. & T., 8th Ed., 163	23
<i>Bastin v. Bidwell</i> , 18 Ch. D., 238	80
<i>Baswantapa v. Baru</i> , 9 Bom., 86	607
<i>Bates v. Delavan</i> , 5 Paige, 299	480
<i>v. Swiger</i> , 21 S. E., 874	410
<i>Bates Mach. Co. v. Bates</i> , 87 Ill. Ap., 225	307
<i>Battalion Westerly Rifles v. Swan</i> , 84 Am. St. R., 849	74
<i>Batten v. Ged. Co.</i> , 41 Ch. D., 507	148
<i>v. Wedgwood Coal Co.</i> , 28 Ch. D., 317	572
<i>Batthyany v. Bouch</i> , 50 L. J. Q. B., 421	88
<i>Batul v. Mansur</i> , 24 All., 17, P. C.	261
<i>Bawa v. Matanomai</i> , 8 I. C., 215	37
<i>Baxendale v. Seale</i> , 19 Beav., 601	297, 324, 75
<i>Baxter v. Burfield</i> , 2 Str., 1266	398
<i>v. Conolly</i> , 1 J. & W., 576	63
<i>v. West</i> , 28 L. J. Ch., 169	549, 553
<i>Baynham v. Guy's Hospital</i> , 3 Ves., 295	98
<i>Beal v. Kyte</i> , 76 L. J. Ch., 294	440, 450
<i>Beals v. Case</i> , 138 Mass., 140	380
<i>Beasley v. Allyn</i> , 15 Phila., 97	72
<i>Beauchamp v. Winn</i> , 6 H. L., 223	658
<i>Beauman v. James</i> , 3 Ch., 508	292
<i>Beaumont v. Bramley</i> , T. & R., 41	447
<i>v. Dukes</i> , [1822] Jac., 422	243, 372, 414
<i>Beck v. Allison</i> , 56 N. Y., 366	166
<i>Becker v. Schwerottle</i> , 141 Calif., 386	457
<i>Beckley v. Newland</i> , 2 P. Wms., 182	125
<i>Beddow v. Beddow</i> , 9 Ch. D., 89	29, 104
<i>Bedford & Cambridge Ry. Co. v. Stanley</i> , 2 J. & H., 746	403
<i>Bedoyere v. Nugent</i> , L. R., 25 Ir., 143	637
<i>Beerbhoom Coal Co. v. Buloram</i> , 5 Cal., 175	429
<i>Beers v. Chelsea Bank</i> , 4 Edw. Ch., 277	580
<i>Begam v. Nur Bibi</i> , 45 P. R., 1892	123
<i>Beharee v. Ajnas</i> , 6 W. R., 86	161
<i>Beharee Lal v. Baboo</i> , 2 Agra, 80	507
<i>v. Ghisa Lal</i> , 24 All., 499	666, 152
<i>v. Habiba Bibi</i> , 8 All., 267	214
<i>v. Jagadish Saha</i> , 8 C. W. N., 635	137
<i>v. Madho Lal</i> , 19 Cal., 236, P. C.	508, 120
<i>Behary v. Sheo</i> , 3 N. L. R., 114	145, 148, 151, 160, 161
<i>Beioley v. Carter</i> , 4 Ch., 230	362
<i>Bejai v. Sarat</i> , 5 A. L. J., 181	37
<i>Bejoy Gopal v. Krishna Mahishi</i> , 34 Cal., 329, P. C.	484, 113
<i>Bell v. Amer. Protection League</i> , 28 L. R. A., 452	559
<i>v. Howard</i> , 9 Mod., 302	320
<i>v. Shibley</i> , 33 Barb., 610	565
<i>Bellairs v. Tucker</i> , 13 Q. B. D., 562	219
<i>Bellamy v. Debenham</i> , [1891] 1 Ch., 412	358
<i>v. Sabine</i> , 2 Ph., 425	232
<i>v. Wells</i> , 60 L. J. Ch., 156	640
<i>Bellringer v. Blagrove</i> , 1 DeG. & S., 63	208
<i>Belknap v. Sealey</i> , 14 N. Y., 148	337

	PAGE.
Benedict v. Lynch, 1 Johns. Ch., 370 ...	273, 381
Bengal Banking Corporation v. Mackertich, 10 Cal., 315 ...	255, 26
Beni v. Dudhnath, 27 Cal., 156, P. C. ...	113
Beni Madho Das v. Kaunsal Kisher, 22 All., 452 ...	153
Beni Madhub Das v. Sadascok, 32 Cal., 437, F. B. ...	153
Beni Ram v. Kundan, 21 All., 496, P. C. ...	475
Benjamin v. Storr, 9 C. P., 400 ...	589
Bennett v. Clough, 1 B. & Ald., 461 ...	203
v. Fowler, 2 Beav., 302 ...	181, 182
v. Stone, [1902] 1 Ch., 232 ...	422
Benode Coomaree v. Sondaminey, 16 Cal., 252 ...	657, 659, 160, 161, 168
Benode Meekerjee v. Raj Narain Mittra, 30 Cal., 699 ...	564
Benson v. Lamb, 9 Beav., 502 ...	273
Bentley v. Craven, 18 Beav., 75 ...	22
v. Mackay, 31 Beav., 151 ...	440, 442
v. Vilmont, 12 A. C., 471 ...	460
Benwell v. Innes, 24 Beav., 307 ...	400
Benyon v. Nettlefold, 3 M. & G., 102 ...	467
Bepin Behari v. Durga Charan, 8 C. L. J., 120 ...	501
Beresford v. Clarke, 2 Ir. R., 317 ...	423
v. Driver, 16 Beav., 134 ...	74
Berkey v. Berwind W. C. M. Co., 16 L. R. A., N. S., 851 ...	634
Bermingham v. Sheridan, 33 Beav., 660 ...	91
Berney v. Sewell, 1 J. & W., 647 ...	555
Berry v. Donovan, 188 Mass., 353 ...	162
Bertie v. Lord Abingdon, 8 Beav., 53 ...	580
Bertrand v. Davies, 31 Beav., 429 ...	573
Besant v. Wood, 12 Ch. D., 605 ...	124, 613, 163
Best v. Drake, 11 Ha., 369 ...	157
v. Stow, 2 Sandf. Ch., 298 ...	173
Betteswerth v. Dean and Chapter of St. Paul's, Sel. Ch. Cas., 67 ...	80
v. Dean of St. Paul's, 1 Bro. P. C., 250 ...	139
Betts v. De Vitre, 34 L. J., Ch., 289 ...	652
v. Mahomed, 25 W. R., 521 ...	261, 431
Beyfus v. Bullock, 7 Eq., 393 ...	600
Beynon v. Cook, 10 Ch. Ap., 391 ...	216
Bhabikan v. Chakradar, 9 I. C., 227 ...	143
Bhagabati v. Linton, 7 C. W. N., 218 ...	63, 31, 34
Bhagat v. Shiv, 141 P. R., 1894 ...	118, 119
Bhagwan v. Kanta, 6 O. C., 119 ...	123
Bhagwan Das v. Sukbdei, 28 All., 300 ...	669, 150
Bhagwanta v. Sukbi, 22 All., 33, F. B. ...	485, 521
Bhagwat v. Debi, 18 M. L. J. R., 100, P. C. ...	200
v. Murari, 15 C. W. N., 524 ...	534
Bhairon Rai v. Saran Rai, 26 All., 588, F. B. ...	45, 47
Bhajahari Saha v. Behari Lal Basak, 33 Cal., 881 ...	105, 261
Bhan Pratap v. Bisheshar, 9 O. C., 232 ...	131
Bhaorai v. Chunilal, 24 Bom., 188 ...	153
Bhaosingh v. Hazari, 7 N. L. R., 179 ...	155, 159
Bharath Singh v. Balbhadur, 20 I. C., 420 ...	99, 514
Bhawan v. Sadula, 20 I. C., 282 ...	192
Bhawani v. Kallu, 17 All., 537 ...	179
v. Rup, 3 O. C., 87 ...	125
Bhicaiji v. Perojshah, 17 Bom. L. R., 1040 ...	159
Bhikaji v. Bapu, 1 Bom., 550 ...	145, 165
v. Pandu, 10 Bom., 43 ...	119, 122
Bhikhi v. Udit, 25 All., 366 ...	91
Bhiku Ravlu v. Puttu Timappa, 8 Bom. L. R., 99 ...	43
Bhim v. Ganga, 11 O. C., 355 ...	159
Bhimbhat v. Yeshwant, 25 Bom., 126 ...	94, 105
Bhinuk v. Collector of Jaunpore, 2 Agra, 271 ...	507
Bhobo v. Issur, 18 W. R., 140 ...	42, 44
Bhola v. Meona, 8 O. C., 124 ...	532
Bholai v. Kali, 8 All., 70 ...	488, 520, 527, 124

	PAGE
Bholai v. Raghubans, 1 A. W. N., 60	130
Bholanath v. Buskin, 14 A. W. N., 127	45
v. Mulchand, 25 All., 639	153
Bholaram v. Corp. of Calcutta, 36 Cal., 671	138
Bhoobun Moyee v. Ramkishore, 10 M. I. A., 279	525
Bhowanee v. Thakoor, 2 Agra, 277	43
Bhubaneshwari v. Ajodhia, 11 I. C., 102	505
Bhugun v. Rumjan, 24 W. R., 380	64
Bhugwan v. Mitturjeet, 17 W. R., 169	130
Bhugwan Das v. Heera Lal, 5 C. W. N., 417	578
Bhujawan v. Nanha, 2 A. W. N., 73	130
Bhujendra Chatterjee v. Tirgunanath Mukerjee, 8 Cal., 761	487, 505 520, 523, 126
Bhundal Panda v. Pandol Pos Patil, 12 Bom., 221	65
Bhupal Ram v. Lachma Kuar, 11 All., 253	520, 127
Bhupendra v. Ranajit, 20 I. C., 670	118, 154
Bhut Nath v. Chandra, 16 C. L. J., 34	669
Bickerton v. Burrell, 5 M. & S., 383	400
Bidya v. Asrafi, 40 Cal., 862	547, 134, 135
Biddomoye v. Sittaram, 4 Cal., 497	71, 40
Bidwell v. Heldon, L. T., 104	653
Bieler v. Dreher, 129 Alabama, 384	449
Bignell re [1892] 1 Ch., 59	560
Bijai v. Gehind, 10 A. W. N., 195	124
Bikutti v. Kalendan, 14 Mad., 267	511, 131
Bill v. Sierra Nevada Co., 1 DeG. F. and J., 177	611
Billage v. Sonthee, 9 Hare, 534	202
Bindeshri v. Jairam Gir, 9 All., 705, P. C.	57, 71, 80
Bindo v. Sham Lal, 1 A. L. J., 102	151, 154
Bindu Basini v. Jahnabi, 24 Cal., 260	662, 153
v. Jahnabi, 13 C. W. N., 303	32
Bingham v. Bingham, 1 Ves. Sr., 126	325, 341, 463
Binks v. Lord Rokeby, 2 Sw., 222	176, 423
Birajan v. Ram Churn Lal, 7 Cal., 719	581, 582, 583
Birangi v. Ram, 7 A. W. N., 103	129
Birhhadra v. Kalpataru, 1 C. L. J., 388	405
Birch v. Joy, 3 H. L. C., 505	423
Birch-Wolfe v. Birch, 9 Eq., 683	637
Birmingham v. Allen, 6 Ch. D., 284	642
Bishambhar v. Nadiar, 18 C. L. J., 601	123
Bishan Chand v. Radha Kishen, 19 All., 489	425, 57
Bishenmun v. Land Mortgage Bank, 11 Cal., 244	396
Bisheshar v. Muirhead, 14 All., 162	163
Bishnu v. Dalsingh, 55 P. R., 1900	122
Bishop v. Church, 2 Ves. Sr., 100	446
v. Moorman, 49 Am. R., 731	595
Bishop of Winchester v. Mid-Hants Ry. Co., 5 Eq., 17	412
Bishun v. Perfect, 7 O. C., 103	152
Bishunath v. Ilahi Baksh, 5 All., 277	395
Bisell v. Kellogg, 60 Barbour., 629	491
Bissesuri v. Baroda Kanta Roy, 10 Cal., 1076	494, 517, 32, 119
Blackford v. Preston, 8 T. R., 89	141
Blackburn v. Randolph, 33 Ark., 119	447
v. Smith, 2 Ex., 783	472
v. Stables, 2 V. and B., 307	385
Blackett v. Bates, 1 Ch. Ap., 117	168, 348, 370, 67
Blackie v. Clark, 15 Beav., 595	449
Blagrove v. Blagrove, 1 DeG. and S., 252	617
Blake v. White, 1 Y. and C. Ex., 420	120
Blakeman v. Blakeman, 39 Con., 320	341, 462
Blackemore v. Glamorganshire Canal Nav., 1 My. and K., 154	600
Blanchard v. Detroit R. R. Co., 31 Mich., 44	289
Bliss v. Anaconda Copper Mfg. Co., 167 Fed., 342	689
Bloomer v. Spittle, 13 Eq., 427	345, 442

	PAGE.
Blore v. Sutton, 3 Mer., 237	198
Bloxam v. Metropolitan Ry. Co., 3 Ch. Ap., 337	605
Blundell v. Brettargh, 17 Ves., 232	165
Board of Examiners v. Proves, 40 Cal., 588	537, 140, 141
Boardman v. Lake Shore R. R., 84 N. Y., 157	91
Bobbs Merrill Co. v. Suellenburgh, 131 Fed. R., 530	394
Bedwell v. Bodwell, 66 Ves., 101	367
Boidya Nath v. Makhan Lal, 17 Cal., 680	546, 583
Bold v. Hutchinson, 5 DeG. M. and G., 558	190, 446
Bole's and British Land Co.'s Contract re, 1 Ch., 244	457
Bolman v. Overall, 80 Ala., 451	186
Bolton v. Bishop of Carlisle, 2 H. Bl., 259	263
v. Jones, 2 H. and N., 564	134
Bombay, Burmah Trading Corporation v. Yorke Smith, 17 Bom., 197	504, 532, 127
F. I. Co. v. Ahmedbhoy, 13 Bom. L. R., 1	70
Bombay Fire Insurance Co. re, 16 Bom., 398	539
v. Ahmadbhoy, 34 Bom., 1	70
Trading Corporation v. Mirzah Mahomed, 19 W. R., 123	74
and Persia Steam Nav. Co., Ltd. v. Rubattino Co. Ltd., 14 Bom., 147	275, 47
Bond v. Walford, 32 Ch. D., 238	479
Bonhote v. Henderson, 1 Ch., 742	443, 448
Bonnard v. Dott, 1 Ch., 740	138
Bonnett v. Sadler, 14 Ves., 526	414, 618
Bonnewell v. Jenkins, 8 Ch. D., 70	194
Booth v. Burdock, 94 N. W., 117	299
v. Pollard, 4 Y. C. Ex., 61	168
Borell v. Dann, 2 Hare., 440	318, 319
Borner v. Canaday, 55 L. R. A., 328	114
Bos v. Helsham, 2 Ex., 72	183
Bosanquett v. Dashwood, Cas. Temp. Talbot., 37	465
Boston Ice Co. v. Potter, 123 Mass., 28	134
Bosworth v. Terminal R. Assn., 174 U. S., 182	566
Bouck v. Wilher, 4 John Ch., 405	103
Boughton v. Boughton, 1 Atk., 625	100
Bourne v. Swan and Edgar [1903], 1 Ch., 211	646
Bovile v. Goodier, 2 Eq., 195	598
Bovill v. Crate, 1 Eq., 388	658
Bowes v. Shand, 2 A. C., 463	271
Bowman v. Bates, 4 Am. Dec., 677	456
v. Hyland, 8 Ch. D., 588	419, 452
Bowser v. McLean, 2 DeG. F. and J., 415	635
Box v. Stanford, 51 Am. Dec., 142	654
Boyanapalli v. Pothapali, 2 M. W. N., 384	529
Boyce v. Rosshorough, 6 H. L. C., 2, 43	214
Boyce's Executors v. Grundy, 3 Peters, 210	609
Boyden v. Bragan, 53 N. J. Eq., 26	609
Boyle v. Betts L. C. Co., 2 Ch. D., 726	584
Boyson v. Deane, 22 Mad., 251	148, 154, 155, 167
Brace v. Wehnert, 25 Beav., 348	106, 167
Bradlangh v. Newdigate, 11 Q. B. D., 1	142
Bradley v. Bertoumieux, 17 Victorian L. R., 144	458
Brady v. Waldron, 2 Johns Ch., 148	638
v. Yost, 55 Pac., 542	89
Braham v. Strathmore, 8 Jur., 567	578
Brahmadeo v. Harjan Singh, 25 Cal., 778	500
Brahmamoyee v. Gopi, 15 C. W. N., 188	47
Brahmaputra Tea Co. v. Scarth, 11 Cal., 345	120, 150, 170
Brajendra v. Rup Lal, 12 Cal., 515	595
Bramwell v. Lacy, 10 Ch. D., 691	617
Brande v. Grace, 154 Mass., 210	660
Brandon v. Brandon, 5 Madd., 473	570
Brashier v. Gratz., 6 Wheat., 533	272

	PAGE.
Bray v. Forgarty, Ir. R. 4 Eq., 544 ...	116
Breadalbane v. Chandos, 2 M. & C. 711 ...	438
Brealey v. Collins, You. 317 ...	122
Brett v. E. I. Shipping Co., 2 Hem. and M., 404 ...	622
Brewer v. Broadwood, 22 Ch. D., 105 ...	358, 55
v. Brown, 28 Ch. D., 309 ...	229, 337, 363, 464
v. Herbert, 30 Md., 301 ...	279
v. Marshall, 19 N. J., Eq., 537 ...	389
Brichene v. Thorp, [1821] Jac. 300 ...	648
Bridgman v. Green, Wilmot's Notes 58... ..	460
Brien v. Swainson, 1 L. R. J. Ch. D., 135 ...	193
Brigg v. Thornton, 73 L. J. Ch., 301 ...	617
Bright v. Boyd, 1 Story, 478 ...	424
Brij v. Shiam, 24 All., 164 ...	98
Brij Bhukhan v. Durga Dat, 20 All., 258 ...	496, 511, 126
Brij Mohan Singh v. Collector of Allahabad, 4 All., 102 ...	495, 118
Brisden v. McAlpine, 8 Beav., 229 ...	601
Bristol Joint Stock Bank re, 44 Ch., 703 ...	618
Briton Life Assn. re, 32 Ch. D., 503 ...	614
Bristowe v. Needham, 2 Ph., 190 ...	566
Britain v. Rossiter, 11 Q. B. D., 123 ...	251
British South Africa Co. v. Compania de Mocambique, A.C., 602 ...	171
Broadbent v. Imperial Gas Co., 7 DeG. M. & G., 436 ...	640, 666
Brocklebank v. E. I. Ry. Co., 12 Ch. D., 839 ...	585
Brogden v. Metropolitan Railway Co., 2 A. C., 666 ...	12
Brohmo v. Burkut, 13 W. R., 264 ...	36
Brohmo Dutt v. Dharmo Das Ghose, 26 Cal., 330 ...	485, 109, 115
Brojo v. Hurro, 5 Cal., 700 ...	42
v. Sreenath, 9 W. R., 463 ...	132
Bromel v. Neville, 53 Sol. J., 321 ...	193
Bromley v. Holland, 7 Ves., 3 ...	24, 481
v. Smith, 78 L. J., K. B., 745 ...	171
Bremmo, v. Anundmoyee, 7 W. R. 316 ...	138
Brommo Moyee v. Koomodinee, 17 W. R., 466 ...	124, 161
Brooke v. Champenowne, 4 Cl. & F., 589 ...	422
Brooke v. Garrod, 3 K. and J., 608 ...	271
Brooking v. Mandslayson and Field, 38 Ch. D., 636 ...	480, 112
Broome v. Monk, 10 Ves., 597 ...	278
Brough v. Oddy, 1 Russ. & M., 55 ...	158
Brown v. Dawson, 12 A. & E., 624 ...	34
v. Gilliland, 3 Dess., 539 ...	89
v. Guarantee Trust Co. 128 U. S., 403 ...	271, 380
v. Kennedy, 33 Beav., 147 ...	442, 448
v. Lamphear, 35 Vt., 252 ...	325, 442
v. Lampton, 25 Vt., 258 ...	434
v. Norman, 65 Miss., 369 ...	473, 474
v. Raindale, 3 Ves., 257 ...	92
v. Royal Insurance Co., 1 El & El., 853 ...	366
v. Tighe, 2 Cl. & F., 369 ...	98
v. Van Winkle Co., 6 L. R. A., N. S., 585 ...	99
Browne v. Browne, 1 Har. & Johns., 430 ...	100
v. Dawson 12 A. & E. 6, 24 ...	51, 59, 34
v. Flower, 1 Ch., 219 ...	159
v. Warner, 14 Ves., 412 ...	127, 364, 366
Brownlie v. Campbell, 5 A. C., 916 ...	223, 227, 459
Bruce v. Tilson, 25 N. Y., 194 ...	172, 286, 414
Bruck v. Tucker, 42 Calif., 347 ...	79
Bruner v. Moore, 73 L. J. Ch., 377 ...	267
Bryan v. Cormick, 1 Cox., 422 ...	562
v. Woolley, 1 Bro. P. C., 184 ...	128
Bryant v. Bull, 10 Ch. D., 155 ...	562
v. Busk, 4 Rss., 1 ...	407
Bryant v. Herbert, 3 C. P. D., 389 ...	68
Buckland v. Hall, 8 Ves., 92 ...	407

TABLE OF CASES CITED.

xiii

	PAGE.
Buckle <i>v.</i> Mitchell, 18 Ves., 100	186
Buckner <i>v.</i> Pacific R. Co., 53 Ark., 16	473
Budda <i>v.</i> Khan [1882] P. R. No. 141	104
Buddinath Paul <i>v.</i> Bycauntnath, 27 Tayl. & Bell, 192	576
Budh <i>v.</i> Dhan, 57 P. R., 1898	119
Budha <i>v.</i> Haku [1882], P. R., No. 130	70
<i>v.</i> Flower, 1 Ch., 219	159
Budhia <i>v.</i> Hari Ram, 14 C. P. L. R., 117	64
Budh Singh <i>v.</i> Hardial [1897], P. R., No. 52	47
Bukshi Das <i>v.</i> Nadu Das, 1 C. L. J., 261...	149, 154
Buldeo Das <i>v.</i> Howe, 6 Cal., 64	271
Bumgardner <i>v.</i> Leovitt, 35 W. Va., 194...	91
Bunny <i>v.</i> Hopkinson, 27 Beav., 565	424
Bunwari <i>v.</i> Bidhu, 12 C. W. N., 459	261
Burdine <i>v.</i> Burdine, 81 Am. St. R., 741	86
Burfield <i>v.</i> Nicholson, 2 Sim. & St., 1	620
Burgess <i>v.</i> Wheate, 1 Eden., 177	40, 186, 397
Burgess's Case, 15 Ch. D., 507	461, 471
Burk <i>v.</i> Serrill, 80 Pa. St., 413	421
Burke <i>v.</i> Smyth, 3 John and Lat., 193	380
Burkhalter <i>v.</i> Jones, 32 Kansas., 5	327
Burn & Co. <i>v.</i> McDonald, 36 Cal., 354	626, 152, 169, 170, 171
Burnett <i>v.</i> Berry, 65, L. J. M. C., 118	541
Burns <i>v.</i> Daggett, 144 Mass., 368	253
Burnes <i>v.</i> Pennell, 2 H. L. C., 497	234
Burney <i>v.</i> Ryle, 91 Ga., 701	626
Burrow <i>v.</i> Scammel, 19 Ch. D., 175	182, 338, 365
Burrows <i>v.</i> Lock, 10 Ves., 470	242, 318
Burt <i>v.</i> Bull, 1 Q. B., 276	571
Burton <i>v.</i> Shotwell, 13 Bush., 271	114
Bury <i>v.</i> Famatina Dev. Corp., 78 L. J. Ch., 506	144
Busey <i>v.</i> Moraja, 130 Calif., 586	447
Buta <i>v.</i> Hamir, 22 P. R., 1888	166
Butcher <i>v.</i> Stapley, 1 Vern., 363	253
Butler <i>v.</i> Frontier Telephone Co., 186 N. Y., 486	49
<i>v.</i> Huskell, 4 Desaus., 650	455
<i>v.</i> Prentiss, 158 N. Y., 49	474
Buxton <i>v.</i> Lister, 3 Atk., 383	83, 93, 97, 119 121, 157, 288
Buzloor Ruheem <i>v.</i> Shumsoonissa Begum, 11 M. I. A., 551	215, 385
Byars <i>v.</i> Stubbs, 85 Ala., 256	185, 230, 334
Byrne <i>v.</i> Acton, 1 Bro. P. C., 186	208
<i>v.</i> Van Tienhoven, 5 C. P. D., 344	195
Bywater <i>v.</i> Richardson, 1 A. and E., 508	224

C

Caballero <i>v.</i> Henty, 9 Ch., 447	180
Cadigan <i>v.</i> Brown, 120 Mass., 493	632
Cadman <i>v.</i> Horner, 18 Ves., 10	243, 244
Caird <i>v.</i> Moss, 33 Ch. D., 22	448
<i>v.</i> Sime, 12 A. C., 326	647
Cairncross <i>v.</i> Lorimer, 7 Jur. N. S., 149	659
Calcroft <i>v.</i> Roebuck, 1 Ves., 221	176
Caldwell <i>v.</i> Depew, 40 Minn., 528	336, 343
Caledonian and D. F. Ry. Co. <i>v.</i> Magistrates of Helensburgh, 2 Mac Q., 391	207, 403
Callianji Harjivan <i>v.</i> Narsi Tricum, 19 Bom., 764	416, 623, 63, 67, 73, 97, 143 152, 170, 171
Campbell <i>v.</i> Fleming, 1 A. & E., 40	471
Campbell <i>v.</i> London Co., 5 Hare, 519	269
<i>v.</i> Seaman, 63 N. Y., 568	603

	PAGE.
Campbell Davys <i>v.</i> Lloyd, [1901] 2 Ch., 518	635
Canadian Pacific Ry. Co. <i>v.</i> Parke, [1899] A. C. 535	657
<i>v.</i> Roy, [1902] A. C., 220	636
Canedy <i>v.</i> Marcy, 13 Gray, 378	435
Cann <i>v.</i> Cann, 3 Sim., 447	183
Cannel <i>v.</i> Buckle, 2 P. Wms., 244	81, 119
Carey <i>v.</i> Stafford, 3 Sw., 427 <i>n</i>	173
Carlen <i>v.</i> Drury, 1 V. & B., 154	619
Carless <i>v.</i> Sparling, 1 R., 9 Eq., 595	176
Carleton <i>v.</i> Rugg, 149 Mass., 550	608
Carlill <i>v.</i> Carbolic Smoke Ball Co., 1 Q. B., 256	11, 195
Carlish <i>v.</i> Salt, 1 Ch., 335	228
Carlisle <i>v.</i> Berkley, Amb., 599	574
<i>v.</i> S. E. Ry. Co., 1 M. & G., 689	629
Carlises Nephews & Co. <i>v.</i> Ricknauth, 8 Cal., 809	151, 170
Carne <i>v.</i> Mitchell, 15 L. J. Ch., 287	126, 127, 365
Carolan <i>v.</i> Brabazon, 3 Jon. and Lat., 200	204, 356, 53
Carpmeal <i>v.</i> Powis, 10 Beav., 39	323
Carrrodus <i>v.</i> Sharp, 20 Beav., 56	422
Carter <i>v.</i> Ferguson, 58 Hun., 569	626
<i>v.</i> Fly, 2 Ch., 541	584
<i>v.</i> Palmer, 8 Cl. & F., 657	22
<i>v.</i> Philips, 144 Mass., 100	271
<i>v.</i> Williams, 9 Eq., 678	393
Cartright <i>re</i> , 41 Ch. D., 532	637
Cartwright <i>v.</i> Cartwright, 3 DeG. M. & G., 982	124
Carty <i>v.</i> Kyle, 4 Cole., 348	316
Casamajor <i>v.</i> Strode, 2 M. & K., 706	357, 52
Cass <i>v.</i> Ruddle, 2 Vern., 280	47
Casserleigh <i>v.</i> Wood, 119 Feb., 308	204
Cassey <i>v.</i> Fitton, 2 Hargrave, 296	410
Castellain <i>v.</i> Preston, 11 Q. B. D., 380	284
Castle <i>v.</i> Wilkinson, 5 Ch., 534	179, 180
Castro <i>v.</i> Barry, 29 Calif., 446	528
Catlin <i>v.</i> Valentine, 9 Paige, 575	640
Cato <i>v.</i> Thompson, 9 Q. B. D., 616	177, 178
Caton <i>v.</i> Caton, 1 Ch., 137	250
Catt <i>v.</i> Tourle, 4 Ch., 654	311, 615
Cattell <i>v.</i> Corral, 4 Y. & C. Ex., 28	360, 362
Cauffman <i>v.</i> Schuler, 123 Fed., 205	645
Causton <i>v.</i> Macklew, 2 Sim., 242	362
Cawley <i>v.</i> Poole, 1 H. & M., 50	428
Central Klondyke Gold Mining, <i>re</i> Thomson's Case, 5 Manson, 282	461
Central Ry. Co. of Venezuela <i>v.</i> Kisch, 2 H. L., 99	223, 227, 236
Central Transportation Co. <i>v.</i> Pullman Palace Co., 139 U. S., 24	207
Central Trust Co. <i>v.</i> Citizens' St. R. Co., 80 Fed., 218	614
Chabildas <i>v.</i> Muni. Commrs. of Bombay, 8 Bom. H. C. R., O. C. J., 85	663, 153
<i>v.</i> Ramdas, 11 Bom. L. R., 606	119
Chadwick <i>v.</i> Chadwick, 120 Alabama, 580	169, 348
<i>v.</i> Manning, [1896] A. C., 231	128, 191, 229
Chaith <i>v.</i> Jivan, 111 P. R., 1884	122
Chaitun Mullick <i>v.</i> Gocool Mullick, 1 C. W. N., 303	577
Chakka <i>v.</i> Maddali, 29 Mad., 298	129
Chamarti <i>v.</i> Arardhi, 26 M. L. J., 518	161
Chamberlain <i>v.</i> Blue, 6 Blackt., 491	144
Chambers <i>v.</i> Betty, Beat., 488	380
<i>v.</i> Livermore, 15 Mich., 381	306
Chance <i>v.</i> Beall, 20 Ga., 143	79
Chandan <i>v.</i> Ram, 5 A. W. N., 293	126
Chandania <i>v.</i> Saligram, 26 All., 40	534
Chandidat Jha <i>v.</i> Padmanand Singh, 22 Cal., 456	548, 583, 133, 144
Chandi Singh <i>v.</i> Jangi Singh, 8 O. C., 21	522, 530
Chando Bibi <i>re</i> , 26 All., 311	595
Chandra <i>v.</i> Hari, 15 C. L. J., ...	573

	PAGE.
Chandra <i>v.</i> Sree Gobind, 6 C. W. N., 308	600, 601, 144, 152
Chandramoni <i>v.</i> Haliyenessa, 9 C. L. J. R., 464	580
Chandres <i>v.</i> Nand, 3 O. C., 336	120, 137
Chandu <i>v.</i> Chatta, 1 Mad., 381	129
Channu <i>v.</i> Babu, 32 All., 527	118
Chanter <i>v.</i> Hopkins, 4 M. & W., 899	224
Chanvirapa <i>v.</i> Danava, 19 Bom., 593	113
Chaplin & Co. <i>v.</i> Brammal, 1 K. B., 233	217
Chapman <i>v.</i> Mad. River R. R., 6 Ohio, 119	419
<i>v.</i> Michaelson, 78 L. J. Ch., 272	117
<i>v.</i> Westerby, 58 S. J., 50	169
Chappell <i>v.</i> Davidson, 8 DeG. M. & G., 1	600
Chapsey <i>v.</i> Jethabai, 9 Bom. L. R., 514	497, 680, 648
Charlesworth <i>v.</i> MacDonald, 23 Bom., 103	152, 282, 623, 21, 152, 171
Charna <i>v.</i> Bans Lal, 5 A. L. J. R., 529	46
Charnock <i>v.</i> Court, [1899] 2 Ch., 35	610
Chartered Bank <i>v.</i> Hnrish Neogy, 5 C. W. N., XV	563
Chase <i>v.</i> Chase, 37 Atl., 804	376
Chatgir <i>v.</i> Matanomai, 8 I. C., 215	34
Chathu <i>v.</i> Kunhamed, 11 Mad., 280	117
Chattock <i>v.</i> Muller, 8 Ch. D., 177	293
Chattur <i>v.</i> Dhaua, [1891] Bom., P. J., 287	162
Cheale <i>v.</i> Kenward, 3 DeG. & J., 527	101, 210
Chedambra Chetty <i>v.</i> Renga Krishna, 13 B. L. R., 509, P. C.	142
Chedi <i>v.</i> Dy. Comr. of Bahraich, 3 O. C., 351	118, 129, 166
Chedworth <i>v.</i> Edwards, 8 Ves., 46	593
Chertsey Market <i>re</i> , 6 Price, 279	629
Cherukuru <i>v.</i> Cherukurn, 18 M. L. J. R., 602	149
Cheslyn <i>v.</i> Dalby, 2 Y. and C. Ex., 170	147
Chester <i>v.</i> Powell, 52 L. T., 722	337
Chesterfield <i>v.</i> Janssen, 2 Ves. Sr., 125	240
Chesterman <i>v.</i> Mann, 9 Hare, 206	352
Chet <i>v.</i> Mul Singh, 10 P. R., 1871	113
Chetan <i>v.</i> Hari, 8 A. L. J. R., 498	142
Chhaganlal <i>v.</i> Dhondu, 27 Bom., 607	478, 484, 110, 112, 113
Chhatardhari <i>v.</i> Bhagwan, 7 O. C., 187	122, 124
Chhiter <i>v.</i> Jagannath, 29 All., 213	408
Chhotu <i>v.</i> Sheobarti, 5 C. W. N., 445	523, 132
Chicago Gaslight Co. <i>v.</i> People's Gaslight Co., 121 Ill., 530	204
Chicago Mil. and St. Paul R. R. <i>v.</i> Durant, 44 Minn., 361	182
Chicago R. I. & P. Ry. Co. <i>v.</i> Union Pacific Ry. Co., 47 Fed. R., 15	167
Chicago Ry. Co. <i>v.</i> Wilcox, 116 Fed., 913	464
Chicago T. and M. R. Co., <i>v.</i> Titterington, 31 Am. St. R., 39	459
Chichester <i>v.</i> M'Intire, 4 Bli. N. S., 78	298
Chidambara <i>v.</i> Srinivasa, 8 M. L. J. R., 61	431
Chiddu <i>v.</i> Durga Dei, 22 All., 382	502, 521
Chifferiel <i>v.</i> Watson, 40 Ch. D., 45	95
Chilliner <i>v.</i> Chilliner, 2 Ves. Sr., 523	116, 117, 118
Chimnai <i>v.</i> Adal, 11 P. W. R., 1913	123
Chinga <i>v.</i> Mangat, 3 P. R., 1898	127
Chinna <i>v.</i> Mahomed, 2 Mad. H. C. R., 332	17
<i>v.</i> Tegarai, 1 Mad., 168	126
Chinna Krishna <i>v.</i> Doraisamy, 12 M. L. J. R., 71	430, 93
<i>v.</i> Dorasami Reddi, 20 Mad., 19	256, 26, 43
Chinnammal <i>v.</i> Varadarajulu, 15 Mad., 307	494, 529
Chinnappa <i>v.</i> Thulasi Ammal, 15 M. L. J. R., 399	496, 511, 530, 130
Chinnaswamy <i>v.</i> Ambalavana, 29 Mad., 48	525, 119
Chinnery <i>v.</i> Evans, 11 H. L. C., 115	572
Chinnoek <i>v.</i> Marchioness of Ely, 4 DeG. J. & S., 638	11, 193
<i>v.</i> Marchioness of Ely, 2 H. & M., 220	415
Chinnoek <i>v.</i> Saintsbury, 30 L. J. Ch., 409	162
Chintaman <i>v.</i> Mahadeo, 6 Bom. L. R., 283	507, 530, 121
<i>v.</i> Mohan, 3 C. P. L. R., 32	534
Chintamanrav <i>v.</i> Bala, 14 Bom., 17	168

	PAGE.
Chinto v. Janki, 18 Bom., 51 ...	32
Chiruvolu v. Chiruvolu, 29 Mad., 390, F. B. ...	500, 520, 521, 120
Chitta v. Debidin, 24 All., 170 ...	493, 123
Chittar v. Jagannath, 4 A. L. J. R., 24 ...	200
Choga Lal v. Piyari, 31 All., 58 ...	139
Choghatta v. Asa, [1913] P. R., No. 30 ...	115
Chokalingam v. Srinivasa, 19 M. L. J. R., 28 ...	106
Chokalingapeshana v. Achiyar, 1 Mad., 40 ...	520, 524
Chokkalingam v. Srinivasa, 19 M. L. J. R., 28 ...	457, 106
Cholmondeley v. Clinton, 2 Mer., 171 ...	495
Chomu v. Umma, 14 Mad., 46 ...	511, 512, 515, 531, 532 131
v. Sankara, 8 M. L. J., 358 ...	532
Chota v. Purna, 21 C. L. J., 144 ...	126, 89
Chotalal v. Lallubhai, 29 Bom., 157 ...	652, 151, 162
Christacharu v. Karibasayya, 9 Mad., 399, 412 ...	255
Christensen v. Hollingsworth, 96 Am. St. R., 256 ...	449
Christian v. Cabell, 22 Grattan, 82 ...	422
Chrislie v. Davey [1893], 1 Ch., 316 ...	640
Chubb v. Peckham, 13 N. J. Eq., 207 ...	100, 305
Chukkun v. Lolit, 20 Cal., 906 ...	120, 123
Chunder Kant v. Krishna Sunder, 10 Cal., 710 ...	409, 90
Chunder Sikhur Mookerjee v. Collector of Midnapore, 3 Cal., 646 ...	288, 64
Chuni v. Hira, 7 C. W. N., 158 ...	45
Chuni Lal v. Boder Mal, 2 P. R., 1886 ...	113
v. Mani Shankar, 18 Bom., 616 ...	151
v. Surat City Municipality, 27 Bom., 403 ...	661, 167
Chunni Kuar v. Rup Singh, 11 All., 57 ...	143
v. Hira, 8 A. L. J. R., 1101 ...	534
Chunnilal v. Hiralal, 6 C. W. N., XCV ...	429
v. Sonibai, 21 Bom., 328 ...	582, 583
Chunni Lal v. Ram Kishen Sahu, 15 Cal., 460, F. B. ...	494, 119, 132
Chunnu v. Babu, 32 All., 527 ...	507
Churaman v. Anoop, 11 C. L. R., 533 ...	126
Church of the Advent v. Farrow, 7 Rich. Eq., 378 ...	291
Chute v. Quincy, 156 Mass., 189 ...	287, 330
Chuthan Rai v. Sheoghulam Rai, 9 A. W. N., 89 ...	67
Chutter v. Wooma, 8 W. R., 273 ...	111
Chytun v. Brojo, 20 W. R., 12 ...	31
Citizen's Life Assurance Co. v. Brown, [1904] A. C., 423 ...	231
Citizen's National Bank v. Judy., 146 Indiana, 332 ...	438, 443
City of London v. Nash, 3 Atk., 512 ...	106, 312, 313
v. Pugh, 4 Bro. P. C., 395 ...	616, 156
City of London Brewery Co. v. Tennant, 9 Ch. Ap., 212 ...	666
Clapham v. Shillito, 7 Beav., 146 ...	234-5
Claringbould v. Curtis, 21 L. J. Ch., 541 ...	88
Clark v. Clark, 55 N. J. Eq., 814 ...	343
v. Davenport, 95 N. Y., 477 ...	480, 528
v. Flint, 22 Pick., 231 ...	85, 92, 101
v. Freeman, 11 Beav., 112 ...	646
v. Girdwood, 7 Ch. D., 9 ...	443
v. Hutzler, 96 Va., 73 ...	303
v. Lord Rivers, 5 Eq., 91 ...	158
v. Malpas, 31 Beav., 80 ...	320
v. Sears, 3 Iowa, 104 ...	375
v. Wallis, 35 Beav., 460 ...	107
Clarke v. Dickson, 6 C. B., N. S., 453 ...	239
v. Dickson [1859], El. B. & El., 148 ...	470, 471
v. Glasgow Assurance Co., 1 Mc. Qu., 668 ...	107
v. Grant, 14 Ves., 519 ...	373, 87
Clarke v. Mackintosh, 4 Giff., 134 ...	238
v. Moore, 1 Jon. & Lat., 723 ...	344, 380, 88
v. Price, 2 Wills., 157 ...	622
v. Ramuz, 2 Q. B., 456 ...	284
v. Rochester R. R. Co., 18 Barb., 350 ...	287, 312

	PAGE.
Clavering v. Clavering, 2 Vern., 473 ...	100
Claverly v. Williams, 1 Ves., 210 ...	324, 330
Clayton v. Ashdown, 9 Vin. Ab., 393 ...	202, 347
v. Duke of Newcastle, 2 Ch. Cas., 112 ...	126
v. Illingworth, 10 Hare, 451 ...	98
Cleaver v. Mutual Reserve Association, 1 Q. B., 147 ...	140
Cleaton v. Gower [1674], Rep. Finch., 164 ...	208
Clegg v. Hands, 44 Ch. D., 503 ...	393
v. Dearden, 12 Q. B., 576 ...	105
Clermont v. Tasburgh, 1 J. & W., 112 ...	177, 182, 243
Cleveland v. Martin, 3 L. R. A., N. S., 629 ...	64
Clifford v. Turrel, 1 Y. & C. Ch., 138 ...	101, 122
Clinan v. Cooke, 1 Sch. & Lef., 22 ...	248, 253
Clinton E. Worden & Co. v. California Fig. Syrup Co., 187 U. S., 516 ...	606
Clinton's claim, [1908] 2 Ch., 515 ...	93
Clitherall v. Ogilvie, 1 Dessaus Eq., 250 ...	306, 320
Clive v. Beaumont, 1 Deg. & Sm., 397 ...	194
Clough v. London & N. W. Ry. Co., 7 Ex., 26 ...	218
v. London & N. W. Ry. Co., 7 A. C., 360 ...	471
Clowes v. Higginson, 1 V. & B., 524 ...	188, 442
v. Staffordshire Potteries W. Co., 8 Ch., 125 ...	641
Coal v. Burney, 1 Gill & J., 324 ...	119
Coaks v. Boswell, 11 A. C., 232 ...	220, 223, 230
Coats v. Merrick Thread Co., 149 U. S., 562 ...	223, 645
Cobban v. Hecklen, 70 Pac., 805 ...	293
Cobbett v. Woodward, 18 Eq., 444 ...	645
Cochrane v. Willis, 1 Ch. Ap., 58 ...	134, 322, 325, 68
Cockell v. Taylor, 15 Beav., 103 ...	321
Cocks v. Izard, 7 Wall., 559 ...	240
Coffin v. Cooper, 14 Ves., 205 ...	414
Coffman v. Robbins, 8 Oreg., 278 ...	114
Cogan v. Duffield, 2 Ch. D., 44 ...	446
Cogent v. Gibson, 33 Beav., 557 ...	101, 123
Cohen v. Sutherland, 17 Cal., 919 ...	193, 106
v. Wilkie, 16 C. W. N., 534 ...	150, 170-1
Cokayn v. Hurst, 10 Sel. Ca. Ch. Seldon Soc. No. 142 ...	19
Coke v. Bishop, 8 Sw., 401n ...	307
Colby v. Colby, 81 Hun., 221 ...	410
Cole v. Tyson, 8 Ired. Eq., 170 ...	423
Colebourne v. Colebourne, 1 Ch. D., 690 ...	582
Coles v. Browne, 10 Paige, 526 ...	289
v. Pilkington, 19 Eq., 174 ...	406
v. Sims, 5 DeG. M. & G., 1 ...	116, 392
v. Trecothick, 9 Ves., 234 ...	318, 457
Collard v. Marshall, [1892] 1 Ch., 571 ...	648
Collier v. Baron, 2 N. L. R., 34 ...	425
v. M'Bean, 1 Ch., 81 ...	361
Collins v. Blantern, 1 Smith L. C., 369 ...	142, 465
v. Castle, 36 C. L. D., 243 ...	392
v. Collins, 93 Am. Dec., 606 ...	124
v. Plumb, 16 Ves., 454 ...	169
Colls v. Home & c. Stores, [1904] A. C., 179 ...	642, 643, 644
Collector v. Kalee, 17 W. R., 195 ...	33
Colt v. Nitherville, 2 P. Wms., 304 ...	90
Columbia Water-Power Co. v. Columbia, 5 S. C., 225 ...	163
Columbian Athletic Co. v. State, 28 L. R. A., 727 ...	608
Columbine v. Chichester, 2 Phil., 27 ...	156, 364
Columbus Club v. Railey, 25 Ohio, L. J., 335 ...	626
Colvin re, 3 Md. Ch., 297 ...	578
Colyar v. Mulgrave, 2 Keen., 81 ...	403
Combs v. Scott, 45 N. W., 532 ...	379, 381
Commercial Bank v. Allavooddeen, 23 Mad., 583 ...	430
Commercial Bank of Tasmania v. Jones, A. C., 313 ...	266
Commrs. of Income Tax v. Pemsel [1891], A. C., 545 ...	21

	PAGE.
Comstock v. Hitt, 37 Ill., 542	400
Comyn v. Kynets, Cro. Jac., 508	49
v. Smith, 1 Hog., 81	577
Conger v. New York W. S. and B. R. R. Co., 120 N. Y., 29	111, 300, 312
Connell v. Read, 128 Mass., 477	606
Const v. Harris, 1 Turn and Russ., 496	553, 567, 605
Contree v. Lyons, 19 D. C., 207	529
Conway v. Fenton, 40 Ch. D., 512	638
Cook v. Andrews [1897], 1 Ch., 266	108
v. Dawson, 3 DeG. F. and J., 127	360, 361
v. Field, 15 Q. B., 460	125
v. Rider, 16 Pick., 186	62
v. Waugh, 2 Giff., 201	225
Cooke v. Boynton, 135 Pa. St., 102	600
v. Clayworth, 18 Ves., 12	298
v. Gilbert, 3 T. L. R., 382	392
v. Cooke, 4 Eq., 77	145
Cookes v. Cookes, 2 DeG. J. and S., 526	583
Cookson v. Cook, Cro. Jac., 125	386
Coombs v. Wilks, 3 Ch., 77	196
Cooper v. Crabtree, 20 Ch. D., 589	609, 635
v. Denne, 4 Bro. C. C., 80	360
v. Hood, 26 Beav., 293	292
In re, 20 Ch. D., 611	478
v. Joel, 27 Beav., 313	480
v. Morgan, 78 L. J. Ch., 195	46
v. Pibbs, 2 H. L., 149	325, 339, 462, 463
Coote v. Coote, 1 Sausee and Scully, 693	305
Cooth v. Jackson, 6 Ves., 12	165
Cooverji v. Bhimji, 6 Bom., 528	392
Corbet v. Plowden, 25 Ch. D., 678	76
Corbett v. Brown, 3 Bing., 33	219
Corbin v. Tracy, 34 Conn., 325	123
Cordingley v. Cheeseborough, 4 DeG. F. and J., 379	183
Corelli v. Wall, 22 T. L. R., 532	647
Corkhill re, 22 Cal., 717	539
Cornfoot v. Fowke, 6 M. and W., 358	337
Cornish v. Abington, 4 H. and N., 549	11
Cornwall v. Henson, [1899] 2 Ch., 710	379, 425
v. Henson, [1900] 2 Ch., 298	425
Corry v. Yarmouth & N. Ry. Co., 3 Hare, 593	632, 155
Corson v. Mulvany, 49 Pa. St., 88	304
Cort v. Lassard, 18 Oreg., 221	626
Cory v. Thames Iron Works and Shipbuilding Co., 11 W. R. (Eng.) 589	417
Coslake v. Till, Russ., 376	272
Cosser v. Collinge, 3 My. and K., 283	197
Costello v. Friedman, 71 Pac., 935	401
Costigan v. Hastler, 2 Sch. and Lef., 160	313
Coulson v. White, 3 Atk., 21	633
Counter v. Macpherson, 5 Moo. P. C., 83	268, 279, 283, 47
Courtown v. Ward, 1 Sch. and L., 8	659
Couturier v. Hastie, 5 H. L. C., 673	133
Coverdale v. Charlton, 4 Q. B. D., 118	62
Cowan v. Milbourn, 2 Ex., 230	465
v. Sapp, 81 Alabama, 525	355
Cowen v. Truefitt, [1899] 2 Ch., 309	434, 447
Cowie v. Elias, 11 W. R., 40	507
Cowles v. Gale, 7 Ch., 12	271
Cowper v. Cowper, 2 P. Wms., 720	31
v. Laidler, 2 Ch., 337	29
Cox v. Barker, 3 Ch. D., 370	488
v. Coventon, 31 Beav., 378	177
v. Middleton, 2 Drew., 209	236

	PAGE.
Cox v. Paxtons, 1 Mad. Ch. Pr., 215n	593
v. Smith, 19 L. T., 517	96
Cragg v. Holme, 18 Ves., 14n	298
Crampton v. Varna Ry. Co., 7 Ch., 562	158
Crane v. Branker, 17 W. R., (Eng.) 342	571
v. Gough, 4 M., 316	119
Cranford v. Tyrrell, 128 N. Y., 341	640
Crave v. Peer, 43 N. J. Eq., 553	116
Crawford v. Spooner, 4 M. I. A., 179	17
v. Toogood, 13 Ch. D., 143	274
Crawley v. Luchmee Ram, 1 Agra, 129	144
Cresswell v. Davidson, 56 L. T., 811	363
Crisp v. Adlard, 23 Cal., 956	147, 70
Crocker v. Orpen, 3 Jones & Lat., 601	99
Croft v. Day, 7 Beav., 84	645
Crofton v. Ormsby, 2 Sch. & Lef., 604	380
Cronin v. Bloemecke, 58 N. J. Eq., 313	639
Croome v. Lediard, 2 M. & K., 251	357, 374, 52, 87
Crosbie v. Tooke, 1 M. & K., 431	399
Crosby v. Wadsworth, 6 East, 602	251
Crosse v. Lawrence, 9 Hare, 462	356, 52
Crossley v. Maycock, 18 Eq., 180	193
Croton Turnpike Road Co. v. Ryder, 1 John. Ch., 611	644
Crow v. Wood, 13 Beav., 271	585
Crowder v. Tinkler, 19 Ves., 617	639
Crowe v. Lewin, 95 N. Y., 423	441, 462
Crutchley v. Jerningham, 2 Mer., 506	119
Cruttwell v. Lye, 17 Ves., 335	152, 597, 623
Cubitt v. Smith, 11 L. T., 298	106
Cud v. Rutter, 1 P. W., 570	90, 97, 155
Cuddee v. Rutter, Vin. Aber. 538, pl. 21, 2 Wh. & T., 416	155, 62
Cuff v. Dorland, 55 Barbour, 497	297, 306
v. Dorland, 50 Barbour, 438	306
Culbreath v. Culbreath, 7 Ga., 64	339
Cundy v. Lindsay, 3 A. C., 459	11, 134, 460
Cumber v. Wane, 1 Sm. L. C., 325	264
Cumming v. Honldsworth, [1910] A. C., 537	373
Cummins v. Perkins [1899], 1 Ch., 16	555
Curl Bros. v. Webster, [1904] 1 Ch., 688	623
Curley v. Dean, 10 Am. Dec., 140	105
Curran v. Holyoke Water Power Co., 116 Mass., 90	300, 313, 413
Currie v. Chatty 11 W. R., 520	41
v. Rennick, [1886] P. R., No. 41	95
Curtis v. Bryan, 2 Daly, 312	606
v. Marquis of Buckingham, 3, V. & B., 168	597
v. Sheffield, 21 Ch. D., 1	521
Cutler v. Babcock, 29 Am. St. Rep., 882	253
v. Powell, 2 Smith L. C., 9	451
Cutting v. Dana, 25 N. J. Eq., 265	124
Cutts v. Brown, 6 Cal., 328	373, 48, 53, 87, 95
Cutts v. Spring 15 Mass., 135	52

D

Dabjee Sahoo v. Tumeejooddeen, 10 W. R., 154	54
Dacie v. John, [1824] McClel., 206	567
Dad v. Suba, 68 P. R., 1877	119
Dadabhai v. Sub-Collector of Broach, 7 Bom. H. C. R., A. C., 82, 51, 54, 56, 60, 32	82, 51, 54, 56, 60, 32
Dagdu v. Bhana, 28 Bom., 420	96, 101, 107
v. Balwant, 22 Bom., 820	154
v. Kalu, 22 Bom., 733	32, 33
Dagdusa v. Bhukan, 9 Bom., 82	104
Daggett v. Ayer, 65 N. H., 82	447, 448
Dahyabhai v. Bapalal, 3 Bom. L. R., 564	669, 143, 150

	PAGE.
Dails <i>v.</i> Lloyd, 12 Q. B. D., 531	336
Dalby <i>v.</i> Pullen, 3 Sim. 29, 1 Russ. and M., 296	175, 358, 363
Dale <i>v.</i> Hamilton, 5 Hare., 369	253
<i>v.</i> Lister, 16 Ves., 7 (cited)	182
Dalip <i>v.</i> Deoki, 21 All., 204	260
Dalmer <i>v.</i> Dashwood, 2 Cox., 378	554
Dalsing <i>v.</i> Saraswati, 15 C. P. L. R., 115...	99
Daly <i>v.</i> Kelly, 4 Dow., 417	591
<i>v.</i> Smith, 38 N. Y., S. C., 158	625
Dambman <i>v.</i> Schulting, 75 N. Y., 55	230, 464
Damodar <i>v.</i> Sheoram, 4 A. L. J. R., 587	23
Dan <i>v.</i> Gopi, 11 A. L. J. R., 973	547
Dandekar <i>v.</i> Dandekar, 6 Bom., 663	104
Daniel <i>v.</i> Adams, Amb., 495	209, 66
<i>v.</i> Ferguson, [1891] 2 Ch., 27	600
<i>v.</i> Stewart, 55 Alabama, 278	527
Daniell <i>v.</i> Sinclair, 6 A. C., 181	338, 463
Daniels <i>v.</i> Davison, 16 Ves., 249	91
<i>v.</i> Keokuk Water-Works, 61 Iowa, 549	665
Darab Kuar <i>v.</i> Gomti Kuar, 22 All., 449	590
Darasha Rustomji, re, 23 Bom., 465	538
Darbey <i>v.</i> Whittaker, 4 Drew., 134	152, 160, 164, 165
Darbo <i>v.</i> Kesho, 2 All., 356	129
Darnley <i>v.</i> London Ry. Co., 1 DeG. J. and S., 204	111
<i>v.</i> L. C. and D. Ry. Co., 2 H. L., 60	266, 268
Daropti <i>v.</i> Jaspat Rai, 49 P. R., 1905	318, 58, 67
Dartmouth <i>v.</i> Spittle, 19 W. R., (Eng.) 444	62
Dason <i>v.</i> Provident Clothing Co., [1913] A. C., 724	150
Dattaram <i>v.</i> Vinayak, 28 Bom., 181	486, 109, 115
Dattatraya <i>v.</i> Ram Chandra, 24 Bom., 533	533
Davenport <i>v.</i> Bishop, 2 Y. and C. Ch., 451	403, 404
<i>v.</i> Davenport, 7 Hare, 217	602, 633
<i>v.</i> Jepson, 4 DeG. F. and J., 440	598
<i>v.</i> Rylands, 1 Eq., 302	419, 60
Davidson <i>v.</i> Cooper, 13 M. and W., 343	262
<i>v.</i> Little, 10 Harris., 245	320
Davies <i>v.</i> Cracraft, 14 Ves., 143	574
<i>v.</i> Davies, 36 Ch. D., 359	140
<i>v.</i> Fitton, Dr. and War., 225	445, 447
Davis <i>v.</i> Angel, 4 DeG. F. and J., 524	505
<i>v.</i> Cundasami, 19 Mad., 398	265, 266
<i>v.</i> Clough, 8 Sim., 262	628, 156
<i>v.</i> Davis, 38 Ch. D., 499	637
<i>v.</i> Duke of Marlborough, 2 Sw., 108	578
<i>v.</i> Foreman, 3 Ch., 654	626
<i>v.</i> Hone, 2 Sch. and Lef., 341	119, 260, 347, 374
<i>v.</i> Maung, 38 Cal., 805	79, 199, 217, 71
<i>v.</i> Parker, 14 Allen, 94	422
<i>v.</i> Shepherd, 1 Ch., 410	297
<i>v.</i> Starr, 41 Ch. D., 242	145
<i>v.</i> Thomas, 1 Russ. and My., 506	273
Davison <i>v.</i> Davis, 125 U. S., 90	379
<i>v.</i> Gent, 26 L. J. Ex., 122	51
Davlatsing <i>v.</i> Pandu, 9 Bom., 176	114
Davone <i>v.</i> Fanning, 2 John Ch., 252	457
Davy <i>v.</i> Garrett, 7 Ch. D., 473	596
Dawson <i>v.</i> Fitzerland, 1 Ex., D., 257	148
<i>v.</i> Yates, 1 Beav., 301	558
Day <i>v.</i> Brownrigg, 10 Ch. D., 294	646
<i>v.</i> Croft, 2 Beav., 488	572
<i>v.</i> Newman, 2 Cox., 77	316
<i>v.</i> Singleton, 2 Ch., 320	268, 419, 421
<i>v.</i> Spiral Spring Buggy Company (Mich.), 58 Am. Rep., 352	204

	PAGE.
Day v. Wells, 30 Beav., 220 ...	331
Day and Co., v. State of Texas, 68 Texas, 527 ...	481
Daya Narain v. Seey. of State, 14 Cal., 256 ...	144
Dayal v. Ram Buddhun, 17 W. R., 454 ...	109
Dean v. Anderson, 34 N. J. Eq., 496 ...	99
v. Bennett, 6 Ch., 489 ...	630
Deane v. Rastron, 1 Ans., 64 ...	319
Dear v. Verity, 38 L. J. Ch., 297 ...	115
Debendra v. Bindhubala, 13 I. C., 125 ...	31, 33
v. Ramtaran, 30 Cal., 599 ...	91
Debi Churn Boido v. Issur Chunder Manjee, 9 Cal., 39 ...	54
DeBiel v. Thompson, 3 Beav., 469 affd. 12 Cl. and F., 61n ...	190
Debi Prasad v. Rup Ram, 10 All., 577 ...	137
Deb Narain v. Narendra, 16 Cal., 267 ...	19
Dehs, re, 158 U. S., 564 ...	642
De Bussche v. Alt, 8 Ch. D., 286, 314 ...	379, 475
DeCamp v. Feay, 5 S. & R., 323 ...	272
Deere v. Guest, 1 My. & Cr., 516 ...	608
De Francesco v. Barnum, 45 Ch. D., 430 ...	161
Defries v. Creed, 34 L. J. Ch., 607 ...	561
DeGray v. Monmouth B. C. H. Co., 50 N. J. Eq., 329 ...	389
DeHoghton v. Money, 2 Ch., 164 ...	399, 76
Deivasikamani v. Subbiah, 5 M. L. T., 224 ...	131
Delafosse v. Crawshay, 4 L. J., Ch., N. S., 32 ...	576
Delaney v. Mansfield, 1 Hog., 235 ...	558
DeLassalle v. Guildford, 2 K. B., 215 ...	219
Delhi and London Bank v. Hem, 14 Cal., 839 ...	150, 160
v. Wordie, 1 Cal., 249 ...	546
DeMattos v. Gibson, 4 DeG. & J., 276 ...	88, 388, 394, 622
Deming v. Darling, 148 Mass., 504 ...	220
Denne v. Light, 8 DeG. M. & G., 774 ...	310, 75
Dennis v. Jones, 44 N. J. Eq., 513 ...	472
Denny v. Hancock, 6 Ch., 1 ...	327, 668
Deno Bundhu Nundy v. Hari Mati, 31 Cal., 480 ...	526, 612, 163
Dent v. Auction Mart Co., 2 Eq., 238 ...	610, 642
Denton v. Stewart, 1 Cox., 258 ...	364
Deokali v. Kadar, 39 Cal., 704 ...	488, 489, 511, 122, 128, 131
Deolie v. Nirban, 5 Cal., 253 ...	54
Deojit v. Pitamber, 1 All., 275 ...	290
DePasquir, v. Cadbury, 1 K. B., 104 ...	68
DeRivañoli v. Corsetti, 4 Paige, Ch., 264 ...	161
Derry v. Peek, 14 A. C., 337 ...	232, 453
Desai v. Keshavbhai, 12 Bom., 419 ...	1468
Detroit v. Martin, 34 Mich., 170 ...	78
Deutsche &c. v. Briscoe, 20 Q. B. D., 177 ...	69
Devati v. Kunehauvarthy, 22 I. C., 279 ...	34
DeVisme v. DeVisme, 1 M. & G., 336 ...	421, 422
Devy v. Thornton, 9 Hare, 222 ...	551
DeWilton v. Saxon, 4 Sim., 13 ...	617
DeWinton v. Brecon, 26 Beav., 533 ...	567
v. Mayor of Brecon, 28 Beav., 200 ...	575, 576
Dhan v. Zamurrad, 27 All., 440 ...	122
Dhanipal v. Maneshar, 28 All., 570, P. C. ...	217
Dhannu v. Bhagwan, 138 P. L. R., 1903 ...	160
Dhanuk Singh v. Tulsi, 15 I. C., 545 ...	533
Dhanukdhari v. Nathuni, 6 C. L. J., 62 ...	118
Dharni v. Hur Pershad, 12 Cal., 38 ...	34
Dharmadas v. Amulya Dhan, 33 Cal., 119 ...	634
Dheru v. Sidhu, 56 P. R., 1903 ...	122
Dhiraj Kuar v. Bikramajit Singh, 3 All., 787 ...	139
Dholi Das v. Fulchand, 22 Bom., 658 ...	149
Dhondo v. Govind, 9 Bom., 20 ...	121, 122
Dhoorjeti v. Dhoorjeti, 30 Mad., 201 ...	125
Dhundiram v. Chandanabai, 2 Bom. H. C. R., 98 ...	581

	PAGE.
Dhunjibhoy v. Lisboa, 13 Bom., 252	643, 151, 167
Dhuronidhur v. Agra Bank, 4 Cal., 380	164
Dhuronidhur Sen v. Agra Bank, 5 Cal., 86	520, 613, 144
Dial v. Beli, 51 P. R., 1897	121
Diamond Match Co., v. Roeber, 106 N. Y., 473	116, 140, 150, 400
Dickenson v. Grand Junction Canal Co., 15 Beav., 260	116, 617
Dickinson v. Dodds, 2 Ch. D., 463	195
Dietrichsen v. Cabburn, Ph., 52	120, 619, 624, 661
Diggles, re, 39 Ch. D., 253	22
Digambar v. Secy. of State, 16 C. L. J., 381	125
Dijendra v. Purnendu, 11 C. L. J., 189	655, 148
Dilbar Sardar v. Hossein Ali, 26 Cal., 553	45
Dills v. Doebler, (Conn.) 20 L. R. A., 432, 62 Conn., 366	28, 130
Diman v. Providence W. & B. Ry. Co., 5 R. I., 130	440
Dimmock v. Hallet, 2 Ch., 21	177
Dina v. Nathu, 26 Bom., 538	409
Dinabandhu v. Rajmohini, 8 B. L. R., Ap., 32	122
Dinkarshaw v. Anantasha, 16 C. P. L. R., 154	61
Dinn v. Blake, 10 C. P., 388	104
Dinnonauth v. Hogg, 2 Hay., 395	565, 580, 583
Dinomoni v. Brojo Mohini, 29 Cal., 187, P. C.	66, 31, 123
Dinshaw v. Jamsetji, 11 Bom. L. R., 85	124
Directors of Shrewsbury & B. Ry. Co. v. Directors, &c. of N. W. Ry. Co., 6 H. L. C., 112	206
Dinwiddie v. Self, 145 Ill., 290	435
Dixon v. Gayfere, 17 Beav., 429	52
v. Holden, 7 Eq., 488	646, 158
v. London S. A. Co., [1876] 1 A. C., 632	645
Dobbs v. Norcross, 24 N. T. Eq., 327	360
Dobell v. Hutchinson, 3 A. and E., 355	175
Dock v. Dock, 180 Pa., 14	72
Dodd v. Watson, 4 Jones Eq., 48	638
Dodge v. Johnson, 67 N. E., 560	644
Doed Carter v. Barnard, 13 Q. B. D., 945	50
Doed Hughes v. Dyeball, 3 C. and P., 610	51
Deo Gray v. Stanion, 1 M. and W., 695	197
Doggett v. Emerson, 3 Story, 733	223
Doherty v. Allman, 3 A. C., 709	115, 369, 392, 617, 636, 638, 655
Dolman v. Nokes, 22 Beav., 402	230
Doloret v. Rothschild, 1 Sim. and St., 590	90, 119, 271, 44, 45
Donald v. Suckling, 1 Q. B., 585	39
Donaldson v. Beckett, 2 Bro., P. C., 129	644
Donnell v. Bennett, 22 Ch. D., 835	120, 622, 624, 625
Dooley v. Watson, 1 Gray, 414	116, 119
Doorga v. Bansy 7 Cal., 199	91
v. Doorg, 4 Cal., 190	127
Dorasamy v. Idangapiranthan, 1 M. L. T., 69	534
Dorman v. Dorman, 3 Ir. Eq. R., 385	566
Dorison v. Westbrook 5 Vin. Ab., 540, pl. 22	90
Doshi Talakshi v. Ujamsi Velsi, 24 Bom., 227	153
Dougall v. Foster, 4 Grant, Ch., 319	638
Douglas v. Baynes, [1908] A. C., 477	64
v. Wiggins, 1 Johns. Ch., 435	638
Doulat Koer v. Rameswari Kuar, 26 Cal., 625	559
Dowell v. Dew, 1 Y. and C. Ch., 345	398
Dowling v. Betjemann, 2 J. and H., 544	73, 89, 43
Downs v. Collins, 6 Hare, 418	356
Downshire v. Sandys, 6 Ves., 107	637
Dowson v. Solomon, 1 Dr. and Sm., 1	303, 371
Doyal v. Chunni Lal, 12 A. L. J., 259	387
Draper v. Stone, 71 Me., 175	365
Dresel v. Jordan, 104 Mass., 407	352
Drewe v. Corp, 9 Ves., 368	175, 176, 362
v. Hanson, 6 Ves., 675	174, 176

	PAGE.
Drobomoyi Gupta v. Davis, 14 Cal., 323	...564, 570
Dronan v. Chundri, 12 I. C., 119	100, 127, 131
Drysdale v. Mace, 2 Sm. and G., 225	...237, 238
Dubowski v. Goldstein, 1 Q. B., 478	...624
Duke of Beaufort v. Berty, 1 P. Wms., 703	...556
n. Neeld, 2 Cl. and F., 248	...336, 343
Duke of Bedford v. Trustees of British Museum, 2 M. and K., 552	312, 314, 372
Duke of Devonshire v. Elgin, 14 Beav., 530	...656
Duke of Leeds v. Earl of Amherst, 2 Ph., 117	...658
Duke of Somerset v. Cookson, 3 P. W., 390	...72, 73
Dulari v. Vallabh Das, 13 Bom., 126	...149
Dull's Appeal, 113 Pa. St., 510	...479
Dulmir Puri v. Hetnarain, 6 C. L. R., 467	557, 582, 583
Duncombe v. Mayer, 8 Ves., 320	...70
Duncuft v. Albrecht, 12 Sim., 189	...90, 44
Dungey v. Angove, 2 Ves., 304	...435
Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co., 78 L. J. P. C., 102	...646
Dunn v. Flood, 28 Ch. D., 586	...208, 454
v. Vere, 19 W. R., (Eng.) 151	...468
Dunwar v. Kakuturn, 16 M. L. T., 370	...51
Dunne v. Chundra Kissore, 30 Cal., 593	...561, 562
Duranty's case, 26 Beav., 268	...231
Durell v. Haley, 1 Paige, Ch., 492	...218
Durham v. Legard, 34 Beav., 611	...51
Durga Baksh v. Mohammad, 1 O. C., 123	...113
Durgadas v. Dewraj, 33 Cal., 306	...669
Durour v. Pirrara, 2 Hargr., 304	...410
Durrell v. Pritchard, 1 Ch. Ap., 244	...657, 660
Dutt v. Shamal Dhone, 41 Cal., 92	...575
Dutton v. Thomson, 23 Ch. D., 278	...457
Duval v. Wellman, 124 N. Y., 156	...149
Dwarka v. Addya, 21 Cal., 319	...120
v. Kameshar, 17 All., 69	...122
v. Ram Partab, 13 C. L. J., 449	...507
Dwight v. Hayes, 150 Ill., 273	...666
v. Pomeroy, 17 Mass., 303	...246
Dy. Commr. v. Mahesh, 6 O. C., 142	...123
Dyal v. Ram Buddun, 17 W. R., 454	...109
Dyas v. Cruise, 2 Jon. and Lat., 460	...179, 208
Dyer v. Dyer, 2 Wh. and T., 803	...21
v. Hargrave, 10 Ves., 505	174, 179, 219, 230, 236
Dyke v. Rendall, 2 DeG. M. and G., 209	...120
Dykes v. Blake, 4 Bing. N. C., 463	...176, 52
Dyson v. Forster, 78 L. J. K. B., 24	...386

E

E. M. and A. Co. v. Fakuruddin, 17 C. W. N., 16	...554
Eaden v. Firth, 1 H. and M., 573	...598
Eads v. Williams, 4 DeG., M. and G., 674	...298, 375
Eagle Valley R. Co. v. Nittany Valley R. Co., 171 Pa., 284	...394
Eaglesfield v. Londonderry, 4 Ch. D., 693	...219, 341
Earl of Bath and Montague's case, 3 Ch. Cas., 56	...342
of Beauchamp v. Winn, 6 H. L., 223	...339, 472
of Bradford v. Earl of Ronney, 30 Beav., 431	...440
of Darnley v. London C. & D. Ry. Co., 2 H. L., 43	...268
of Durham v. Legard, 34 Beav., 611	182, 337, 426
of Feversham v. Waston, Freeman, 35	...268
of Lindsay v. G. N. Ry. Co., 10 Hare, 664	...402
of Moxborough v. Bower, 7 Beav., 127	...656
of Oxford's case, 13 Jac., 1	...612
of Ripon v. Hobart, 3 M. & K., 169	...663
of Shrewsbury v. North Staffordshire Ry. Co., 1 Eq., 593	...207, 402

	PAGE.
East Anglian Ry. Co. v. E. C. Ry. Co., 11 C. B., 775	67
Easter v. Russ, 1 Ch., 468	150
Eastern Counties Ry. Co. v. Hawkes, 5 H. L. C., 331	102, 205, 305, 403
Eastern M. & A. Co. v. Rakea, 16 C. W. N., 907	554
East India Co. v. Nuthumbadoo, 7 Moo. P. C., 482	259, 293
v. Odit Churn Pal, 5 M. I. A., 43	144
v. Vincent, 2 Atk., 83	161
Eastman v. Plumer, 46 N. H., 464	367
East St. Louis R. Co. v. East St. Louis, 182 Ill., 433	314
Eastwood v. Ashton, 1 Ch., 68	373
Eaton v. Lyon, 3 Ves., 690	98
Ebrahimbhai v. Fulbai, 26 Bom., 577	485
Echelkamp v. Schroder, 45 Misso., 505	634
Echliff v. Baldwin, 16 Ves., 267	591, 597
Eckstein v. Downing, 10 Am. St. R., 404	156
Eccles. Coms. v. Kino, 14 Ch. D., 213	643
Edge v. Bumford, 31 Beav., 247	129
Edgerton v. Peckham, 11 Paige, Ch., 351	272, 375
Edgington v. Fitzmaurice, 29 Ch. D., 459	218
Edison v. Edison Polyform Mfg. Co., 67 Atl., 392	647
Edwards v. Allouez Mining Co., 38 Mich., 46	602, 609, 666
v. Clay, 28 Beav., 145	40
v. Edwards, 2 Ch. D., 291	561
v. Grand Junction Ry. Co., 1 My. & Cr., 650	207, 210, 305
v. McLeay, G. Coop., 308; (2 Sw., 289)	219, 454, 455
v. Wickwar, 1 Eq., 68	228
Edwards-Wood v. Marjoribanks, 3 DeG. & J., 329	180, 228, 229
Edwin v. Beacon Co., 54 Fed., 678	598
Egerton v. Earl of Brownlow, 4 H. L. C., 1, 99	141
Ehrensperger v. Anderson, 3 Ex., 148	458
Ehrman v. Bartholomew, [1898] 1 Ch., 671	625, 628
Ekhar v. Anu, 6 I. C., 46	509, 119, 123
Elahi v. Harnam, 18 A. W. N., 215	533
Eldridge v. Dexter P. R. Co., 88 Maine, 191	443
Eley v. Positive G. S. L. Ass. Co., 1 Ex. D., 20	152
Elias v. Snowdon Co., 4 A. C., 454	637
Eliason v. Henshaw, 4 Wheat., 225	194
Ellard v. Lord Llandaff, 1 Ba. & Be., 241	176, 226, 295, 73, 95
Elliot v. Crutchley, 1 K. B., 565	277
Ellis v. Bedford, [1899] 1 Ch., 494	117
v. Colman, 25 Beav., 662	209
v. Hunt, 3 T. R., 464	36
v. Rogers, 29 Ch. D., 661	197
Ellison v. Ellison, 6 Ves., 656	211, 384, 24
Elliston v. Reacher, [1908] 2 Ch., 374	372, 392, 617
Elphinstone v. Monkland Iron and Coal Co., 11 A. C., 332	117
Emerson v. Davies, 3 Story, 768	645
Emery v. Wise, 5 Ves., 846	179
v. Wise, 8 Ves., 505	128
Emma Silver Min. Co. v. Emma S. M. Co. of New York, 7 Fed., 401	471
v. Grant, 11 Ch. D., 918	209, 66
Emmerson v. Ind. Coope & Co., 33 Ch. D., 233	29
Emp. v. Muhammad, [1914] 96 P. L. R.,	67
Emperor of Austria v. Day, 3 DeG. F. and J., 217	27, 164
Empire Realty Corp. v. Sayre, 107 N. Y. Ap. D., 415	360
Enaetoollah v. Kishen Soondur, 8 W. R., 386	49, 52, 54, 60, 30, 35
Engell v. Fitch, 4 Q. B., 659	421
England v. Curling, 8 Beav., 129	170, 619
Enterprise Mfg. Co. v. Landers, 124 Fed., 923	646
Eppstein v. Kuhn, 10 L. R. A., N. S., 117	279, 282, 48, 56
Equitable Gaslight Co. v. Baltimore Coal Tar, etc., Manufacturing Co., 2 Md., 285	92
Erfan v. Samiruddin, 15 I. C., 552	510, 518, 129
Erhardt v. Boaro, 113 U. S., 537	591

	PAGE.
Erlanger v. New Somberero Phosphate Co., 3 A. C., 1218	456, 475, 476, 71
Errington v. Aynesly, 2 Bro. Ch., 341	90, 166, 173, 365
Ertaza Hossein v. Bany Mistry, 9 Cal., 130	54
Erwin v. Myers, 10 Wright, 96	179
v. Parham, 12 Howard, 197	319
Esdaib v. La Nauze, 1 Y. and C., Ex., 394	593
Eshan Kishore v. Haris Chandra, 13 B. L. R., App. 42	137
Esposito v. Bowden, 4 El. and Bl., 963	138
v. Bowden, 7 E. and B., 763	141, 275
Etwaria v. Chandra Nath Mukerjee, 10 C. W. N., 763	201
Evans v. Chapman, 86 L. T., 381	101
v. Coventry, 5 DeG. M. and G. 911	550
v. Davis, 10 Ch. D., 747	617
v. Edmonds, 13 C. B., 777	232
v. Llewellyn, 1 Cox., 333	443
v. Mathias, 26 L. J., Q. B., 309	570
v. Taylor, San. and Sc., 681	570
v. Welshe, 2 Sch. and Lef., 519	304
v. Wood, 5 Eq., 9	91
Evelyn v. Lewis, 3 Hare, 472	562
Everett v. Prythergh, 12 Sim., 363	556
Evitt v. Price, 1 Sim., 483	628, 156
Ewing v. Chooneelal, Cor., 150	645
v. Grant Smith, 2 Hyde, 185	645
v. Hanbury, 16 T. L. R., 140	100
v. Orr Ewing, 9 A. C., 34	46
Exchange Co. v. Central News, [1897] 2 Ch., 48	616, 647
Exchange Tel Co. v. Gregory, [1896] 1 Q. B., 147	645, 647, 152
Ex parte Banner, 17 Ch. D., 480	405
Ex parte Barrell, 10 Ch., 512	425
Ex parte Chase, 43 Ala., 303, 310 (cited)	185
Ex parte Cooper, 6 Ch. D., 255	564
Ex parte Evans, 13 Ch. D., 255	567
Ex parte Izard, 23 Ch. D., 80	572
Ex parte Jijai Amba, 13 Mad., 390	583
Ex parte Kintrea, 5 Ch., 95	239
Ex parte Lacey, 6 Ves., 625	353
Ex parte Manning, 2 P. Wms., 410	281
Ex parte Minor, 11 Ves., 559	279
Ex parte Peake, 1 Madd., 355	301
Ex parte Rami Mathusri Jijai Amba, 13 Mad., 390	579
Ex parte Sawyer, 124 U. S., 200	613
Ex parte Varadarajulu, 1 Mad. H. C., 66	137
Ex parte Warren, 10 Ch., 222	545
Ex parte Whitfield, 3 Atk., 315	545
Ex parte Whittaker, 10 Ch., 446	218
Express Co. v. Railroad Co., 99 U. S., 191	352, 410
Ezra v. Secretary of State, 80 Cal., 85	132

F

Fadu Jhala v. Gour Mohan Jhala, 19 Cal., 544, F. B.	61, 64, 32
Faggie v. Bland, 11 Q. B. D., 711	584
Fahamidannissa v. Secy. of State, 14 Cal., 67, F. B.	33
Faine v. Brown, 2 Ves. Sr., 307 (cited)	307, 74
Fairbanks M. and Co. v. Walker, 17 L. R. A., N. S., 558	109
Fairthorne v. Weston, 3 Hare, 387	619
Fakharuddin v. Official Trustee, 8 Cal., 178, P. C.	113
Fakir v. Abdulla, 12 Bom., 658	80
v. Jaimal, [1891] P. R., No. 50	70
Fakirapa v. Rudrapa, 16 Bom., 119	397
Fakir Chand v. Anunda Chunder, 14 Cal., 586	510, 515
Falcke v. Gray, 4 Drew, 453	88, 97, 297, 305, 316, 320, 334, 40, 43

	PAGE.
Falkner v. Equitable Reversionary Soc., 4 Drew, 352	274
Fane v. Fane, 20 Eq., 698	449
Farasram v. Bhimbhai, 5 Bom. L. R., 195	509, 514
Fardunji v. Jamsidji, 28 Bom., 1	70
Farina v. Fickus 1 Ch., 331	191
v. Silverlock, 6 DeG. M. and G., 214	645, 664
Farnsworth v. Duffner, 142 U. S., 43	234
Farrow v. Wilson, 4 C. P., 744	397
Farthing v. Rochelle, 43 S. E., 1	290
Fateh v. Bhawani, 14 O. C., 60	65, 31
v. Menghi, 100 P. R., 1913	128
v. Narsingh, 16 I. C., 988	143, 415, 44, 89
Fatimabai v. Abdool, 6 Bom. L. R., 1140	571
Fatima Bibi v. Debnauth Shah, 20 Cal., 508	200, 249
Fatteh v. Menghi, [1904] P. L. R., 99	163
Favell v. Wright, 64 L. T., 85	463
Fawcett and Holmes, re, 42 Ch. D., 150	454, 95
Fazal v. Amir, [1911] 199 P. L. R.	128
v. Amir, [1911] 217 P. L. R.	260, 429
Fazal Karim v. Maula Baksh, 18 Cal. 448, P. C.	632, 153, 154
Fazlar Rahman v. Rajchunder, 5 C. W. N., 234	54
Fazilatunnessa v. Ijaz, 30 Cal., 901	655
Fazlur v. Anath, 16 C. W. N., 114	560
Fazulbhoj v. Bombay & Co., 20 Bom., 232, F. B.	147, 69
Fechter v. Montgomery, 33 Beav., 22	628
Federal Oil Co. v. Western Oil Co., 121 Fed. R., 674	350
Fells v. Read, 3 Ves., 70	71, 74, 87
Fellowes v. Lord Gwydyr, 1 Sim., 63	400
Felthouse v. Brindley, 11 C. B. N. S., 869	194
Fennelly v. Anderson, 1 Ir. Ch. R., 706	348
Fenton v. Browne, 14 Ves., 144	219, 237
Fetoffes of Heriot's Hospital v. Gibson, 2 Dow., 301	373
Ferguson v. Blackwell, 58 Pac., 647	307, 310
v. Wilson, 2 Ch., 77	415, 416, 419, 60
Ferne v. Young, 1 H. L., 63	599
Ferry v. Bank of Central New York, 15 How. Pr., 445	579
Fetridge v. Wells, 13 How. Pr., 385	606
Fielden v. Slater, 7 Eq., 523	616
Fife v. Clayton, 13 Ves., 546	447
Filley v. Hopkins, 93 Am. Dec., 337	409
Finch v. Earl of Salisbury, Rep. Finch, 212	117
Fine Cotton S. D. Assn. v. Harwood Cash Co., 76 L. J., Ch., 670	645
Fink v. Baldeo Das, 26 Cal., 715	565
v. Chundra Kissore, 30 Cal., 721	562
v. Maharaj Bahadur, 25 Cal., 642	565
Finlen v. Heinze, 73 Pac., 123	319
Firth v. Midland Ry. Co., 20 Eq., 100	111, 164
Fischer v. Kamla Naicker, 8 M. I. A., 170	143
v. Secretary of State, 22 Mad., 270, P. C.	80, 487, 490, 516 117, 130
Fish v. Leser, 60 Ill., 394	297
Fisher v. Arunachella, 19 M. L. J. R., 236	122
Fishmongers' Co. v. East India Co., 1 Dick., 163	642
v. Robertson, 5 Man. & G., 131	206
Fitch v. Sutton, 5 East., 230	264
Fitzhugh v. Jones, 6 Munf., 83	194
Fitzpatrick v. Dorland, 27 Hun., 291	314
Flamang's Case, 7 Ves., 308	633
Fleetwood v. Hull, 23 Q. B. D., 85	386
Fleming v. Burnham, 100 N. Y., 1	360
v. Hislop, [1886] 11 A. C., 686	640
v. Paterson, 107 Ill., 465	122
v. Snook, 5 Beav., 250	618
Fletcher v. Bealey, 28 Ch. D., 688	30, 550, 663
v. Rogers, 10 Hare, Ap., xiii	132

	PAGE.
<i>Fletcher v. Tollet</i> , 5 Ves., 3	339
<i>v. Tuttle</i> , 25 L. R. A., 143	164
<i>v. Walker</i> , 3 Bligh, 172	634
<i>Flight v. Bolland</i> , 4 Russ., 298	200, 348, 349
<i>v. Booth</i> , 1 Bing. N. C., 370	224, 454
<i>v. Cook</i> , 2 Ves. Sr., 619	99
<i>Flinn v. Pountain</i> , 58 L. J., Ch., 389	410
<i>Flint v. Brandon</i> , 8 Ves., 159	90, 167
<i>Flower v. Local Board of Low Leyton</i> , 5 Ch. D., 352	598
<i>v. Marten</i> , 2 My. & C., 459	479
<i>Floyd v. Storrs</i> , 144 Mass., 56	121
<i>Fludyer v. Cocker</i> , 12 Ves., 25	423
<i>Flureau v. Thornhill</i> , 2 W. Bl., 1078	420
<i>Foley v. Keegan</i> , 4 Iowa, 1	118
<i>Foligno v. Martin</i> , 16 Beav., 586	468
<i>Folsom v. Marsh</i> , 2 Story, 100	646
<i>Fool v. Nobin</i> , 23 Cal., 441	34
<i>Ford v. Harrington</i> , 16 N. Y., 285	106
<i>v. Jermon</i> , 6 Phila., 6	625
<i>v. Lerke</i> , Noy, 109	49
<i>Fordyce v. Ford</i> , 4 Bro. Ch., 494	175, 380
<i>Formby v. Barker</i> , [1903] 2 Ch., 539	388, 392
<i>Forrer v. Nash</i> , 35 Beav., 167	358
<i>Forrest v. Elwes</i> , 4 Ves., 492	85, 42
<i>v. Manchester S. & L. Ry. Co.</i> , 4 DeG. F. & J., 126	523
<i>v. ditto</i> , 30 Beav., 40	605
<i>Fortescue v. Lostwithiel & F. Ry. Co.</i> , 3 Ch., 621	109, 162
<i>Foster v. Dawber</i> , 6 Ex., 831	264
<i>v. Hale</i> , 3 Ves., 696	254
<i>v. Mackinnon</i> , 4 C. P., 704	134
<i>v. Wheeler</i> , 36 Ch. D., 695	19
<i>Fothergill v. Phillips</i> , 6 Ch., App., 770	222, 223
<i>v. Rowland</i> , 17 Eq., 132	93, 122, 156, 615, 624
<i>Fouldes v. Willoughby</i> , 8 M. & W., 540	6
<i>Fountaine v. Carmarthen Ry. Co.</i> , 5 Eq., 316	206
<i>Fowle v. Freeman</i> , 9 Ves., 351	194
<i>Fowler v. Black</i> , 136 Ill., 363	338
<i>v. Down</i> , 1 B. & P., 47	69
<i>v. Fowler</i> , 4 DeG. & J., 250	437
<i>v. Odell</i> , 16 Ch. D., 723	556
<i>v. Sands</i> , 50 Atl., 1067	95
<i>v. Senilly</i> , 72 Pa., 456	136
<i>Fox v. Mackreth</i> , 2 Bro. Ch., 400	230, 23
<i>Frame v. Dawson</i> , 14 Ves., 386	253
<i>Framji Shapurji v. Framji Edulji</i> , 30 Bom., 329	643, 652, 151, 154, 155, 161, 166
<i>France v. Clarke</i> , 26 Ch. D., 263	26
<i>Francis, &c. v. Feldman</i> , 2 Ch., 728	646
<i>Francisco v. Smith</i> , 143 N. Y., 488	389, 400
<i>Franklin Telegraph Co. v. Harrison</i> , 145 U. S., 459	304, 313
<i>Franklyn v. Tuton</i> , 5 Madd., 469	115
<i>Fraser & Co. v. Bombay Ice Manufacturing Co.</i> , 29 Bom., 107	151, 615
<i>Frederick v. Coxwell</i> , 3 Y. & J., 514	173
<i>Fredericks v. Mayer</i> , 13 How. Pr., 566	625
<i>Freeman v. Cooke</i> , 2 Ex., 654	11
<i>v. McArthur</i> , 2 Tay & B., 10	601
<i>Freer v. Hesse</i> , 4 DeG. M. & G., 495	362
<i>Freetly v. Barnhart</i> , 51 Pa., 279	293
<i>Freeth v. Burr</i> , 9 C. P., 208	458
<i>Freme v. Wright</i> , 4 Madd., 364	198
<i>French v. Macale</i> , 2 Dr. & War., 269	116, 118
<i>Frewin v. Lewis</i> , 4 My. & Cr., 254	541
<i>Friend v. Lamb</i> , 152 Pa. St., 520	306
<i>Fripp v. Chard Ry. Co.</i> , 11 Hare, 241	547
<i>Frith v. Lawrence</i> , 1 Paige, 434	194

	PAGE.
Fritz v. Hobson, 14 Ch. D., 542	589
Fritzler v. Robinson, 70 Iowa, 500	462
Frogley v. Lovelace, [1879] Johns., 333	617
Frost v. Courtis, 52 N. E. Rep., 515	52
Fry v. Lane, 40 Ch. D., 312	320
v. Shipler, 7 Pa. St., 91	254
Fugatt v. Robinson, 18 B. Mon., 680	100
Fukeer v. Thakoor, 15 W. R., 421	112
Fulkerson v. Chisua M. & I. Co., 122 Fed., 782	513
Fulkumari v. Ghanshyam, 31 Cal., 511	524, 129
Fullwood v. Fullwood, 9 Ch. D., 176	607, 657
Furlong v. Edwards, 3 Indiana, 99	579
Furnival v. Crew, 3 Atk., 83	410
Futeck v. Mohender, 1 Cal., 385	416
Futteh v. Kharak, 88 P. R., 1882	122
v. Leelumbar, 16 W. R., 20	43
Fuzeelun v. Omdah, 10 W. R., 469	22
Fuzlur Rahman v. Krishna Prasad, 29 Cal., 614	64
Fyfe v. Arbuthnot, 1 DeG. & J., 406	132

G

G. I. P. Ry. Co. v. Nowroji, 10 Bom., 390	153, 160
Gadigeya v. Basaya, 12 Bom. L. R., 358	121
Gadsden v. Barrow, 9 Ex., 514	50
Gaekwar v. Gandhi, 27 Bom., 344, P. C.	657, 100, 165, 167
Gaffur v. Bhikaji, 26 Bom., 159	90
Gage v. New Market Ry. Co., 18 Q. B., 457	268
Gajadhar v. Kandhaya, 9 I. C., 243	413, 429
Gajapathi v. Alagia, 9 Mad., 89	56, 83
Gaj Kumar v. Lachman, 14 C. L. J., 627	187, 196, 290, 428, 649, 51, 71, 72, 75
Gale v. Abbot, 8 Jur., N. S., 987	599
v. Lino, 1 Vern., 475	477
Galliher v. Caldwell, 145 U. S., 368	377
Galstaun v. Doonia Lal, 32 Cal., 697	640, 152
Galusha v. Sherman, 105 Wis., 263	457
Galway v. Metrop. Elev. Ry. Co., 128 N. Y., 132	607, 640, 665
Gami v. Khio, 205 P. R., 1889	120
Ganapathy v. Butchu, 21 M. L. J. R., 759	514
Ganda v. Nathu, [1912] 151 P. L. R.	149, 153
Gandla v. Sivanappa, 27 M. L. T., 520	117
Gandy v. Gandy, 30 Ch. D., 57	403
Ganesh v. Kaushal, 21 A. W. N., 53	660
v. Mohesh, 13 C. W. N., 669	85
v. Vishnu, 32 Bom., 37	213, 214, 217
Ganesha v. Tuljaram, 19 M. L. J. R., 4	77
Ganesh Baksh v. Harihar Baksh, 26 All., 299, P. C.	539
Ganeshi v. Beni, P. R., No. 1 1911	122
Ganga v. Badham, 30 All., 134	150
v. Ganga, 6 A. L. J., 43	129
v. Munl. Board, Cawnpore, 19 All., 313	137
Gangabai v. Purshotum, 32 Bom., 146	597, 153
Ganga Baksh v. Jagat Bahadur, 23 Cal., 15	313, 72, 94
Gangavishnu v. Moreshvar, 13 Bom., 358	645, 157
Ganga Das v. Yakub Ali, 27 Cal., 670	561
Ganga Dei v. Asaram, 4 A. L. J. R., 778	275, 458
Ganga Ghulam v. Tapesbri, 26 All., 606	514, 130
Gangaram v. Secretary of State, 20 Bom., 798	54
Ganga Sahai v. Lekhraj Singh, 9 All., 253	104
Gannett v. Albree, 103 Mass., 372	369
Ganoda v. Nalini, 36 Cal., 28	149, 152
Ganpat v. Annaji, 23 Bom., 144	156
Ganpatgir Bholaqir v. Ganpatgir, 3 Bom., 230	524

	PAGE.
Gansa v. Ganga Ram, 12 P. R., 1890	111
Garbut v. Fawcus, [1876] 1 Ch., 155	612
Gardner v. Jay, 29 Ch. D., 50	188
v. Knight, 124 Alabama, 273	447
v. Pullen, 2 Vern., 394	90
v. Trustees of Newburga, 2 Johns., Ch., 162	641
v. Walsh, 5 E. B., 83	263
Garner v. Haunynghon, 22 Beav., 444	39
Garnet v. Macon, 6 Cal., 308	380
Garrard v. Frankel, 30 Beav., 445	441, 449
Garst v. Hall & Lyon, 179 Mass., 588	394
Garth v. Cotton, Dick., 183	402, 504, 637
v. Townsend, 7 Eq., 220	257
Gas Light Co. v. St. Mary Vestry, 15 Q. B. D., 1	148
Gaskarth v. Lord Lowther, 12 Ves., 107	192
Gaskell v. Gosling, 1 Q. B., 669	554
Gaskin v. Balls, 13 Ch. D., 324	657, 660
Gasper v. Gonsalves, 13 B. L. R., 109	126
Gasque v. Small, 2 Strobb. Eq., 72	297, 306
Gates v. Lumber Co., 172 Mass., 495	609
Gatha v. Moohita, 23 W. R., 179	133
Gaunt v. Fynney, [1872] 8 Ch., 8	640
Gauri v. Lala, 12 O. C., 33	167
Gauri Nath v. Madhmani, 9 B. L. R., App., 37	139
Gaya v. Sarfaraz, 29 I. C., 972	115
Geddis v. Prop. of Bann Reservoir [1878], 3. A. C., 430	657
Gee v. Pearse, 2 DeG. and Sm., 325	381
v. Pritchard, 2 Sw., 402	69, 646, 27, 158
Geipel v. Smith, 7 Q. B., 404	452
Gell v. Tajanocora, 27 Bom., 307	538, 539, 137, 139
General Bill-posting Co. v. Atkinson, 78 L. J., Ch., 77	152
Gerrard v. O. Reilly, 3 Dr. and War., 414	658
Gervais v. Edwards, 2 Dr. and War., 80	353, 355, 619
Ghanasham v. Moroba, 18 Bom., 493	549, 632, 643, 657, 154, 161, 167
Ghanashyam v. Gobind Moni, 7 C. W. N., 452	554
Ghulam v. Abiden, 125 P. R., 1886	131
v. Fateh, [1910] 130 P. L. R.	102
v. Muhammad, 6 A. L. J. R., 177	127
v. Narain, 5 A. L. J. R., 534	46
v. Narain, 6 A. L. J. R., 64	71
v. Sher, 111 P. R., 1882	128
Ghulam Khan v. Muhammad Hasan, 29 Cal., 167, P. C.	103, 68
Gibbons v. Caunt, 4 Ves., 840	100
v. Count, 4 Ves., 840	405
Gibbs v. David, 20 Eq., 373	558, 560
v. Smith, 115 Mass., 592	240
Gibson v. Goldsmith, 5 DeG. M. and G., 757	367
v. Ingo, 6 Hare, 112	74
Giles v. Dunbar, 181 Mass., 22	197
v. Edwards, 7 T. R., 181	458
v. Harris, 189 U. S., 475	649
Gillespie v. Moon, 2 Johns. Ch., 585	434, 436, 445
Gillespie and Co., v. Maung, 8 I. C., 441	154
Gillett v. Peppercome, 3 Beav., 78	23
Girdhari v. Hnrdeo, 26 W. R., 44, P. C.	138
Giri v. Modhu, 17 C. W. N., 324	128
Giridhari Lall v. Bengal Government, 12 M. I. A., 448	29
Girijanund v. Sailajanund, 23 Cal., 645	141
Girish Cando v. Sirish Das, 9 C. W. N., 255	638
Giriswold v. Hazard, 141 U. S., 260	435
Girraj v. Hamid, 9 All., 340	109
Gitabai v. Balaji, 17 Bom., 232	125, 318, 42, 94
Gladstone v. Ottoman Bank, 1 H. & M., 505	611
Glassbrook v. Richardson, 23 W. R. (Eng.) 51	271

	PAGE.
Glasse <i>v.</i> Woolgar, 41 Sol. J., 573	98
Glassington <i>v.</i> Thwaites, 1 S. & S., 124	618
Glenorchy <i>v.</i> Bosville, 2 Wh. & T., 763	383, 21
Gleston, <i>v.</i> Sigmund, 27 Md., 304	201
Gloag & Miller's Contract, <i>re</i> , 23 Ch. D., 320	198, 476
Glocke <i>v.</i> Glocke, 113 Wis., 303	459
Glossup <i>v.</i> Harrison, 3 V & B., 184	581
Gloucester Isinglass & Glue Co. <i>v.</i> Russia Cement Co., 154 Mass., 92	92
Gluckstein <i>v.</i> Barnes, [1900] A. C., 240	227
Gobardhan Das <i>v.</i> Jaikishen Das, 22 All., 224	212, 105
Goberdhun <i>v.</i> Munnoo, 15 W. R., 95	119
Gobind <i>v.</i> Ganesh, [1882] Bom. P. J., 63	160
<i>v.</i> Gooroo, 3 W. R., 71	159
<i>v.</i> Udai, 6 B. L. R., 320	119
Gobinda <i>v.</i> Nanda, 18 C. W. N., 689	295, 72
<i>v.</i> Radha, 15 C. W. N., 205	187
Gobind Prasad <i>v.</i> Mohan Lal, 24 All., 157	51
Gobindasami <i>v.</i> Ramasawmy, 32 Mad., 72	112
Gobindo Chandra Jha, <i>v.</i> Shyamlal Jha, 1 C. L. J., 85	151, 241
Goculdas <i>v.</i> Lachmidas, 3 Bom., 402	143
Goculdas Madhavji <i>v.</i> Narsu Yenkuji, 13 Bom., 630	274
Goddard <i>v.</i> Jeffreys, 51 L. J., Ch., 57	332, 68
Godwin <i>v.</i> Collis, 4 Houst. (Del.) 28	187
Gogun Chunder <i>v.</i> Dhuronidhur, 7 Cal., 616	263
Golmere <i>v.</i> Battison, 1 Vern., 48	410
Gokal <i>v.</i> Radho, 10 All., 358	647
Gokool Nath <i>v.</i> Issur, 14 Cal., 222	22
Gokul <i>v.</i> Bande, 8 I. C., 9	507
<i>v.</i> Karan, 8 I. C., 782	115
Golam <i>v.</i> Bissonath, 12 W. R., 9	31
<i>v.</i> Fatima, 16 C. W. N., 394	571
Golap Singh <i>v.</i> Indra Kumar, 9 C. L. J., 367	396
Goldman <i>v.</i> Rosenberg, 116 N. Y., 78	278
Goldsmith <i>v.</i> Guild, 10 Allen., (Am.) 239	271
Goldsall <i>v.</i> Goldman, 84 L. J., Q. B., 63	150
Gomes <i>v.</i> Carter 1 Ind. Jur., N. S., 411	144
Gangayya <i>v.</i> Mahalakshmi, 10 Mad., 90	503
Gomti <i>v.</i> Darab, 22 A. W. N., 187	516, 117
Genesh Chunder Doss <i>v.</i> Troyluckonath Biswas, [1887] Unrep., Woodroffe, <i>Rec.</i> , 219	569, 575, 580
Goodale <i>v.</i> Goodale, 16 Sim., 316	74
Goodall <i>v.</i> Goodall, 16 Jur., 316	592
Goode <i>v.</i> Riley, 153 Mass., 585	443
Goodenow <i>v.</i> Curtis, 18 Mich., 298	228
Goodman <i>v.</i> Whitecomb, 1 J. & W., 589	553, 619
Goods <i>v.</i> Early, 95 Va., 307	638
Goodson <i>v.</i> Richardson, 9 Ch. Ap., 221	608, 634, 666
Goodwin <i>v.</i> Fielding, 4 DeG. M. & G., 90	209
Goolab <i>v.</i> Kurun, 14 M. I. A., 176	500
Gopal <i>v.</i> Arura, 62 P. R., 1901	450
<i>v.</i> Baji, 4 A. W. N., 123	261
<i>v.</i> Ganpat, 13 C. P. L. R., 172	90
<i>v.</i> Laluram, 69 P. R., 1886	113
<i>v.</i> Shewag, 12 P. R., 1899	129
Gopalasami <i>v.</i> Sankara, 8 Mad., 418	136
Gopee <i>v.</i> Bhugwan, 12 W. R., 7	124
Gopi <i>v.</i> Mahanandi, 15 Mad., 99	98
<i>v.</i> Taramoni, 5 Cal., 7	120
Gorachand <i>v.</i> Makhhan Lal, 11 C. W. N., 489	571, 586
Gordon <i>v.</i> Cheltenham Ry. Co., 5 Beav., 229	659
<i>v.</i> Gordon, 3 Sw., 460	100, 405
<i>v.</i> Hertford, 2 Madd., 106	85
<i>v.</i> Street, 2 Q. B., 641	221, 231
Goring <i>v.</i> Nash, 3 Atk., 186	172, 186, 480

TABLE OF CASES CITED.

XXXI

	PAGE.
Gormly v. Gormly, 130 Pa., 467	476
Gotthelf v. Stranaham, 20 L. R. A., 455	314
Gough v. Crane, 3 Md. Ch., 119	119
v. Kemp, 2 My. & K., 308	302
Gould v. Murch, 70 Me., 288	277, 48
v. Womack, 2 Ala., 83	119
Gour v. Chunder, 25 W. R., 45	56
v. Prasanna, 33 Cal., 812	255, 262
Gour Mohan v. Dinonath, 25 Cal., 49	495, 511, 643, 119, 130
Gourmoni v. Panihati Municipality, 12 C. L. J., 75	151, 497, 507
Gouri v. Tirumaya, 18 M. L. J. R., 17	501
Gourlay v. Duke of Somerset, 19 Ves., 429	165
v. Duke of Somerset, 1 V. and B., 68	389
Gove v. City of Biddeford, 27 Atl., 264	300
Govind v. Udai, 6 B. L. R., 320	125
Govind Venkaji v. Sadashib Shet, 17 Bom., 771	632, 150
Govinda v. Apathsahaya, 22 M. L. J. R., 257	180, 365, 51, 53
v. Perumdevi, 12 Mad., 136	510, 531, 129
v. Taluq Bd., 4 M. L. T., 209	149
Govinda Pillai v. Thayammal, 28 Mad., 57	282, 498, 501, 503, 521, 522 530, 117, 133
Govinda Sami v. Kuppasami, 12 Mad., 239	203
Gowdu Magata v. Gowdu Bhagavan, 22 Mad., 297	104
Gower v. Bennett, 9 L. T., 310	563
Graffam v. Burgess, 117 U. S., 180	241, 321
Graham v. Noakes, 1 Ch., 66	572
v. Pancoast, 30 Pa. St., 89	320
v. Peat, 1 East, 244	50, 52
Graham & Co. v. Kerr Dodds & Co., 3 B. L. R., Ap. 4	646
Grahame v. Swan, 7 A. C., 547	661
Grant v. Bangsi Deo, 6 B. L. R., 652	55
v. Bell, 58 Atl., 951	459
v. Munt, Coop., 173	175, 219
Granville v. Betts, 18 L. J., Ch., 32	355, 53
Grasser v. Blank, 110 La., 493	360
Grave v. Peer, 43 N. J., Eq., 553	116
Graves v. Johnson, 156 Mass., 211	141
Gray v. Chaplin, 2 Russ., 126	549
v. Mathias, 5 Ves., 286	106
v. Pearson, 5 C. P., 568	397
v. Smith, 43 Ch. D., 208	120, 45
Great N.-E. Ry. Co. v. Clarence Ry. Co., 1 Coll. Ch., 507	661
Great Northern Ry. Co. v. Manchester S. & L. Ry. Co., 5 DeG. and Sim., 138	292
Great N. W. C. Ry. Co. v. Charlesbois, [1899] A. C., 114	206
Greatrex v. Greatrex, 1 DeG. and S., 602	657
Great Western Ry. Co. v. Birmingham, etc. Ry. Co., 2 Ph., 597	357
Greaves v. Wilson, 25 Beav., 290	452
Grebert-Borgnis v. Nugent, 15 Q. B. D., 85	420
Greeman Singh v. Wahari Lall Singh, 8 Cal., 12	500, 503
Green v. Biddle, 8 Wheat., 1	425
v. Low, 22 Beav., 625	356, 374, 52
v. Marris, 1 Ch., 562	623
v. Paterson, 32 Ch. D., 95	404
v. Pulsford, 2 Beav., 70	362
v. Smith, 1 Atk., 572	364
v. West Cheshire Co., 13 Eq., 44	110
Greene v. Smith, 160 N. Y., 533	439
Greenhalgh v. Brindley [1901], 2 Ch., 324	225, 294
Greenhill v. Isle of Wight Co., 23 L. J. Ch., 887	167
Greenwood v. Algesiras Ry. Co. [1894], 2 Ch., 205	571
v. Leather Shod Wheel Co. [1900], A. C., 421	227
v. Holquette, 12 B. L. R., 42	69, 40
v. Hornsey, 33 Ch. D., 471	596, 661

	PAGE.
Greesh Chunder v. Bhuggobutty, 13 M. I. A., 419 ...	215
Gregory v. Cochrane, 8 M. I. A., 275 ...	44
v. Nelson, 41 Calif., 278 ...	642
v. Wilson, 9 Hare, 683 ...	170, 369
Gregg v. Holland, [1902] 2 Ch., 374 ...	196
Gregson v. Riddle, 7 Ves., 275 (cited) ...	269
u. Udoy, 17 Cal., 223, P. C. ...	25, 41, 44, 89
Greenfell v. Dean &c., of Windsor, 2 Beav., 544 ...	578
Grenningham v. Ewer, Cro. Eliz., 396 ...	366, 367
Grever v. Taylor, 53 Ohio, St., 621 ...	233
Greville v. Fleming, 2 J., and L., 339 ...	549
Grey v. Northumberland, 17 Ves., 281 ...	597
v. Tubbes, 43 Calif., 359 ...	273
v. Woogra Mohun, 28 Cal., 790 ...	566, 578
Gri v. Muhammad, 17 O. C., 354 ...	121
Gridhari v. Hurdeo, 26 W. R., 44, P. C. ...	138
Gridhari Lall v. Bengal Government, 12 M. I. A., 448 ...	29
Griffith v. Blake, 27 Ch. D., 474 ...	601
v. Griffith, 2 Ves. Sr., 401 ...	570, 580
v. Sebastian County, 49 Ark., 24 ...	462
v. Spratley, 1 Cox, 383 ...	317
v. Tower Publishing Co. [1897] 1 Ch., 21 ...	398
Grigg v. Landis, 21 N. J. Eq., 494 ...	273, 367
Grimston v. Cunningham, 1 Q. B., 125 ...	623, 627
Grish Chunder v. Bhugwan Chunder, 13 W. R., 191 ...	61
Groves v. Loomes, 53 L. T., 529 ...	388
Grymes v. Sanders, 93 U. S., 55 ...	448, 464
Guard v. Bradley, 7 Indiana, 60 ...	408
Guinness v. Land Corporation of Ireland, 22 Ch. D., 357 ...	548
Gulab v. Sukham, 104 P. R., 1900 ...	126
Gulabsingji v. Laksamansingji, 18 Bom., 100 ...	149
Gulla v. Chunni, 10 A. L. J. R., 498 ...	74
Gumani v. Ram Charan, 1 All., 555 ...	409, 90
Gun v. McCarthy, L. R. Ir 13 Ch. D., 404 ...	440
Gunesha v. Darobuti, 20 P. R., 1875 ...	122
Gunga v. Bhoopal, 19 W. R., 101, P. C. ...	41
Gunnes v. Rampria, 5 Cal., 53 ...	127
Gur Das v. Bhag, 11 I. C., 231 ...	121, 150
v. Khuda, 8 I. C., 687 ...	155
Gurdyal Singh v. Raja of Faridkote, 22 Cal., 222, P. C. ...	171
Gur Fershad v. Khuda, 8 I. C., 687 ...	151
Gurulinga Swami v. Ramalakshamma, 18 Mad., 53 ...	501
Gurusami v. Ganapathia, 5 Mad., 337, F. B. ...	181, 209
	49, 55, 66, 71
Guruva v. Ragummal, 8 M. L. T., 189 ...	451
Guruvajamma v. Venkatakrishnama, 24 Mad., 34 ...	149
Guthrie v. Abool, 14 M. I. A., 53 ...	115
Guynet v. Mantel, 4 Duer, 86 ...	128
G. W. Ry. Co. v. B. & O. Ry. Co., 2 Ph., 597 ...	592, 47
Gwyne v. Heaton, 1 Br. Ch., 1 ...	319, 455
Gyananda v. Kristo, 8 C. W. N., 404 ...	581
Gyanendro Nath Roy v. Lobongomunjori, 11 C. L. R., 198 ...	503

H

H. v. H., 1 Ch. D., 276 ...	582
Hacke's Appeal, 101 Pa. St., 245 ...	609, 644
Hackley v. Headley, 45 Mich., 569 ...	212
Hadley v. Baxendale, 9 Ex., 341 ...	420
v. Clinton Importing Co., 13 Ohio St., 502 ...	227
v. London Bank of Scotland, 3 DeG. J. & S., 63 ...	597
Hafizabai v. Abdul Karim, 19 Bom., 83 ...	556
Haidari v. Hayet Begam, H. Ct. Alld., unreported ...	595

	PAGE,
Haigh <i>v.</i> Jaggar, 2 Coll. Ch., 231	598, 602
Haines <i>v.</i> Carpenter, 1 Woods, 262	547, 556
<i>v.</i> Taylor, 10 Beav., 75	663, 166
Haji Hassan, <i>re</i> , 4 Bom. L. R., 773	537
Haji Mahomed <i>v.</i> Spinner, 24 Bom., 510	192
Hakeem <i>v.</i> Beejoy, 22 W. R., 8	91
Hakim <i>v.</i> Mahtab, 109 P. R., 1893	121
<i>v.</i> Waryaman, 140 P. R., 1907	533
Haldana <i>v.</i> Harvey, 4 Burr., 2487	50
Hale <i>v.</i> Hale, 4 Beav., 369	553
<i>v.</i> Wilkinson, 21 Gratt., 75	31, 314, 318
Halfey <i>v.</i> Lynch, 143 N. Y., 241	365
Halkett <i>v.</i> Earl of Dudley, 67 L. J., Ch., 330	364
Hall <i>v.</i> Burnell, 2 Ch., 551	273, 426, 97
<i>v.</i> Byron, 4 Ch. D., 667	644
<i>v.</i> Ewin, 37 Ch. D., 74	410
<i>v.</i> Hall, 8 Ch., 430	448
<i>v.</i> Hall, 3 M. & G., 79	553
<i>v.</i> Hardy, 3 P. Wms., 187	103, 127
<i>v.</i> Hills, 2 Bush, 532	95
<i>v.</i> Jenkinson, 2 Ves. & B., 125	557
<i>v.</i> McLeod, 2 Metc., 98	291
<i>v.</i> Otterson, 52 N. J. Eq., 522	216, 377, 378, 381
<i>v.</i> Rood, 29 Am. Rep., 528	660
<i>v.</i> Thompson, 1 Sm. & Marsh., 443	237
<i>v.</i> Warren, 9 Ves., 605	20, 165, 200
<i>v.</i> Wright, E. B. & E., 746	276, 407
Hall-Dare <i>v.</i> Hall-Dare, 31 Ch. D., 251	435
Hallett <i>v.</i> Middleton, 1 Russ., 243	364
Hallsell <i>v.</i> Renfrow, 78 Pac., 118	197
Halsey <i>v.</i> Grant, 13 Ves., 73	19, 128, 174, 176, 178, 49
Halstead <i>v.</i> Grinnan, 152 U. S., 412	379
Halton <i>v.</i> Gray, 2 Cas. Ch., 164	347
Hamilton <i>v.</i> Brewster, 2 Moll., 407	580
<i>v.</i> Cummings, 1 John. Ch., 517	480, 431
<i>v.</i> Liverpool, &c., Insurance Co., 136 U. S., 242	148
<i>v.</i> Whitridge, 11 Md., 128	610
Hamlyn & Co. <i>v.</i> Talisker Distillery, [1894] A. C., 202	172
Hammersley <i>v.</i> De Biel, 12 Cl. & F., 45	191, 372
Hammersmith Ry. Co. <i>v.</i> Brand, 4 H. L., 215	636
Hammond <i>v.</i> Pennock, 6 N. Y., 145	474
Hampshire <i>v.</i> Wickens, 7 Ch. D., 555	198
Hampson <i>v.</i> Price's Patent Candle Co., 45 L. J., Ch., 437	542
Hanks <i>v.</i> Pulling, 25 L. J., Q. B., 375	322
Hanmantrav <i>v.</i> Secretary of State, 25 Bom., 287	54, 67
Hansom <i>v.</i> Keating, 4 Hare, 1	367
Hanseswar <i>v.</i> Rakhal, 18 C. L. J., 359	560, 134
Hanuman <i>v.</i> Hanuman, 19 Cal., 123	321
<i>v.</i> Jota Kunwar, 28 A. W. N., 207	502
Hanumayya <i>v.</i> Venkata, 18 Mad., 23	135
Hapgood <i>v.</i> Rosenstock, 23 Fed. R., 86	91
Hapwood <i>v.</i> McCausland, 120 Iowa, 218	368
Haradhan <i>v.</i> Bharabati, 19 C. L. J., 420	272, 379, 409, 74
Harak <i>v.</i> Luchmi, 5 C. L. R., 287	32
Harakh Chand <i>v.</i> Bijoy Chand, 2 C. L. J., 87	521
Haramoni <i>v.</i> Hari Churn, 22 Cal., 833	395, 397
Haran <i>v.</i> Madan, 15 C. W. N., 956	63
Hardasmal <i>v.</i> Kundabai, 7 S. L. R., 21	153
Harden <i>v.</i> Jones, 86 Ill., 313	495
Hardenberg <i>v.</i> Bacon, 33 Calif., 346	365
Hardigree <i>v.</i> Mitchum, 51 Alabama, 151	343
Harding <i>v.</i> Glover, 18 Ves., 281	553
<i>v.</i> Glyn, 2 Wh. and T., 335	22
<i>v.</i> Metropolitan Railway Co., 7 Ch., 154	98

	PAGE.
Harding v. Parshall, 56 Ill., 219	182
Hardoon v. Belios, [1901] A. C., 118	93
Hardy v. Martin, 1 Cox, 26	118
v. Veasey, 3 Ex., 107	648, 158
Hare v. London and N. W. Ry. Co., 7 Jur. N. S., 1145	605, 667
Harendra v. Abinash, 7 I. C., 761	587
v. Brinda Rani, 2 C. W. N., 521	144, 151
Harendra Lal v. Uma Charan, 9 C. W. N., 695	267
Harford v. Purrier, 1 Madd., 532	278, 423, 47
Hargrave v. Hargrave, 9 Beav., 549	552
Hargu Lal v. Dwarka, 1 A. L. J. R., 239	662
Hari v. Bajrung, 13 C. W. N., 544	501
v. Barada, 31 Cal., 1014...	150
v. Elemjan, 19 C. L. J., 17	35
v. Lachmi, 1 P. R., 1882...	130
v. Muni. Com., Pindighat, 78 P. R., 1901	166
v. Raghunath, 11 All., 27, F. B.	260, 429, 430, 46
v. Ram, 14 I. C., 28	90, 122
v. Ramji, 28 Bom., 371	217
v. Secretary of State, 27 Bom., 424	149
v. Shankar, 19 Bom., 420	160
Hari Halkrishna v. Naro Moreshvar, 18 Bom., 342	466, 106
Hari Chand v. Bura Mal, 27 P. L. R., 1906	98
Hari Das Kundu v. Macgregor, 18 Cal., 477	562, 564, 570
Harihar v. Harendra, 12 C. L. J., 252	558, 568
v. Shyam, 40 Cal., 615	122
Hari Khardu v. Dhondi Natha, 8 Bom. L. R., 96	49, 50
Hari Mohan v. Baburali, 24 Cal., 715	41
Hari Raghunath v. Krishnaji Anant, 19 Bom., 546...	414
Hari Valabhdas v. Bhai Jevanji, 26 Bom., 689	143, 214
Haribhai v. Sharafali, 22 Bom., 861	138, 151
Hariganga v. Tricamlal, 26 Bom., 374	153
Harihar v. Dasarathi, 33 Cal., 257	484, 113
Harington v. Derby Corp., [1905] 1 Ch., 205	635
Harnam v. Bhagwan, 50 P. R., 1890	122
v. Sundar, 73 P. R., 1881	130
Harnandan v. Bhupendar, 4 O. C., 207	131
Harnett v. Yielding, 2 Sch. & Def., 549	20, 208, 289, 66
Haro Dayal v. Kristo Govind, 17 W. R., 70	65
Har Prashad v. Phul Chand, 2 A. L. J. R., 609	526
Harrell v. Hill, 19 Ark., 102	176
Harris v. Beauchamp, 1 Q. B., 801	29
v. Boots Cash Chemists, 73 L. J., Ch., 708	656
v. Greenleaf, 25 Ky. L. R., 1940	272
v. Kemble, 1 Sim., 111	233, 234
v. Kemble, 5 Bli. N. S., 730	243
Harris v. Loyd, 5 M. & W., 432	343
v. Pepperell, 5 Eq., 1...	325, 345, 434, 442
v. Tyson, 24 Pa. St., 347	321, 455
Harsha v. Reid, 45 N. Y., 415...	426
Hart v. Hart, 18 Ch. D., 670	259, 613
v. Herwig, 18 Ch., 860	88, 171
v. Leonard, 42 N. J., Eq.	642
v. Swaine, 7 Ch. D., 46	454
Hartley v. Smith, Buck, Bankr. C., 368	362
Harvey v. Ashley, 3 Atk., 611	125
v. Cooke, 4 Russ., 34...	405
Harwood v. Tooke, 2 Sim., 192	125
Hasan v. Nazo, 11 All., 456	113
Haskell v. Sutton, 53 W. Va., 206	492
Hatch v. Hatch, 9 Ves., 292	202
Hatton v. Gray, 2 Cas. Ch., 164	347
Haviland v. Willets, 141 N. Y., 35	343
Hawkes v. Eastern Counties Ry. Co., 1 DeG. M. & G., 737	305, 351, 611

	PAGE.
Hawkes <i>v.</i> Kehoe, 10 L. R. A., N. S., 125...	48
Hawkesworth <i>v.</i> Chaffey, 55 L. J., Ch., 335	193
Hawkins <i>v.</i> Kemp, 3 East, 410	361
<i>v.</i> Maltby, 3 Ch., 188, 4 Ch., 100	90, 91
Hawksley <i>v.</i> Outram, 3 Ch., 559	94, 259, 268
Hawley <i>v.</i> Clowes, 2 Johns, Ch., 122	638
<i>v.</i> Steele, 6 Ch. D., 528	611
Hawralty <i>v.</i> Warren, 90 Am. Dec., 613	181
Haydock <i>v.</i> Haydock, 33 N. J. Eq., 494	200
Haygarth <i>v.</i> Wearing, 12 Eq., 320	220, 320
Hayman <i>v.</i> Rugby School, 18 Eq., 28	630
Hayne <i>v.</i> Cummings, 16 C. B., N. S., 421...	78
Haynes <i>v.</i> Haynes, 1 Dr. & Sm., 426	11
Hays <i>v.</i> Hale, 4 Porter, 374	374
Haywood <i>v.</i> Brunswick P. B. Building Society, 8 Q. B. D., 403	393
<i>v.</i> Cope, 25 Beav., 140	20, 31, 188, 222, 292, 304
Hazara <i>v.</i> Bishen, 128 P. R., 1907	531
Head <i>v.</i> Tattersall, 7 Ex., 7	273, 473
<i>v.</i> Porter, 70 Fed., 498	644
Hearne <i>v.</i> Marine Insurance Co., 20 Wallace, 488	444
Heath <i>v.</i> Wright, 3 Wall, Jr., 141	606
Heathcote <i>v.</i> North Staffordshire Ry. Co., 2 Mac. & G., 100	95, 156, 611
Heckard <i>v.</i> Sayre, 34 Ill., 142	272
Heiniger <i>v.</i> Droz., 25 Bom., 433	155
Helen <i>v.</i> Martin, 53 Calif., 321	423
Hellier <i>v.</i> Silcox, 19 L. J., Q. B., 295	32
Helling <i>v.</i> Lumley, 3 DeG. & J., 493	309
Helmore <i>v.</i> Smith, 35 Ch. D., 449	573
Hemanginee <i>v.</i> Kumode Dass, 26 Cal., 441	550
Hemanta <i>v.</i> Baranagar, etc., 24 I. C., 313	144
<i>v.</i> Midnapur Zamindari Co., [1915] 19 C. W. N., 347	26
Hem Chunder <i>v.</i> Prankristo, 1 Cal., 403	561
<i>v.</i> Sarnamayi, 22 Cal., 354	500, 508, 120
Hem Raj <i>v.</i> Sahiba, 116 P. R., 1901	123
Henderson <i>v.</i> Bank of Australasia, 40 Ch. D., 170	542
<i>v.</i> Hayes, 2 Watts, 148	298
<i>v.</i> N. Y. C. R. Co., 78 N. Y., 423	640
<i>v.</i> Vanlx, 10 Yerg., 30	592
Hendrickson <i>v.</i> Ivins, Saxton, 562	435
Henkla <i>v.</i> Royal Exchange Assurance Co., 1 Ves. Sr., 318	440
Hennessy <i>v.</i> Carmony, 50 N. J. Eq., 616	186, 603, 640, 664
Henthorn <i>v.</i> Fraser, [1892] 2 Ch., 27	195
Henty <i>v.</i> Schroder, 12 Ch. D., 666	468
Hepburn <i>v.</i> Dunlop, 1 Wheat, 179	359
<i>v.</i> Leather, 50 L. T., 660	107
<i>v.</i> London, 34 L. J., Ch., 293	663
Herbet <i>v.</i> Mutual Life Insurance Company, 12 Fed. R., 807	123
<i>v.</i> Salisbury Ry. Co., 2 Eq., 224	421
Hercy <i>v.</i> Birch, 9 Ves., 359	170
Hermann <i>v.</i> Charlesworth, [1905] 2 K. B., 123	149
<i>v.</i> Hodges, 16 Eq., 18	99
Herron <i>v.</i> Rathmines Co., [1892] A. C., 498	641
Hersey <i>v.</i> Giblett, 18 Beav., 174	198, 353
Hervey <i>v.</i> Smith, 1 K. & J., 389	600
Herzog <i>v.</i> Atchison T. S. R. Co., 17 L. R. A., N. S., 428	75
Hesse <i>v.</i> Briant, 6 DeG. M. & G., 623	299
Hetfield <i>v.</i> Willey, 105 Ill., 286	334
Henblin <i>v.</i> Adams, 125 Fed., 782	646
Hexter <i>v.</i> Pearce, [1900] 1 Ch., 341	79, 292, 365
Heywood <i>v.</i> Mallalieu, 25 Ch. D., 357	363, 454
Hibblethwaite <i>v.</i> M'Morine, 5 M. & W., 462	156, 364
Hick <i>v.</i> Hicks, 3 Atk., 274	575
<i>v.</i> Stevens, 121 Ill., 186	220, 237, 575
<i>v.</i> Turck, 72 Mich., 311	124

	PAGE.
Hidden v. Jordan, 21 Calif., 92	256
Higgings v. Betts, [1908] 2 Ch., 210	643
v. Butler, 78 Maine, 520	321
v. Samels, 2 J. & H., 460	219, 233, 234
v. Senior, 8 M. & W., 334	400
Higginson v. Clowes, 15 Ves., 516	327, 86
Hill v. Barclay, 18 Ves., 56	369
v. Bedaput, 1 C. W. N., lxxi	398
v. Buckley, 17 Ves., 394	176, 337, 426, 49
v. Clarke, 27 All., 266	139
v. Gray, 1 Stark, 434	227
v. Gomme, 5 My. & Cr., 250	406
Hills v. Croll, 2 Phillips, 60	311, 348, 622, 64, 175
v. Rowland, 4, DeG. M. & G., 430	440
Hilton v. Earl Granville, Cr. & Ph., 283	609, 665
v. Eckersley, 6 E., B., 66	150
v. Granville, 4 Beav., 130	601
Himatlal v. Vasudeo, 36 Bom., 446	90
Hinde v. Whitehouse, 7 East, 558	278
Hinton v. Hinton, 2 Ves. Sr., 631	92
v. Insurance Co., 63 Alabama, 488	445
Hipwell v. Knight, 1 Y. & C., Ex., 401	274
Hira v. Dhana, 112 P. R., 1876	132
v. Ganga, 6 All., 322	98
v. Jai Singh, 2 C. P. L. R., 156	117
Hira Singh v. Narain, 10 C. P. L. R., 117	393, 90
Biralal v. Gulab, 10 C. P. L. R., 1	118
Hirschfield v. London & Co. Ry. Co., 2 Q. B. D., 1	219
Hitchins v. Pettingill, 58 N. H., 3	441
Hoare v. Dresser, 7 H. L. C., 317	95
v. Owen, [1892] 3 Ch., 94	558
Hobson v. Tulloch, [1898] 1 Ch., 424	163
Hoblyn v. Hoblyn, 41 Ch. C., 200	404
Hochster v. De La Tour, 22, L.J., Q. B., 455	265, 451
Hodge v. Sloan, 107 N. Y., 244	389
Hodges v. Kowing, 58 Conn., 12	102
Hodgson v. Duce, 2 Jur., N. S., 1014	610, 632, 634, 157
Hoffman v. Duncan, 18 Jur., 69	584
Hogg v. Scott, 18 Eq., 444	645, 659
Hoggart v. Scott, 1 R. & M., 293	352
Holbrook v. Sharpey, 19 Ves., 131	109, 115
Holcombe v. Johnson, 27 Minn., 353	577
Hole v. Chard-Union, [1894] 1 Ch., 293	668
v. Thomas, 7 Ves., 589	638
Holland v. Challen, 110 U. S., 20	489, 490
v. Worley 26 Ch. D., 578	643, 661
Hollier v. Hedges, 2 Ir. Ch. R., 564	460, 585
Hollins v. Fowler, 7 H. L., 757	134, 460
Holloway v. Holloway, 13 Beav., 209	606
Holloway Bros. v. Hill, [1902] 2 Ch., 612	115, 388
Holmon v. Johnson, Cowp., 341	140, 203
Holmes' Appeal, 77 Pa. St., 50	231
Holmes v. Bell, 20 Beav., 298	555
v. Chester, 26 N. J., Eq., 81	503
v. Eastern Counties Ry. Co., 3 Jur. N. S., 737	374
v. Eastern Ry. Co., 3 K. & J., 675	616
v. Millage, 1 Q. B., 551	547
v. Newcastle & Co., 1 Ch. D., 682	629
v. Powell, 8 DeG. M. & G., 572	409
Holroyd v. Marshall, 10 H. L. C., 191, 209	94, 126, 364
Holsan v. Trever, 2 P. Wms., 191	117
Holworthy Urban Council v. Holworthy Rural Council, 76 L. J.,	
Ch., 389	100
Holt v. Holt, 1 Eq. Abr., 274, pl. 11	106

	PAGE.
Home v. Douglas, 17 C. W. N., 215, P. O. ...	169
Home &c., Stores v. Colls, [1902] 1 Ch., 302 ...	642
Homfray v. Fothergill, 1 Eq., 567 ...	170, 618
Honeyman v. Marryat, 6 H. L. C., 112 ...	192
Honumayya v. Venkatasubbaya, 18 Mad., 23 ...	546, 547
Hood v. Aston, 1 Russ. 412 ...	592
v. Mackinnon, 78 L. J., Ch., 300 ...	105
v. North-Eastern Railway Co., 8 Eq., 666 ...	110
Hock v. Kinnear, 3 Gw., 417n ...	400
Hooper v. Brodrick, 11 Sim., 47 ...	163, 168
v. Bromet, 90 L. T., 234 ...	393
v. Smart, 18 Eq., 683 ...	179, 365
Hope v. Hope, 26 L. J. Ch., 417 ...	124
v. Hope, 8 DeG. M. & G., 731 ...	172, 351
v. Hope, 22 Beav., 351 ...	53
v. Walter, [1899] 1 Ch., 877 ...	101, 225
v. Walter, [1900] 1 Ch., 257 ...	309
Hopkinson v. Burghley, 2 Ch., 447 ...	647
Horihar v. Dasarathi, 9, C. W. N., 636 ...	484
Hormasji v. Pedder, 12 Bom. H. C. R., 199 ...	164
v. Pestanji, 12 Bom., 422 ...	137
Horniblow v. Shirley, 13 Ves., 81 ...	128
Horrocks v. Rigby, 9 Ch. D., 180 ...	179
Horsley Estate v. Steiger, 2 Q. B., 89 ...	386
Horsfall v. Thomas, 1 H. & C., 90 ...	223, 230
Hosmer v. Wyoming Ry. & Iron Co., 129 Fed. R., 883 ...	272
House v. Jackson, 24 Oregon, 89 ...	400
House, etc. Co. v. Heinze, 102 Mo., 245 ...	288
Household Fire Insurance Co. v. Grant, 4 Ex. D., 216 ...	195
Houston v. Townsend, 12 Am. Dec., 109 ...	253
Howard v. Hopkins, 2 Atk., 371 ...	119
v. Miller, 84 L. J. P. C., 49 ...	254
v. Press Printers Ltd., 73 L. J., Ch., 100 ...	600
Howatson v. Webb, [1907] 1 Ch., 537 ...	134
Howe v. Hunt, 31 Beav., 420 ...	416
v. Smith, 22 Ch. D., 89 ...	273, 425
v. Watson, 60 N. B. R., 415 ...	352
Howell v. Coupland, 1 Q. B. D., 258 ...	276
v. Dowson, 13 Q. B. D., 67 ...	569
v. George, 1 Madd., 1 ...	332
Howgate and Osborn's Contract, [1902] 1 Ch., 451 ...	263
Howland v. Norris, 1 Cox, 58 ...	175
Howther v. Heaver, 41 Ch. D., 248 ...	259
Hoyle v. Southern Works, 105 Ga., 123 ...	472
Hubbell v. Van Schoening, 4 N. Y., 326 ...	270, 375, 380
Huddleston v. Briscoe, 11 Ves., 583 ...	190
Hudson v. Bartram, 3 Madd., 440 ...	273, 596
v. Cripps, [1896] 1 Ch., 265 ...	617
v. Morgan, 36 Cal., 713 ...	135
Hudson Iron Co., v. Stockbridge Iron Co., 120 Mass., 45 ...	445
Hughes v. Graeme, 33 L. J., Q. B., 335 ...	91
v. Jones, 8 DeG. F. & J., 307 ...	176
v. Morris, 2 DeG. M. & G., 349 ...	354, 278
v. Parker, 8 M. & W., 244 ...	197
v. Piedmont Life Ins. Co., 55 Geor., 111 ...	124
Huguenin v. Baseley, 14 Ves., 285 ...	214, 232, 457, 460, 558, 21, 22
v. Courtney, 53, Am. Rep., 688 ...	284, 322
Hukan v. Nikka, 15 P. R., 1908 ...	60, 90
Hukun v. Kamalananda, 33 Cal., 927 ...	144
Hulodhur v. Gooroo Dass, 20 W. R., 126 ...	43
Humble v. Langston, 7 M. & W., 517 ...	101
Humberston v. Humberston, 1 P. Wms., 332 ...	385
Hume v. Bentley, 5 DeG. & Sm., 520 ...	198
Humphery v. Conybeare, 80 L. T., 40 ...	198

	PAGE.
Humphrys v. Polak, [1901] 2 K. B., 385 ...	148
Hunoomanpersaud v. Munraj, 6 M. I. A., 393 ...	201
Hunsbutti v. Ishri Dutt, 5 Cal., 512 ...	487, 520
Hunsraj Morurjee v. Ranchordas Dharmsey, 7 Bom. L. R., 319 ...	98, 172, 96
Hunt v. Hunt, 4 DeG. F. & J., 221 ...	78, 87, 98, 124, 172, 612
v. Luck, [1902] 1 Ch., 428 ...	410
v. Ronsmaniere's Administrators, 8 Wheat., 174 ...	26, 340, 437, 439
v. Peake, Johns., 705 ...	688
Hunter v. Carroll, 64 N. H., 572 ...	609, 660
v. Daniel, 4 Hare, 420 ...	453
v. Walters, 7 Ch., 75 ...	134
Hunting v. Damon, 160 Mass., 441 ...	360
Huntley v. Huntley, 8 Q. B., 112 ...	142
Hurnandun v. Jawad Ali, 27 Cal., 468 ...	26, 409, 44, 90
Hurri v. Upendra, 24 Cal., 1 ...	111, 113
Hurrydass v. Uppoonah, 6 M. I. A., 433 ...	638
v. Rungunmony, Sev., 657 ...	500, 638
Husain v. Jahan, [1913] 58 P. R., 1913 ...	154, 241, 53
Husain Buksh v. Rahmat Husain, 11 All., 128 ...	143
Husaini Begum v. Rustam Ali, 29 All., 222 ...	385
Huse etc. Co. v. Heinze, 102 Mo., 245 ...	288
Hussey v. Horne-Payne, 4 A. C., 311 ...	194
Hutcheson v. Eaton, 13 Q. B. D., 861 ...	104
Hutchings v. Humphreys, 54 L. J., Ch., 650 ...	468, 107
Hutton v. West Cork Ry Co., 23 Ch. D., 673 ...	542
Huxham v. Llewellyn, 28 L. T., 577 ...	271
Hyam v. Subbay, 20 C. W. N., 66 ...	194
Hyde v. Warden, 1 Ex. D., 309 ...	584
v. Wrench, 3 Beav., 334 ...	195

I

Ibrahim v. Munl. Com., Lahore, 52 P. R., 1900 ...	164-5
Ibrahimbai v. Fletcher, 21 Bom., 827 ...	425, 59, 97
Ide v. Thorlicht, 115 Fed., 137 ...	607, 658
Ilahi v. Din, 14 P. R., 1897 ...	120
Imperial Gas, &c. Co. v. Broadbent, 7 H. L. C., 600 ...	602, 665-6
Imperial Ice Mf. Co. v. Munchershaw Wadia, 13 Bom., 415 ...	402,
	67, 79, 93
Imperial Loan Co. v. Stone, 1 Q. B., 602 ...	135
Inayat Husen v. Ali Husen, 20 All., 182 ...	61
Inchbald v. Robinson, [1869] 4 Ch., 388 ...	641
Ind Coope & Co., v. Kidd, 63 L. J., Q. B., 726 ...	576
Indar v. Narindar, 33 P. R., 1904 ...	109
Inderdawan v. Gobind, 23 Cal., 790 ...	409
Inder Pershad v. Campbell, 7 Cal., 474 ...	336, 470, 483, 47, 104, 105, 114
Indra v. Chandika, 14 O. C., 170 ...	123
Ingle v. Jenkins, [1900] 2 Ch., 368 ...	411
Innasi v. Sivagnana, 5 M. L. J. R., 95 ...	62, 65, 32
Innasimuttu v. Upakarath, 23 Mad., 10 ...	123
Innes v. Sayer, 3 M. & G., 606 ...	256
In re Briggs, [1891] 2 Ch., 127 ...	384
In re British P. T. & L. Co., Halifax J. S. B. Co. v. British P. T. & L. Co., 2 Ch., 470 ...	574
In re British S. P. B. Co., 17 Ch. D., 461 ...	209
In re Bryant & Birmingham, 44 Ch. D., 218 ...	358
In re Cameron & Wells, 37 Ch. D., 32 ...	404
In re Chytun Chunder Roy, 20 W. R., 12 ...	66
In re Cooper, 20 Ch. D., 611 ...	478
In re Dagenbaum, 8 Ch., 1022 ...	272
In re Dames & Wood, 29 Ch. D., 626 ...	452
In re Daniel's Trusts, 1 Ch. D., 373 ...	434
In re Fickus, Farina v. Fickus, 1 Ch., 331 ...	191

	PAGE.
<i>In re Garnett</i> , 31 Ch. D., 1 ...	381
<i>In re Lauder and Bayley's contract</i> , 3 Ch., 48 ...	198
<i>In re Martin</i> , 20 Ch. D., 365 ...	186, 188, 596
<i>In re Reddington</i> , 1 Moll., 256 ...	571
<i>In re Starr-Bowkett Society & Sibun</i> , 42 Ch. D., 375 ...	452
<i>In re Young</i> , 7 Fed., 855 ...	563
International Soc. of Auctioneers, <i>re Baillie's Case</i> , [1898] 1 Ch., 110 ...	461
In the goods of Okilmoney Dassee, Fulton, 90 ...	582
In the matter of Chando Bibi, 26 All., 311 ...	595
<i>Inturi v. Aripalara</i> , 15 I. C., 623 ...	51
<i>Invinson v. Hutton</i> , 98 U. S., 79 ...	443
<i>Iqbal Husen v. Nand Kishore</i> , 24 All., 294 ...	62, 33
<i>Irnham v. Child</i> , 1 Bro. C. C., 92 ...	324, 87
Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala., 498 ...	169, 348
<i>Irwin v. Williar</i> , 110 U. S., 499 ...	153
<i>Isenberg, v. E. I. House Estate Co.</i> , 3 De G. J. & S., 263 ...	661
<i>Ishan Chunder v. Ram Lochun</i> , 9 W. R., 79 ...	62, 33
<i>Ishvar v. Devar</i> , 27 Bom., 146 ...	111
<i>Ishwari v. Narain</i> , 36 All., 314 ...	130
<i>Ismail v. Jaigun</i> , 27 Cal., 570 ...	168
<i>v. Municipal Comur.</i> , 28 Bom., 253 ...	539, 139
<i>Ismail Arif v. Mahomed Ghons</i> , 20 Cal., 834, P. C. 51, 54, 56, 495, 29, 119, 130 ...	51, 54, 56, 495, 29, 119, 130
<i>Israil v. Samser</i> , 18 C. W. N., 176 ...	600, 655
<i>Isri Dut v. Hansbutti</i> , 10 Cal., 324, P. C. ...	639, 524, 118, 127
<i>Issacs v. Fiddleman</i> , 42 L. T., 395 ...	652
<i>Iswar Narain v. Janki</i> , 15 All., 132 ...	502
<i>Ittapan v. Manvikrama</i> , 21 Mad., 153 ...	45, 32
<i>Ives v. Edison</i> , 50 L. R. A., 134 ...	661
<i>v. Metcalfe</i> , 1 Atk., 64 ...	103, 382
<i>Ivimey v. Stocker</i> , [1866] 1 Ch. Ap., 396 ...	644
<i>Iyyappa v. Ramalakshimamma</i> , 13 Mad., 549 ...	484, 114

J

<i>Jaccard v. O'Brien</i> , 70 Mo. Ap., 432 ...	626
<i>Jackson v. Butler</i> , 2 Atk., 306 ...	74
<i>v. Jackson</i> , 1 Sm. & Gif., 184 ...	165, 571
<i>v. Lever</i> , 2 Bro. C. C., 605 ...	313
<i>v. McCoy</i> , 56 Miss., 78 ...	410
<i>v. Newcastle</i> , 3 De G. J. & S., 275 ...	155
<i>v. Normandy Co.</i> , [1899] 1 Ch., 438 ...	599
<i>v. Oakshott</i> , 14 Ch. D., 851 ...	452
<i>Jackson's Case</i> , Lane 60 ...	409
<i>Jackson v. Stevenson</i> , 156 Mass., 496 ...	313
<i>Jacobs v. Locke</i> , 2 Ired. Eq., 286 ...	426
<i>v. Morange</i> , 47 N. Y., 57 ...	339
<i>v. Revell</i> , 2 Ch., 858 ...	175, 183
<i>v. R. R. Co.</i> , 8 Cush., 225 ...	252
<i>v. Seward</i> , 5 H. L., 464 ...	45, 638
<i>Jadab v. Herz</i> , 1 Ind. Jur., N. S., 21 ...	34
<i>Jadu v. Adal</i> , 11 I. C., 892 ...	181, 208, 365, 53
<i>Jadubnath v. Ram Soondar</i> , 7 W. R., 174 ...	52
<i>Jadunandan v. Abdul</i> , 11 I. C., 892 ...	53, 61, 66
<i>Jadu Nath v. Bhagwant</i> , 1 O. C. (Sup.), 4 ...	111
<i>Jafr v. Kadir</i> , 12 Bom., 634 ...	165
<i>Jafr Begam v. Ali Raza</i> , 23 All., 883, P. C. ...	104, 98, 99
<i>Jagabandhu v. Dinabandhu</i> , 2 B. L. R., Ap., 30 ...	62
<i>Jagadamba v. Dakhina</i> , 13 I. A., 84 ...	502
<i>Jagadis v. Satrugghan</i> , 33 Cal., 1065 ...	137
<i>Jagannath v. Akali</i> , 21 Cal., 463 ...	154
<i>v. Berhampur Municipality</i> , 9 C. L. J., 286 ...	164, 165
<i>v. Triguna</i> , 13 A. L. J. R., 252 ...	515, 124, 130

	PAGE.
Jagannatha v. Rama Rayer, 28 Mad., 288	61, 32
Jagardeo v. Phuljhari, 30 All., 375	113
Jagar Nath v. Lalita, 31 All., 21	115
Jagarnath Singh v. Jainath Singh, 27 All., 88	44, 45, 46, 655
Jagat v. Secy. of State, 13 C. W. N., lviii	130
Jagat Singh v. Jit Singh, 41 P. R., 1876	132
Jagat Tarini v. Naba Gopal, 34 Cal., 305	550, 565
Jagdeep Narain v. Jaibashi 22 I. C., 928	522
Jagesh v. Ananda, 19 I. C., 907	415
Jageshar v. Jawahir. 1 All., 311, F. B.	32
Jaggi Lal v. Cooper, 27 All., 696	98
Jagjivan v. Shridhar, 2 Bom., 252	166
Jagmohan Das v. Pallonjee, 22 Bom., 1	400
Jagodanund v. Amritlal, 22 Cal., 767	19
Jahar v. Nanda, 18 C. W. N., 545	167
Jai v. Lalit, 26 All., 236	36, 113
Jaidayal v. Ram, 17 Cal., 432	59
Jai Kisson Das v. Zena Bai, 14 Bom., 431	554, 582, 135
Jaipalkunwar v. Indar, 26 All., 238, P. C.	520, 521, 530, 72, 120, 126, 133
Jairam v. Atmaram, 4 Bom., 486	546
v. Babaji, 1 N. L. R., 184	652, 152, 160
Jairamdas v. Zamonlal, 27 Bom., 357	590, 144, 145, 163
Jai Singh v. Uttam, 148 P. R., 1884	118
Jaitun Bi v. Nabi, [1912] 24 M. L. J. R., 15	69
Jaldu v. Asiatic Steam Co., 30 I. C., 840, F. B.	40
Jambala v. Kingsley, 17 C. W. N., 1201	31
James v. Couchman, 29 Ch. D., 212	436
v. James, 13 Eq., 421	648
v. Lichfield, 9 Eq., 51	180
v. Shore, 1 Stark, 426	52
Jamna v. Harcharan, 38 Cal., 405	144
v. Jagdeo, 6 A. L. J. R., 11	126
Jamadas v. Atmaram, 2 Bom., 133	378, 607, 661, 155, 159, 160, 161, 162, 168
Jamnet v. Nowranga, 42 P. R., 1876	125
Jamsetji v. Hari, 32 Bom., 181	143, 150
v. Kashinath, 26 Bom., 326	408, 73
Jamshed v. Burjorji, 30 M. L. J., 186, P. C.	270, 51, 81
Jan v. Khonkar, 6 B. L. R., 154	124
Janardana v. Badava, 23 Mad., 385	516, 130
v. Bhairab, 30 I. C., 365	271
Jangu v. Ahmad, 13 All., 419	153
Janki v. Bhairab, 30 I. C., 365	71, 80
v. Jamini, 22 I. C., 612	66
v. Salig, 2 O. C., 96	125
v. Yahia, 16 C. L. J., 119	89, 90
Janki Prasad v. Kishun Dat, 16 All., 478, F. B.	409
Janoki v. Dina Mani, 13 C. W. N., 305	32
Janson v. Driefontein Consolidated Mines, [1902] A. C., 484	141, 153
Janukdhari v. Gossain, 13 C. W. N., 710	74
Jaques v. Millar, 6 Ch. D., 153	417, 60
Jardine Skinner v. Shurno Moyee 24 W. R., 215	124
Jarrett v. Hunter, 34 Ch. D., 182	196
Jaskuar v. Mahtab, 26 P. R., 1903	118
Jatindra v. Amirta, 5 C. W. N., 20	528
Javanmal v. Muktabai, 11 Bom., 516	19
Jawahir Singh v. Arjun Singh, 8 O. C., 1	440, 462, 100
Jawahra v. Akbar Husain, 7 All., 178	498
Jawitri v. Emile, 13 All., 98	668, 162
Jefferies v. G. W. Ry. Co., 5 El. & B., 802	49, 70
Jeffery v. Stewart, 80 L. T., 70	468
Jeffreys v. Boosey, 4 H. L. C., 815	644
v. Fairs, 4 Ch. D., 448	297
v. Marshall, 23 L. T., 548	83-4
Jenkins v. Green, [No. 1] 27 Beav., 437...	292

	PAGE.
Jenner v. Jenner, 1 Eq., 361 ...	434
Jennings v. Bronghton, 5 DeG. M. & G., 126 ...	231, 234
v. Moore, 2 Vern., 609 ...	409
Jennisons v. Leonard, 21 Wall., 302 ...	271
Jeorakhan v. Thakoore, 2 N. W. P., H. C., 303 ...	128
Jerome v. Ross, 7 Johns. Ch., 315 ...	633
Jersey City v. Lembeck, 31 N. J. Eq., 255 ...	489
Jervis v. Berridge, 8 Ch., 351 ...	324, 474
Jesmanee v. Debee, 3 N. W. P., H. C., 137 ...	124
Jessel v. Chaplin, 2 Jur. N. S., 931 ...	660, 162
Jeston v. Key, 6 Ch., 610 ...	125
Jethalal v. Lalbhai, 28 Bom., 298 ...	634, 653, 155
Jewraj v. Norwich Assurance Co., 5 Bom. L. R., 853 ...	438
	444, 101, 102
Jeyram v. Ganpati, 17 C. P. L. R., 19 ...	97
Jhan v. Lochh, 13 I. C., 541 ...	34
Jhanda v. Ramji, 15 A. W. N., 148 ...	127
Jhangi v. Ramzan, 13 P. R., [1910] ...	35
Jhari v. Ganga, 5 A. W. N., 215 ...	126
Jhinguri v. Durga, 7 All., 878 ...	137
Jhuman v. Debu, 16 I. C., 898 ...	511, 513, 517, 130, 131
Jhuna v. Beni Ram, 9 All., 439 ...	482, 111
Jiaullah Sheikh v. Inu Khan, 23 Cal., 693 ...	66, 36
Jibanessa v. Majidunnessa, 17 C. W. N., 581 ...	549, 551, 134
Jibunti v. Shib, 8 Cal., 819 ...	129
Jinatboo v. Sha Nagar, 11 Bom., 78 ...	113
Jino v. Manon, 18 All., 125 ...	428, 114
Jit Lal v. Kamaleswari, 16 C. L. J., 555 ...	595, 144
Jiwan v. Santok, 98 P. R., 1886 ...	122
Jiwani v. Labhu, 107 P. R., 1908 ...	135
Jnan v. Lochh Mohan, 13 I. C., 541 ...	37
Job v. Banister, 2 K. & J., 374 ...	268
v. Potton, 20 Eq., 84 ...	638, 157
Jodha v. Budha, 35 P. R., 1890 ...	130
Joel v. Law U. C. Ins. Co., 2 K. B., 431 ...	223
Jogal v. Tale, 4 All., 320 ...	122
Jogendro v. Debendro, 26 Cal., 127 ...	561, 135
John v. John, 2 Ch., 573 ...	550
Bros. A. B. Co., v. Holmes, 1 Ch., 188 ...	388, 417
Johnson v. Bland, 2 Burr., 1086 ...	82
v. Bragge, 1 Ch., 28 ...	434
v. Johnson, 40 Md., 189 ...	101
v. " 3 Bos. & P., 162 ...	356
v. Legard, T. & R., 281 ...	384, 84
v. Mining Co., 148 U. S., 360 ...	379
v. Orr Ewing, [1882] 7 A. C., 219 ...	646
v. Rickett, 5 Calif., 218 ...	79
v. S. & B. Ry. Co., 3 DeG. M. & G., 914 ...	161, 203, 348
v. Smith, 1 Ves. Sr., 314 ...	100
v. Wyatt, 2 DeG. J. & S., 18 ...	658
Johnston Co. v. Hunt, 142 N. Y., 621 ...	626, 783
Johnstone v. Hull, 2 K. & J., 414 ...	402
Jonab v. Surjya, 33 Cal., 821 ...	36
Jonardan Acharjee v. Haradhan, 9 W. R., F. B., 513 ...	60, 63, 31
Jones, re, [1893] 2 Ch., 461 ...	56
v. Bowden, 4 Taunt., 847 ...	223
v. Chapman, 2 Ex., 803 ...	52
v. Chappell, 20 Eq., 539 ...	641
v. Clifford, 3 Ch. D., 779, 793 ...	325, 463
v. Evans, 17 L. J., Ch., 469 ...	182
v. Gardiner, [1902] 1 Ch., 195 ...	417, 421, 422
v. Heavens, 4 Ch. D., 636 ...	615
v. Howe, 7 Hare, 267 ...	367
v. Jones, 6 Conn., 111 ...	100

	PAGE.
Jones v. , 12 Ves., 188	170
v. Just, 3 Q. B., 197	224
v. Lees, 26 L. J., Ex., 9	313
v. Merionethshire Building Soc., [1892] 1 Ch., 173	212
v. Newhall, 115 Mass., 244	101, 122
v. North, 19 Eq., 426	616
v. Parker, 163 Mass., 564	115, 291, 386
v. Rimmer, 14 Ch. D., 588	363
v. Roe, 3 T. R., 88	125
v. Smith, 1 Hare, 55	23
v. Williams, 2 M. & W., 326	62
v. Winkle G. & M. Works, 17 L. R. A., N. S., 848	649
Jordan v. Money, 5 H. L. C., 185	191
v. Stevens, 51 Maine, 78	340, 341, 463
Jorderson v. Sutton & Co., [1899] 2 Ch., 217	543, 603, 643
Josiam v. Sami, 5 I. C., 937	149
Jotindra v. Sarfaraz, 14 C. W. N., 653	562, 563, 564
Joy v. Birch, 4 Cl. & F., 57	269
v. Srinath, 1 C. L. J., 23	221
v. St. Louis, 133 U. S., 1	113
Joy Chunder Rukhit v. Bippro Churn Rukhit, 14 Cal., 236	655
Joy Gopal v. Lalit Mohan, 26 All., 236	484
Joynes v. Statham, 3 Atk., 388	245, 325
Juala Singh v. Narain Das, 3 All., 541	104
Jugal Kishore v. Anunda Lal, 22 Cal., 545	408, 71
Jugul Kishore v. Lakshmandas, 23 Bom., 659	518
Juggannath Pershad v. Hogg, 12 W. R., 117	565
Juggernath Sew Bux v. Ram Dayal, 9 Cal., 791	138, 153
Juggurnath v. Mahomed, 17 W. R., 161	66, 36
Juggessur v. Panchcowree, 14 W. R., 154	149
Juggobundhu Mukerjee v. Ram Chunder Bysack, 5 Cal., 584, F. B.	41, 433
Juggodumba v. Puddomoney, 15 B. L. R., 318	546
Juggurnath Deb v. Mahomed Mokeem, 17 W. R., 161	66
Jumla v. Kingsley, 17 C. W. N., 1201	32
Jumna v. Harcharan, 38 Cal., 405	590, 161
Jumoon v. Bamasondari, 1 Cal., 289	500, 521
Justices of the Peace for Calcutta v. Oriental Gas Co., 17 W. R., 364	137, 142
Juturi v. Aripalara, 15 I. C., 623	181, 63
Juzan v. Toulmin, 9 Alabama, 662	317
Jwala v. Ganga, 30 All., 331	31, 37
v. Munna, 37 Cal., 204	645, 149, 155
Jyoti Prokash v. Jhowmull, 36 Cal., 134	151

K

Kadarbhai v. Rahimbhai, 13 Bom., 674	643, 661, 160
Kadir v. Bhawani, 14 All., 145	17
v. Nepean, 26 Cal., 1, P. C.	20
Kahn v. Ali, 16 Bom., 577	135
v. Walton, 46 Ohio, 195	153, 467
Kahu v. Ali Mahomed, 16 Bom., 577	561
Kailasa v. Raghubar, 17 O. C., 331	118
Kailash v. Gajendra, 15 C. L. J., 1	36
v. Sonatun, 1 Cal., 132	22
Kaji Hassan v. Sagun Balkrishna, 24 Bom., 170	498
Kalabariga v. Ravikanty, 19 M. L. J. R., 331	125
Kalabhai v. Secretary of State for India, 29 Bom., 19	511, 519, 531
Kalamea v. Harperink, 36 Cal., 323	95
Kalee Chunder Sein v. Adoo Shaikh, 9 W. R., 602	58, 59, 30
Kalee Pershad v. Perhlad Sein, 12 M. I. A., 282	476
Kalian v. Sanwal, 7 All., 163	120
Kali v. Bachhan, 17 C. W. N., 974	560
Kali Baksh v. Ram Gopal, 36 All., 81, P. C.	216

	PAGE.
Kali Charan v. Ruchi, 1 A. L. J. R., 375	502
v. Sarat Chunder, 30 Cal., 397	105
Kalldas v. Giribala, 23 I. C., 360	54
v. Kanhya Lall, 11 I. A., 218	384
Kalidhun v. Shibnath, 8 Cal., 483	395, 128, 129
Kalidas Jivram v. Parjaram Hirji, 15 Bom., 309	498, 518, 118, 153, 155
Kalikishen Tagore v. Golam Ali, 13 Cal., 3	511, 530, 127, 129
Kali Shanker v. Nawbat, 31 All., 507	201
Kalka v. Himayat, 10 O. C., 218	260
Kalliandas v. Tulsidas, 23 Bom., 786	416, 97, 155, 161
Kallu v. Shamsuddin, [1912] P. W. R., 269	117
Kally v. Secy. of State, 6 Cal., 725	31, 33
Kalova v. Padapa, 1 Bom., 248	121, 129, 132
Kalu v. Jan Meah, 29 Cal., 100	662
v. Kishore, 6 A. W. N., 96	430
v. Ram, 13 C. W. N., 388	64
Kalup Nath Singh v. Ramdein Lal, 16 Cal., 117	496, 125
Kamala v. Kaura, [1912] P. R., No. 12	135
Kamal Kumari v. Kiran Chandra, 2 C. W. N., 229	43
v. Narendra, 9 C. L. J., 19	77
Kamatchi v. Sundaram, 26 Mad., 492	585
Kameshar v. Bhikhan, 20 Cal., 609	18
Kameshwar Pershad v. Bhabua Municipality, 27 Cal., 849	516, 544, 120, 159
Kamini v. Kali, 12 Cal., 225, P. C.	216
Kamini v. Sabad, 14 C. W. N., 403	63, 35
Kamira v. Lalu, [1912] P. R., 110	119, 130
Kamla Kant Ghose v. Kalu Mahomed, 3 B. L. R., A. C., 44	137
Kampta Prasad v. Sheo Gopal Lal, 26 All., 234	485-6
Kanahi v. Biddya, 1 All., 549	151
Kanakasabai v. Muttu, 13 Mad., 445	607, 608, 668, 149, 167
Kanakayya v. Narasimhulu, 19 Mad., 38	159
Kandarpa v. Jogendra, 12 C. L. J., 391	425
Kandasami v. Akkammal, 13 Mad., 195	502
Kanh Sing v. Dassaunderha, 111 P. R., 1876	118, 126
Kanhai v. Babu, 8 A. L. J. R., 1058	115
v. Kalka, 27 All., 670	545, 571
Kanhya v. Mohru, 96 P. R., 1890	261
Kannan v. Krishnan, 13 Mad., 324	408, 510, 516, 89, 90, 130
Kanti Chandra Mukerji v. Al-i-Nabi	125
Kanukurty v. Venecataramadass, 4 Mad. Jur., 251	639
Karam v. Daryai, 5 All., 331	111, 113
v. Ram Das, 19 P. R., 1896	69
Karam Elahi v. Abdul Aziz, 127 P. L. R. [1909]	157
Karamdad v. Nathu, 86 P. R. 1905	534
Karampalli v. Thekku Vittil, 26 Mad., 195	265
Karim v. Begam, 52 P. R., 1895	113
v. Rajooma, 12 Bom., 174	46
Karukalli v. Karmdad, 79 P. R., 1905	484
Karmadhar v. Hari, 37 Cal., 731	153, 155, 163
Karri v. Kollu, 32 Mad., 76	65, 156
Kartie v. Padmanund, 11 Cal., 496	559
Kartick Churn v. Gopal Kristo, 3 Cal., 264	68, 40
Karyan v. Doddali, 6 Mad. H. C. R., 307	124
Kashar v. Rathore, 7 Bom., 289	132
Kashee v. Debkristo, 16 W. R., 240	74
Kashi v. Channu, 5 A. L. J., 247	97
v. Indra, 5 A. L. J. R., 590	22
v. Ram, 1 A. L. J. R., 257	70
Kashi Nath v. Surbanand, 12 Cal., 317	263
Prasad v. Kedar Nath Sahu, 20 All., 219	137
Katala v. Katala, 8 I. C., 567	128
Katama v. Rajah of Shivaganga, 9 M. I. A., 543	43, 133
Kathama Natchiar v. Dorasinga Tever, 2 I. A., 169	488, 500, 520, 522
Kathari v. Bhupati, 29 M. L. J., 721	26

	PAGE.
Kaufman v. Gerson, 1 K. B., 591	172, 212
Kauri v. Ganga, 10 All., 615	106
Kaushal v. Ganesh, 21 A. W. N., 53	161
Kaveri v. Sastri, 26 Mad., 104	133
Kawa Manji v. Khowaz Nussio, 5 C. L. R., 278	54, 33
Kay v. Johnson, 2 H. & M., 118	131, 167
Keates v. Earl of Cadogan, 10 C. B., 591	227, 228
v. Lyon, 4 Ch., 218	391
Keating v. Sparrow, 1 Ba. & Be., 367	27
Kedar v. Khettur, 6 Cal., 34	669
v. Bhagwanti, 8 A. L. J., 462	513, 516, 111
v. Mann, 16 C. W. N., 247	179, 375, 378, 51, 88
Keech v. Sandford, 2 Wh. & T., 693	22
Keen v. James, 39 N. J. Eq., 527	222
Keenan v. Handley, 2 DeG. J. & S., 283	122
Keene v. Gaehle, 56 Indiana, 343	577
Keighley Maxted & Co. v. Durant, [1901] A. C., 240	12
Keir v. Leeman, 6 Q. B., 308	142
Keisselbrack v. Livingston, 4 Johns. Ch., 144	450
Keister v. Cubine, 101 Va., 768	578
v. Myers, 115 Indiana, 312	443
Keith Prewsc & Co. v. National Telephone Co., 2 Ch., 147	115, 167, 169
Kekewich v. Manning, 1 DeG. M. & G., 176	384
Kelke v. Pearson, 6 Ch. Ap., 806	661
Kellie v. Fraser, 2 Cal., 453	546
Kelly v. Central Pacific R. R. Co., 74 Calif., 557	244
v. Solari, 9 M. & W., 54	366
v. Turner, 74 Alab., 513	439
v. York Cliffs Improvement Co., 94 Maine, 374	333
Kemble v. Kean, 6 Sim., 333	120, 357
Kemp v. Sober, 1 Sim., N. S. 517	115, 617, 656
Kempson v. Ashbee, 10 Ch., 15	475
Kenaram v. Dinonath, 9 W. R., 325	123
Kendall v. Frey, 17 Am. St. R., 118	167, 300
Kenduri v. Gottumukkala, 17 M. L. J. R., 218	255
Kennedy v. Elliot, 85 Fed., 832	493
v. Green, 3 M. & K., 699	134
v. Lee, 3 Mer., 441	192
v. Panama etc. Mail Co., 2 Q. B., 580	455
Kenny v. Wexham, 6 Madd., 355	101, 122, 278, 284
Keplinger v. Woolsey, 93 N. W., 1008	632, 642
Keppel v. Bailey, 2 M. & K., 517	386
Kerr v. Corporation of Preston, 26 Ch. D., 466	608, 165
Kesar v. Mangal, 84 P. R., 1913	31
Kesar Devi v. Partab, 39 P. R., 1908	551
Keshbati v. Mohan, 39 Cal., 1010	550
Kesho v. Srinivasa, 13 C. L. J., 394	633, 150
Kesho Ram v. Ram Kuar, 7 A. L. J. R., 311	125
Keshoree v. Gobind, N. W. P., H. C., 70A	121
Kessowji v. Hurjivan, 11 Bom., 566	142, 212
Kettle R. R. v. Eastern Ry., 44 Minn., 461	388
Kettlewell v. Refuge Assn. Co., [1908] 1 K.B., 545	109
Kewalram v. Graham, [1911] 11 I. C., 274	70
Kewan v. Sanderson, 20 Bq., 65	299
Khadim v. Nazeer, 3 N. W. P. H. C., 262	121
Khagendra v. Pran Nath, 29 Cal., 395	112
v. Sashadhar, 31 Cal., 495	583
Khairati v. Matab, 11 I. C., 211	500
Khairunnessa v. Loke Nath, 27 Cal., 276	348, 408, 11, 71, 89
Khajah Enaetoolah v. Kishen Soondar, 8 W. R., 386	52, 55, 58
Kharshedji v. Secy. of State, 5 Bom. H. C. R., O. C., 97	12
Kherodamoney v. Doorgamoney, 4 Cal., 468	400
Khetra v. Piru, 15 C. W. N., 387	65, 31
Khetsidas v. Shib Narain, 9 C. W. N., 178	128, 56

	PAGE,
Khetter Mohan v. Wells, 8 Cal., 719 ...	570
Khobhari v. Ram, 7 C. L. J., 387 ...	55
Khub Chand v. Beram, 13 Bom., 150 ...	139
Khub Singh v. Jhau Lal, 12 C. P. L. R., 13 ...	114
Khub Surat v. Saroda, 14 C. L. J., 526 ...	554
Khuda Baksh v. Budhar Mall, 186 P. R., 1882 ...	114
Khudad v. Alamgir, 116 P. R., 1900 ...	123
Khushala v. Ditmal, [1903] P. L. R., 133 ...	163
Kiamuddin v. Rajoo, 11 All., 13 ...	266
Kilarn v. Polavarapu, [1913] M. W. N., 637 ...	112
Kiley v. Halifax Corp., 97 L. T., 278 ...	151
Kilmer v. Smith, 77 N. Y., 126 ...	443
Kilmorey v. Thakeray, 2 Br. Ch., 343 (cited) ...	130
Kimber v. Barber, [1872] 8 Ch., 56 ...	23
Kimberley v. Jennings, 6 Sim., 340 ...	302, 619
Kimpton v. Eve, 2 V. & B., 349 ...	617
Kine v. Jolly, [1907] A. C., 1 ...	643
King v. Bardeau, 6 John. Ch., 38 ...	174
v. Charu Mitra, Unrep., Woodroffe, <i>Rec.</i> , 239 ...	566
v. Dickeson, 40 Ch. D., 596 ...	392
v. King, 63 Ohio, 363 ...	204
v. Knapp, 59 N. Y., 162 ...	223
v. Raab, 123 Iowa, 632 ...	314
v. Smith, 2 Hare, 239 ...	638
v. Townshend, 141 N. Y., 358 ...	528
Kingdom v. Kirk, 37 Ch. D., 141 ...	425
Kingsford v. Merry, 11 Ex., 577 ...	471
Kirchner v. Gruban, 78 L. J., Ch., 117 ...	68, 158, 170
Kirk v. Bromley Union, 2 Phill. Ch., 640 ...	119, 259
Kirley v. Harrison, 2 Ohio St., 326 ...	381
Kirpa v. Gourbakhsh, 2 P. R., 1893 ...	160
v. Samiuddin, 25 All., 284 ...	216
Kirpa Dayal v. Rani Kishori, 10 All., 80 ...	595
Kishen v. Ram Chunder, 3 W. R., 28 ...	57
v. Purnendu, 16 C. W. N., 753 ...	271
Kishoree v. Gobind, 4 N. W. P. H. C., 70 A ...	121
Kishoree v. Jugunnath, 9 W. R., 269 ...	43
Kishori v. Srinath, 13 C. W. N., 530 ...	31
Kishory v. Kali Charan, 1 C. W. N., 106 ...	357
Kissen Gopal v. Kally Prosonno, 33 Cal., 633 ...	378, 71
Kistnasammy Pillay v. Municipal Commissioners of Madras, 4 Mad., H. C. R., 120 ...	143
Knatchbull v. Grueber, 1 Madd., 153 ...	178, 370
v. Hallett, 13 Ch. D., 710 ...	187
Kneeland v. American Loan Co., 136 U. S., 89 ...	561
Knight v. Lord Plymouth, 3 Atk., 480 ...	576
v. Marjoribanks, 2 M. & G., 10 ...	321, 457
v. Simmonds, 2 Ch., 294 ...	391, 393
Knott v. Manufacturing Co., 30 W. Va., 790 ...	130
Knox v. Symmonds, 1 Ves., 369 ...	105
Kochappa v. Sachi, 26 Mad., 494 ...	150
Kocherlakota v. Vadrevu Venkappa, 27 Mad., 262 ...	42
Koegler v. Coringo Oil Co., 1 Cal., 42 ...	69
Koenig v. City of Watertown, 104 Wis., 409 ...	643
Kollipara v. Kollipara, 3 M. L. T., 309 ...	530
Kombi v. Aundi, 13 Mad., 75 ...	509, 519
Kommeneni v. Kommeneni, 22 M. L. J. R., 375 ...	532
Komola Kamini v. Lokenath Kur, 11 C. L. R., 183 ...	532
Konchadi Shanbhogue v. Shiva Rao, 28 Mad., 54 ...	255
Kondibai v. Nana, 27 Bom., 408 ...	91
Kondopaneni v. Gagaru, [1912] M. W. N., 995 ...	200, 412, 51, 71
Kondugari v. Karupati, 15 I. C., 352 ...	82
Kong Ye Lone & Co. v. Lowjee Nunjee, 29 Cal., 461, P. C. ...	153
Koomud Chunder Dass v. Chunder Kant Mookerjee, 5 Cal., 498 ...	147, 70

	PAGE.
Koondo v. Dheer, 20 W. R., 345	119
Koothan v. Vandu, 29 M. L. J. R., 760	35
Kopplien v. Kopplien, 8 Fox Civ. App., 625	121
Koripalli v. Sajja, 13 I. C., 315	356, 412, 76
Kosuri v. Ivalury, 26 Mad., 74	88
Kota v. Matoori, 9 M. L. T., 318	48, 51
Kotamarti v. Kotamarti, 7 Mad. H. C., 351	501, 127
Kota Seetamma v. Kollapurla, 8 Mad. H. C. R., 81	104
Kotrabassappya v. Chenvirappaya, 23 Bom., 375	477, 111, 112
Kowalke v. Milwankee Ry. Co., 100 Wis., 472	464
Koylash v. Sonatun, 7 Cal., 132	282
Koylash C. Doss v. Tariney C. Singhee, 10 Cal., 588	86, 193, 25, 41
Krehl v. Burrell, 7 Ch., D., 551	652, 660, 661, 668
Krell v. Henry, 2 K. B., 740	277
Krishna v. Akilanda, 13 Mad., 54	65
v. Hari, 9 Cal., 367	32
v. Hari, 14 C. L. J., 47	122
v. Lakshmi, 18 M. L. J. R., 275	484, 533
v. Mahomed, 3 C. W. N., 255	162
v. Secy. of State, 33 Mad., 173	123
v. Shamanna, 23 M. L. J., 610	181, 200, 61, 89
Krishnabhupati v. Ramamurti, 18 Mad., 405	517, 130
Krishnacharya v. Lingawa, 20 Bom., 270	54
Krishnaji v. Antaji, 18 Bom., 256	32
v. Vithalrao, 12 Bom., 80	150
Krishna Kamal v. Hiru Sardar, 4 B. L. R., F. B., 101	144
Krishnan v. Vellaichami, 2 M. W. N., 461	201
Krishnarav v. Vasudev Apaji, 8 Bom., 371	54, 58, 30, 36
Krishnasami v. Kanakasabai, 14 Mad., 183	396
v. Somasundaram, 30 Mad., 335	122
v. Sundarappayar, 18 Mad., 415	200, 349, 408, 71, 89
Krishnendra v. Devendra, 12 C. W. N., 793	405
Krista v. Joy, 8 C. W. N., 158	153
Krista Chundra v. Krista Sakha, 36 Cal., 52	570, 139
Kristna v. Venkatachella 7 Mad. H. C. R., 60	150
Kristnam v. Pathma, 29 Mad., 151	117
Kristodhone v. Brojo, 24 Cal., 895	52, 114
Kuldip Dube v. Mahant Dube, 34 All., 43	261, 382
Kuldip Singh v. Gillanders Arbuthnot & Co., 26 Cal., 615	63, 31
Kullammal v. Kuppu, 1 Mad. H. C. R., 85	29
Kumarsami v. Subbaraya, 9 Mad., 325	22
Kumholen v. Thirumulpad, 8 Mad. H. C. R., 17	123
Kumul Dutt v. Mohan Malla, 15 W. R., 278	52, 29
Kundan v. Bidhi Chand, 29 All., 64	648
Kunhamed v. Kutti, 14 Mad., 167	526, 613, 126
Kunhiamma v. Kunhunni, 16 Mad., 140	488, 509, 517, 117
Kunhi Komapen v. Changaruchan, 2 Mad. H. C. R., 313	54, 55, 56, 58, 59, 30
Kunja Mal v. Gauri Sankar, 3 A. L. J. R., 30	201
Kunj Bihari v. Keshavlal, 28 Bom., 567	511, 512, 524, 129
Kuppu Garukal v. Dorasami, 6 Mad., 76	141
Kuppusami v. Rathnavelu, 24 Mad., 511	572, 583
Kuppusawmy v. Doraisawmy 5 M. L. T., 247	270
v. Suppan, 30 Mad., 505	563
Kurrutulain v. Nuzbatud-dowla, 33 Cal., 116, P. C.	400
Kusel v. Watson, 11 Ch. D., 129	198
Kussessur v. Jogodishuri, 7 C. L. R., 269	33
Kusum v. Satya, 5 C. W. N., 162	121
Kuthaperumal v. Secy. of State, 30 Mad., 245	406
Kuttayan v. Mammanna, 35 Mad., 681	655
Kutubuddin v. Umri, 18 P. R., 1887	119
Kya Get v. Bu Nwe, 22 Travancore L. R., 88	527

L

L. & N. W. Ry. v. Westminster Corp. 73 L. J., Ch., 386	657
--	-----

	PAGE,
Labouchere v. Dawson, 13 Eq., 325 ...	623
v. Wharnccliffe, 13 Ch. D., 340 ...	630
Lachho v. Har Sahai, 12 All., 46 ...	55
Lacho v. Asanand, 44 P. R., 1882 ...	120
Lachman v. Ganpat, 2 N. L. R., 49 ...	102
v. Shambhu, 33 All., 174, F. B. ...	51, 67, 35
Lachmeswar Singh, v. Manowar Hussein, 19 Cal., 253, P. C. ...	44, 150
Lachmi v. Bankey, 19 I. C., 463 ...	123
v. Hondi, [1913] P. R., No. 100 ...	529, 117, 131
v. Marudevi, 21 M. L. J. R., 1063 ...	128
Lachmie Narain v. Fateh Bahadur Singh, 25 All., 195 ...	135
Lachmi Narain v. Jwala Nath, 18 All., 344, F. B. ...	432
Lady Stanley v. Earl of Shrewsbury, 19 Eq., 616 ...	668
Thynnee v. Earl of Glengall, 2 H. L. C., 131 ...	259
Lahori v. Radha, 72 P. R., 1906 ...	504, 120
Laidlaw v. Organ, 2 Wheat., 178 ...	228, 229
Lakshmana v. Ramchandra, 10 Mad., 351 ...	151, 160
Lakshmi v. Ganga, 5 A. L. J. R., 93 ...	159
Lakshmibhai v. Vithal Ramchandra, 9 Bom. H. C. R., A. C., 53... ..	54, 36
Lakshmi Narain v. Tara Prosanna, 31 Cal., 944 ...	652, 815, 153, 160
Lalbbhai v. Munl. Comr., 33 Bom., 334 ...	666
Lali v. Murlidhar, 24 All., 195, 28 All., 488, P. C. ...	534
Lalji v. Walji, 19 Bom., 507 ...	154
Singh v. Gaya Singh, 25 All., 317, F. B. ...	138
Lallan Monee Dossee v. Nobi Mohan Singh, 25 W. R., 32 ...	149
Lallubhai v. Mankuverbhai, 2 Bom., 388 ...	400, 21
Lalmoney v. Jaddoonath, 1 Ind. Jur., N. S., 319 ...	396
Lamare v. Dixon, 6 H. L., 414 ...	188, 219, 243, 247, 372, 81
Lambert v. Stroother, Willes, 221 ...	50
Lamprey v. St. Paul etc., Railway Co. 89 Minn., 157 ...	348
Lancashire v. Lancashire, 9 Beav., 120 ...	557
Lancashire &c. Ry. Co. v. North Western Ry. Co., 2 K. and J., 293 ...	611
Land Mortgage Bank of India v. Ahmedbhoj, 8 Bom., 35 ...	607, 668, 154, 155, 157
Land Mortgage Bank v. Sudurudeen, 19 Cal., 358 ...	46
Landregan v. Peppin, 94 Calif., 465 ...	528
Lane v. Newdigate, 10 Ves., 192 ...	590, 599
Langford v. Pitt, 2 P. Wms., 630 ...	55
Langlois v. Rattray, 3 C. L. R., 1 ...	168
Lansdowne v. Lansdowne, Mosely, 364... ..	343
Larios v. Bonany, 5 P. C., 346 ...	62
v. Gurety, 5 P. C., 346 ...	157
Latafat v. Kamalanand, 16 I. C., 586 ...	122
Latafat Hossein v. Anunt Chowdhury, 23 Cal., 517 ...	554, 581, 135
Husain v. Badshah Husain, 8 O. C., 143 ...	343
Latimer v. A. B. Ry. Co., 9 Ch. D., 385 ...	555
Launkra v. Moher, 93 P. R., 1884 ...	119, 131
Lavender v. Lavender, 9 Ir. Eq., 593 ...	579
Laver v. Fielder, 32 Beav., 1 ...	191
Lavergne v. Cooper, 8 Mad., 149 ...	645
Laughter's Case, 5 Co. Rep., 21b ...	366
Law v. Garrett, 8 Ch. D., 26 ...	145
Lawder v. Blashford, Beat., 522 ...	313
Lawes v. Bennett, 7 Ves., 436 ...	400
Lawley v. Hooper, 3 Atk., 278 ...	240
Lawrence v. Beaubien, 2 Bailey, 623 ...	325, 339
v. Bushnell, 12 C. W. N., 753 ...	167
v. Saratoga L. Ry. Co., 36 Hun., 467 ...	107, 109, 110, 111, 179, 291
v. Staigg, 8 R. L., 256 ...	438, 483
Lawrenson v. Butler, 1 Sch. and Lef., 13 ...	347
Lawrie v. Lees, 7 A. C., 31 ...	303, 74
Lawton v. Campion, 18 Beav., 57 ...	100, 405
Laxmawa v. Ramappa, 9 Bom. L. R., 1054 ...	534
Leach v. Fohes, 71 Am. Dec., 732 ..	114

	PAGE.
Leather Cloth Co. v. American Leather Co., 11 H. L. C., 523	606
Leather Co. v. Lorsche, 9 Eq., 345	648
Leathes v. Leathes, 5 Ch. D., 221	70
Leavitt v. Yates, 4 Ewd. Ch., 162	548
Le Blanche v. L. and N. W. Ry. Co., 1 C. P. D., 286	420
Ledgard v. Bull, 9 All., 191, P. C.	396
Lee v. Jones, 17 C. B. N. S., 482	227
v. Kirby, 104 Mass., 420	313
Leech v. Schweder, 9 Ch., 463	20, 31, 79, 115, 602, 642, 655
Leeds v. Amherst, 2 Ph., 117	659, 166
Le Flenr v. Chace, 171 Mass., 59	408
Legal v. Miller, 2 Ves. Sr., 299	248, 267
Legard v. Johnson, 3 Ves., 352	124
Legge v. Rambaren, 20 All., 53, F.B.,	533
Leggett v. Standard Oil Co., 149 U. S., 294	379
Legh v. Lillie, 6 H. & N., 165	117
Lehigh Zinc and Iron Co. v. Bamford, 150 U. S., 665	232
Lehman v. M'Arthur, 3 Ch., 496	289
Leigh v. Jack, 5 Ex. D., 264	59
Lekhraj v. Abdul, 14 A. W. N., 205	131
v. Barcha, 94 P.R., 1879	118
Lelly v. Ford, [1899] 2 Ch., 107	572
Le Neve v. Le Neve, 2 Wh. and T., 175	258, 23, 91
Leng v. Andrews, 78 L. J., Ch., 80	615
Lennon v. Napper, 2 Sch. and L., 682	123, 98
Leominster Canal Co. v. Shrewsbury Ry. Co., 3 K. and J., 654	140
Leonard v. Poole, 114 N. Y., 371	465
Lep Singh v. Nimar Khasia, 21 Cal., 244	56
Leroux v. Brown, 12 C. B., 824	251
Lesley v. Morris, 9 Pa., 110	263
Leslie v. Crommelin, 11 I. R., 2 Eq., 134	182
Lester v. Foxcroft, 2 Wh. and T., 1	253
Letterstadt v. Broers, 9 A. C., 371	86
Letton v. Gordon, 2 Eq., 123	644
Lever v. Dennett, 109 U. S., 90	475
v. Koffler, [1901] 1 Ch., 543	98
Levy v. Stogdon, [1899] 1 Ch., 5	375, 425
Lewes v. Earl of Shaftesbury, 2 Eq., 270	416
Lewin v. Guest, 1 Russ., 325	356
Lewis v. Bond, 18 Beav., 85	170, 368
v. Gollner, 129 N. Y., 227	390
v. Jones, 4 B. and C., 506	219
v. Lord Lechmere, 10 Mad., 503	101, 102, 271
v. Smith, 1 M. and G., 417	628, 156
Life Assn. of Scotland v. Siddal, 3 DeG. F. and J., 58	475
Light v. Light, 21 Pa. St., 407	343
Lightfoot v. Heron, 3 Y. and C. Ex., 586	298, 409
Liles v. Terry, 2 Q. B., 679	216
Lillie v. Legh, 3 DeG. and J., 204	418, 60
Lima L. M. Co. v. National S. C. Co., 11 L. R. A., N. S., 713	311
Limba bin Krishna v. Rama bin Pimplu, 13 Bom., 584	497, 531, 532, 118, 119, 131
Lincoln v. Arcedeckne, 1 Coll., 98	361
Lindsay v. Lynch, 2 Sch. & Lef., 1	250, 254
v. Montana Federation, 17 L. R. A., N. S., 707	649
Lindsay Petroleum Co. v. Hurd, 5 P. C., 221	376, 378, 473, 607
Lindsey v. G. N. Ry. Co., 10 Ha., 664	92
Lingammal v. Chinna Venkatammal, 6 Mad., 239	397
Lingappa v. Sangara, 12 Bom. L. R., 370	405
Lingen v. Simpson, 1 Sim. & St., 600	120
Lining v. Geddes, 16 Am. Dec., 606	74
Linnell v. Battey, 17 R. I., 241	481
Lippincott v. Wickoff, 54 N.J., Eq., 107	361
Lister v. Hodgson, 4 Eq., 30	448

	PAGE.
<i>Litchfield v. Browne</i> , 36 U. S., Ap., 130	472
<i>Little v. Gould</i> , 2 Blatchf., 165	596
<i>Littlefield v. Perry</i> , 88 U. S., 205	394
<i>Littlewood v. Coldwell</i> , 11 Price, 97	605, 168
<i>Liverpool &c. Asson. v. Smith</i> , 37 Ch. D., 170	648
<i>Livingston v. Peru Iron Co.</i> , 2 Paige, 390	334
<i>v. Ralli</i> , 5 E. & B., 132	145
<i>Llewhellin v. Chunni Lal</i> , 4 All., 423	395
<i>Lloyd v. Collett</i> , 4 Bro., Ch., 469	273, 380
<i>v. Loaring</i> , 6 Ves., 773	72
<i>v. London C. & D. Ry. Co.</i> , 2 DeG., J. & S.	300, 159
<i>v. Mason</i> , 2 M. & C., 487	561
<i>v. Nowell</i> , 2 Ch., 744	193
<i>v. Rippingale</i> , 1 Y. & C., Ex. 410 (cited)	271
<i>Load v. Green</i> , 15 M. & N., 216	218
<i>Lobo v. Brito</i> , 21 Mad., 231	154, 459, 495, 513, 119
<i>Lockwood v. Lockwood</i> , 124 Mich., 627	459
<i>Logan v. Ward</i> , 5 L. R. A., N. S., 156	533
<i>v. Wienholt</i> , 1 Ch. & F., 611	85, 116
<i>Logombad v. Vinthinatha</i> , 30 I. C., 768	640
<i>Loke Nath Surma v. Keshab Ram Dass</i> , 13 Cal., 147	511, 514
<i>Lokessur v. Purgun</i> , 7 Cal., 418	433
<i>Lolit v. Surja</i> , 28 Cal., 709	66, 31
<i>London &c. Co. v. Evans</i> , 2 Ch. D., 432	644
<i>London & Birmingham Ry. v. Winter</i> , [1840] Cr. & Ph., 62	245
<i>London & Blackwell Ry. Co. v. Cross</i> , 31 Ch. D., 354	28
<i>London &c. Ry. Co. v. Lancashire &c. Ry. Co.</i> , 4 Eq., 174	600, 653
<i>London & Proy. Insurance Co. v. Seymore</i> , 17 Eq., 85	478
<i>London & S. W. Ry. Co. v. Gomm</i> , 20 Ch. D., 562	388, 393
<i>Long v. Bowring</i> , 33 Beav., 585	119, 61
<i>Lonsdale v. Curwen</i> , 3 Bligh, 168	634, 157
<i>Loot v. Showkee</i> , 2 C. L. R., 382	55
<i>Lord v. Stephens</i> , 1 Y. & C. Ex., 228	371, 374, 81
<i>Lord Advocate v. Lord Blantyre</i> , 4 A. C., 770	62
<i>v. Young</i> , 12 A. C., 544	41, 62
<i>Lord Brooke v. Rounthwaite</i> , 6 Hare, 298	177
<i>Lord Byron v. Johnston</i> , 2 Mer., 29	646
<i>Lord Buckhurst's Case</i> , 1 Co. Rep., 2a	70, 39
<i>Lord Castlemain v. Lord Gaven</i> , 22 Viner, 523 pl. 11	636
<i>Lord Feversham v. Watson</i> , [1678] Freeman, 35	259, 268
<i>Lord Gordon v. Marquis of Hertford</i> , 2 Mad., 106	344
<i>Lord Irnham v. Child</i> , 1 Bro. Ch., 92	25, 374, 438
<i>Lord Kensington v. Philips</i> , 5 Dow, 61	199
<i>Lord Manners v. Johnson</i> , 1 Ch. D., 673	115, 617, 656
<i>Lord Portarlington v. Soulby</i> , 2 M. & K., 104	171, 593, 612
<i>Lord Ranelagh v. Melton</i> , 2 Dr. & Sm., 278	269
<i>Lord Tenham v. Herbert</i> , 2 Atk., 438	634
<i>Lord Townshend v. Stangroom</i> , 6 Ves., 238	344
<i>Lord Walpole v. Lord Oxford</i> , 3 Ves., 402	288
<i>Louisville Ry. Co. v. Flanagan</i> , 3 Am. St. R., 674	206
<i>Lovejoy v. Potter</i> , 60 Mich., 95	410
<i>Lovesy v. Smith</i> , 15 Ch. D., 665	443
<i>Low v. Tredwell</i> , 12 Me., 441	301, 304
<i>Lowe v. Fox</i> , 12 A. C., 206	263
<i>v. Peers</i> , Wilm., 364	148
<i>Lowell v. Boston & Lowell R. R. Co.</i> , 23 Pick., 24	203
<i>Lowndes v. Bettie</i> , 10 Jur., N. S., 226	492, 591, 602, 633, 634
<i>v. Lane</i> , 2 Cox., 363	234
<i>Lows v. Telford</i> , [1876] 1 A. C., 414	33
<i>Lowther v. Lowther</i> , 13 Ves., 95	88, 40
<i>Lucas v. Comerford</i> , 1 Ves., 235	167
<i>v. Hall</i> , 19 A. W. N., 92	198
<i>v. James</i> , 7 Hare, 410	194, 225, 337
<i>Luckumsey v. Fazulla</i> , 5 Bom., 177	89

	PAGE.
Lucy's case, 4 DeG. M. & G., 355	99
Ludington v. Patton, 111 Wis., 208	377
Lukey v. Higgs, 24 L. J., Ch., 495	305
Lumley v. Ravenscroft, 1 Q. B., 634	200, 348, 356, 365
v. Wabash Ry. Co., 71 Fed. R., 21	414
v. Wagner, 1 DeG. M. & G., 604	78, 120, 302, 311, 614, 620, 622, 623, 625, 53, 169, 171
Luscombe v. Steer, 17 L. T., 229	663
LuTha v. MaShwe Me., 3 L. B. R., 4	111
v. MaShere Me., [1905] 3 L. B. R., 4	480, 111
Luttayan v. Mammanna, 35 Mad., 681	153
Lutterel's case, [1670] Prec. Ch., 53 (cited)	637
Lyddell v. Weston, 2 Atk., 19	360
Lyde v. Myun, 1 My. & K., 683	125
Lydney & Wigpool Iron Co. v. Bird, 33 Ch. D., 91	402
Lyman v. Robinson, 14 Allen, 254	189
Lynch v. Union Inst., 159 Mass., 306	653, 660
Lynde v. Anglo-Italian Hemp Spring Co., [1896] 1 Ch., 176	456
Lyon v. Home, 37 L. J., Ch., 674	457
v. Richmond, 2 John. Ch., 559	340
Lyons v. Blenkin, [1821] Jac., 245	406
v. Gulliver, 1 Ch., 631	640
v. Williams, [1896] 1 Ch., 811	610
Lysaght v. Edwards, 2 Ch. D., 499	278, 284, 423
Lytile v. Sandefur, 93 Alabama, 396	493, 529
Lytleton Times Co. v. Warners, 76 L. J., P. C., 100	656
Lytton v. Devey, 54 L. J., Ch., 293	646
v. G. N. Ry. Co., 2 K. & J., 394	110

M

Macbryde v. Weekes, 22 Beav., 533	271
Macauley v. Schakell, 1 Bligh, N. S., 96	608
Macclesfield v. Davis, 3 V. & B., 18	72
Macdonald v. Foster, 6 Ch. D., 193	186, 188
MacDougal v. Jersey Hotel Co., 2 H. & M., 528	156
Macher v. Foundling Hospital, 1 V. & B., 188	659
Mackay v. Dick, 6 A. C., 251	458
Mackenzie v. Childers, 43 Ch. D., 265	391, 393, 151
v. Culson, 8 Eq., 368	437, 438
v. Hesketh, 7 Ch. D., 675	337
v. Striramiah, 13 Mad., 472	151, 163, 170
Mackie v. Herbertson, 9 A. C., 303	404
Macklin v. Richardson, 2 Bro. P. C., 138	646
Mackreth v. Marlar, 1 Cox., 259	380
Macleod v. Kisson, 6 Bom. L. R., 995	587
Macmillan v. Suresh Deb, 17 Cal., 962	645
v. M. Zaka, 19 Bom., 537	645
Madan v. Gaja, 14 C. L. T., 159	260, 415, 433
Madanmohan Shaha v. Rajab Ali, 28 Cal., 223	45
Madari v. Malki, 6 All., 428	502
Maddison v. Alderson, 8 A. C., 467	190, 251, 252, 253
Madeley v. Booth, 2 DeG. & S., 718	362
Madgwick v. Wimble, 6 Beav., 495	552
Madhab v. Kamala, 6 B. L. R., 643	123
Madhab Poramanick v. Raj Coomar Das, 14 B. L. R., 76	120, 150
Madhavji v. Ramnath, 8 Bom. L. R., 354	102
Madheswar v. Mahamaya, 13 C. L. J., 487	554, 134
Madho v. Kashi, 9 All., 228	216
Madhoda v. Ramji, 16 All., 286	396
Madho Parshad v. Mehrhan Singh, 18 Cal., 15, P. C.	486
Madhu v. Sabar, 14 C. W. N., 681	568
Madhub v. Jogesh, 30 Cal., 281	153

	PAGE.
Madhusudan v. Mahadev, 11 Bom. L. R., 58	500, 507, 649
Madhu Sudhan v. Rooke, 25 Cal., 1, P. C.	500
Madras Ry. Co. v. Rust, 14 Mad., 18	627, 61, 152, 170, 171
Maenooddeen v. Greesh Chunder, 7 W. R., 230	86, 29, 36
Maganlal v. Chotalal, 26 Bom., 136	661, 161
v. Govindlal, 15 Bom., 697	520, 532
Magennis v. Fallon, 2 Moll., 561	177, 220, 238, 368, 81
Magniac v. Thomson, 2 Wall. Jr., 254	414
Magniram v. Bakubai, 36 Bom., 510	54
Magrane v. Archbold, 1 Dow., 107	117, 118
Mahabala v. Kunhanna, 21 Mad., 373	119
Mahabir v. Hurrihur, 19 Cal., 629	113
Mahadeo v. Nandan, 12 W. R., 22	429
v. Vithoba, 18 I. C., 853	113
Mahadeo Singh v. Bachu Singh, 11 All., 224	494, 117
Mahadev v. Narayan, 6 Bom. L. R., 123	662, 151, 153
Mahadoo v. Hubeebool, 15 W. R., 44	81
Mahammed v. Maheshur, 5 O. C., 118	126
Maharaj v. Paresb, 31 Cal., 839	153
Maharaj Narain v. Shashi, 13 A. L. J., 455	491, 118
Maharaja of Benares v. Ramji, 27 All., 138	522, 126
Maharaja of Burdwan v. Apurva, 15 C. W. N., 872...	562
Maharaja of Vizianagram v. Lingum Krishna Bhupati, 12 M. L. J.	
R., 473	539
Maharaja Ram Narayan v. Krishna, 17 I. C., 490	150
Maharani v. Nanda Misser, 1 B. L. R., A. C. J., 27	551
Mahendra v. Jogendra, 2 C. W. N., 260	101, 103
Mahesh v. Chandar, 13 All., 17	126
Maheshar v. Muhammad, 7 O. C., 372	124
Maheshwar v. Pratap, 12 O. C., 58	33
Mahip v. Chotu, 5 All., 429	164, 165
Ma Hia Win v. Maung Shive, 2 U. B. R., 293	261
Mahmud v. Yawar, 13 A. L. J., 739	51
Mahomed v. Bashotappa, 27 Bom., 402	37
v. Chutterput, 20 Cal., 854	101
v. Dilbar, 5 C. W. N., 285	132
v. Jafur, 4 W. R., 123	160, 162
v. Kanizuk, 6 N. W. P. H. C., 231	124
v. Mangru, 7 I. C., 318	124, 125
v. Nunda, 16 I. C. 390	208, 26, 66
v. Panchapakasa, 35 Mad., 578	562, 564, 567
v. Phul Kuar, 5 I. C., 115	122
v. Wilkie, 11 C. W. N., 946, P. C.	273
Mahomed Buksh v. Hosseini Bibi, 15 Cal., 684	216, 428, 114
Mahomed Mehdi v. Zoharra Begum, 17 Cal., 285	586
Mahomed Mitha v. Musaji Esaji, 15 Bom., 657	358, 57, 83
Mahomed Riasat v. Hasin, 21 Cal., 157, P. C.	261
Mahommed v. Mahommed, 21 Cal., 85	135
Mahtab v. Mahtab, 24 P. R., 1877	121
Maina v. Brijmohun, 12 All., 587, P. C.	506, 126, 127
Maine Moilar v. Islam Amanath, 13 Mad., 355	649, 154
Mair v. Himalayan Tea Co., 1 Eq., 411...	615
Maitland v. Backhouse, 16 Sim., 58	593
Majebar v. Mukhtashan, 16 C. W. N., 854	142
Makbul v. Lalta, 4 A. L. J. R., 574	527
Makhan v. Gokul, 32 P. R., 1885	120
Makhdoom v. Hashim, 29 I. C., 210	36
v. Fateh, [1913] 80 P. L. R.	128
Makund Ram v. Saligram, 21 Bom., 590, P. C.	105, 98
Makundi v. Sarabsukh, 6 All., 417	109
Maktula v. Kauleswar, 5 I. C., 482	67
Malaiya v. Tirumalaperumal, 21 M. L. J. R., 1022	130
Malcolm v. Gasper, 2 Cal., 278	138
Malik v. Ahmad, 57 P. R., 1899	144

	PAGE.
Malins v. Freeman, 2 Ke., 25	332, 96
Malkarjan v. Narhari, 25 Bom., 337, P. C.	533
Malbesbury Ry. Co. v. Budd, 2 Ch. D., 113	104
Maluk v. Dasaundha, [1910] 120 P. L. R., ?	127
Mammoth Vein Coal Co.'s Appeal, 54 Pa. St., 183	598
Mamtazuddin v. Barkatulla, 2 C. L. J., 1	36
Manby v. Gresham Life Assurance Society, 29 Beav., 4	163, 63
Mancharji v. Kongseoo, 6 Bom., H. C. R., 59	23, 91
Manchester Banking Co. v. Parkinson, 22 Q. B. D., 173	135
Manchester Brewery v. Coombs, [1901] 2 Ch., 395	98
Manchester Canal Co. v. Manchester Race Course Co., [1901] 2 Ch., 37	624
Mander v. Falcke, [1891] 2 Ch., 534, 554	393, 410, 597
Mandslay v. Mandslay Sons & Field, [1900] 1 Ch., 602	568
Maneklal v. Nurbheram, [1891] Bom. P. J., 302	160
Mangal v. Buta, 19 P. R., 1883	122
Mangal Das v. Jewunram, 23 Bom., 673	65, 19
Mangal Sen v. Shankar, 25 All., 580, F. B.	255, 262
Mangli Prasad v. Debi-Din, 19 All., 499	41
Manhattan Co. v. New Jersey Co., 23 N. J. Eq., 161	632
Manick v. Ganpata, 6 A. W. N., 22	126
Manik v. Bani, 13 C. L. J., 649	36
Manik Lal Seal v. Surrat Coomary, 22 Cal., 648	560, 136
Manilal v. Kavasji, 9 I. C., 124	199, 115
Manilal Haragovandas v. Vanamalidas Amratlal, 29 Bom., 621, F. B.	105
Manilal Hurgovan, re, 25 Bom., 553	41
Manindar v. Annoda, 15 I. C., 586	138
Mankuar v. Tara Singh, 7 All., 593	527, 121, 129
Manlins v. Brown, 4 N. Y., 403	252
Manmatha Biswas v. Rohilli Moni, 27 All., 406	503
Manmohandas v. Macleod, 26 Bom., 765	137, 229
Mann v. Edinburgh N. T. Co., [1895] A.C. 69	93
v. Stephens, 15 Sim., 377	392
v. Willey, 51 N. Y. Ap., 169	641
Manna Singh v. Bai Jan, 76 P. L. R., 1904	125
Manners v. Furze, 11 Beav., 30	573
Mannu Singh v. Umadat Pande, 12 All., 523	213, 477, 112
Manohar Das v. Ram Autar, 25 All., 431	138
Manohur v. Thakur Das, 15 Cal., 319	265, 266
Manraj v. Radha, 4 A. W. N., 352	164
Manram v. Bhola, 6 A. L. J. R., 561	111
Manser v. Back, 6 Hare, 443	345, 345, 97
Mansfield v. Hodgdon, 147 Mass., 304	328, 336
v. Sherman, 81 Maine, 365	287, 328
Mansingh v. Rampiare, 8 I. C., 1184	52, 56, 63
Mantota v. Mohan, 11 C. P. L. R., 72	118
Ma Pon v. Mang San, 2 U. B. R., 446	261
Marble Co. v. Riply, 10 Wallace, 339	301, 313, 314, 348, 352, 367, 369
Margraff v. Muir, 57 N. Y., 155	334, 421
Marha Singh v. Md. Umar, 7 I. C., 393	190
Marks v. Tichenor, 85 Ky., 536	279
Marquis Townshend v. Stangroom, 6 Ves., 328	324
Marsden v. Sambell, 43 L. T., 120	452
Marsh v. Buchan, 46 N. J. Eq., 595	232
v. Cook, 32 N. J. Eq., 262	244
v. Milligan, 3 Jur. N. S., 979	95, 289
Marshall v. Baltimore and Ohio Railroad Co., 16 How., 314	141
v. Berridge, 19 Ch. D., 233	11, 198, 370
v. Broadhurst, 1 Tyrw., 349	398
v. Keach, 227 Ill., 35	71
v. Perry, 90 Ill., 289	381
v. Ross, 8 Eq., 651	606
v. Westrope, 67 N. W. Rep., 257	438, 439
Martin v. Cotter, 3 Jon. and Lat., 507	238

	PAGE.
Martin v. Mitchell, 2 J. & W., 413	320
v. Nutkin, 2 P. Wins., 266	616, 620
v. N. Y. S. & W. R. Co., 36 N. J. Eq., 109	439
v. Price, [1894] 1 Ch., 276	596, 602, 614
v. Pycroft, 2 DeG. M. & G., 785...	428
v. Read, 11 C. B., N. S., 730	99
Martineau v. Kitching, 7 Q. B., 453	281
Marudamuthu v. Rangasami, 24 Mad., 401	137
v. Srinivasa, 21 Mad., 128, F. B.	508
Marullasida v. Siddalinga, 17 J. C., 16	546
Marvin v. Bennett, 8 Paige, 312	324
v. Wallace, 6 E. & B., 726	40
Marzethi v. Williams, 1 E. & A., 415	158
Mason v. Armitage, 13 Ves., 25	325, 326
Massey v. Davies, 2 Ves., 317	23
Massim v. Sham, 22 W. R., 189	91
Masson v. Boyet, 1 Denio, 69	474
Master v. Hansard, 4 Ch. D., 718	391, 392
v. Miller, T. R., 320	262
Masters v. Braban, 1 Rus., 560 <i>n</i>	111
Mastin v. Halley, 61 Mo., 196	291
Mathews v. Terwilliger, 3 Barb., 50	342
Mathewson v. Gobardhan, 28 Cal., 492	527, 126
v. Ram, 9 C. L. J., 523	75, 78
Mathunsa v. Apsa, 21 M. L. J. R., 969	425
Mathur v. Sheo, W. R., 1864, 281	43
Mathura v. Jadubir, 3 A. L. J. R., 138	114
v. Shib Dayal, 14 C. W. N., 252	546, 557, 135
Mathusri Umamba v. Mathusri Deepamba, 19 Mad., 120	579, 583, 585
Mati v. Brojo, 7 C. W. N., viii	144
v. Preo, 13 C. W. N., 226	90
Matra Mondal v. Hari Mohan, 17 Cal., 155	396
Matu v. Hirde, 44 P. R., 1894...	113
Mandslay v. Mandslay Sons & Field, 1 Ch., 602	568
Maung v. Ma Lun, 11 I. C., 855	130
Maung Tha v. Lutchman, 14 Bur. L. R., 276	150
Mung Tha Dun v. Mung Su Va, [1905] U. B. R., 7	153
Maunsell v. Egan, 3 J. & Lat., 251	574
v. White, 4 H. L. C., 1039	190, 191
Maw v. Topham, 19 Beav., 576	182
Maxim Nordenfelt, Etc. Co. v. Nordenfelt, [1893] 3 Ch., 122	419
Maxwell v. Port Tennant Co., 24 Beav., 495	209
May v. Platt, [1900] 1 Ch., 816	429, 442, 447, 450
v. Thomson, 20 Ch. D., 705	152, 623
Maya Mal v. Bela, 121 P. R., 1890	122
Mayaram v. Pragdat, 5 All., 44	86, 159, 41, 61, 64
Mayen v. Alston, 16 Mad., 238	23
Mayor of Congleton v. Pattison, 10 East, 130	386
Mayor of New Windsor v. Stovell, 27 Ch. D., 665	299
Mayor of Norwich v. Norfolk Ry. Co., 4 El. & Bl., 397	205
Mayor etc. of Wolverhampton v. Emmons, 1 K. B., 515	106, 109, 166
Maythorne v. Palmer, 11 L. T., N. S., 261	149
McAdams v. Cates, 24 Mo., 223	225
McCabe v. Atchinson Ry. Co., [1915] 235 U. S.	604
v. Mathews, 155 U. S., 550	185, 381
McCalmont v. Rankin, 2 DeG. M. & G., 403	133
McCan v. O'Ferral, West H. L., 593	576
McCartney v. Londonderry & L. S. Ry. Co., [1904] A. C., 313	635
McCarty v. Kyle, 4 Cold., 348	316
McClatchie v. Huslam, 6 L. T., 691	476
McClelland v. McClelland, 176 Ill., 83	472
McClure v. Leagcraft, 183 N. Y., 36	662
McCormick v. Grogan, 4 H. L., 82	250, 22
v. Malin, 5 Blackf., 509	320

	PAGE.
McCorkle v. Brown, 9 Smedes & M., 167	119
McCrary v. Williams, 127 Alabama, 251	447
McCulloch v. Cowher, 5 Watts & Serg., 427	256
McCullough v. Connelly, 15 L. R. A., N. S., 823	119
McCutcheon v. Merz Capsule Co., 71 Fed. R., 787...	468
McDaniels v. Whitney, 38 Iowa, 60	357
McDougall v. Jersey Hotel Co., 2 H. & M., 528	629
McFadden v. Jenkins, 1 Hare., 458	384
McGowin v. Remington, 12 Ph. St., 56	71, 74, 89, 95
McGregor v. Camden, 47 W. Va., 193	640
v. McGregor, 21 Q. B. D., 424	124
McGruther v. Fitcher, [1904] 2 Ch., 306	394
McIntyre v. McGavin, [1893] A. C., 268	641
McKee v. Higbee, 79 S. W., 407	289
McKewan v. Sanderson, 20 Eq., 65	158, 299
McKnight v. Thompson, 58 N. W. R., 453	456
McMahon v. Field, 7 Q. B. D., 597	420
McManus v. Boston, 171 Mass., 152	321
v. Cooke, 35 Ch. D., 681	250, 254, 259
McMullen v. Vanzant, 73 Ill., 190	89, 159
McMurray v. Cadwell, 6 T. L. R., 183	640
McNutta v. Lockridge, 141 U. S., 327	586
McPherson v. Watt, [1877] 3 A. C., 254...	22, 79
McQueen v. Farquhar, 11 Ves., 467	175, 176, 362, 49
McWilliams v. Neely, 2 Serg. & R., 507...	126
Md. Zohuruddeen v. Md. Nooroodeen, 21 Cal., 85	561
Meaden v. Sealy, 6 Hare, 620	584
Measures Brothers Limited v. Measures, 2 Ch., 248	350, 152
Mechanics' Bank v. Setton, 1 Peters, 299	97
Mechanics' Bank of Alexandria v. Lynn, 1 Peters, 376	260
Mecord v. Oakland Co., 64 Calif., 145	638
Medwin v. Dilchman, 47 L. T., 250	553
Megha v. Shadi, 34 P. R., 1892	119, 123, 132
Meghan v. Pran, 5 A. L. J. R., 14	200
Meghraj v. Chunilal, 1 N. L. R., 190	80
v. Lala Mal, 4 A. L. J., 342	595
Mehdee v. Aujud, 6 N. W. P. H. C., 259	119
Mehdi v. Muhammad, 11 O. C., 217	61
Meigs v. Lister, 23 N. J. Eq., 196	640
Meknight v. Robbins, 1 Halsted Ch., 229	130
Mellor v. Thompson, 21 Ch. D., 55	648
Mendu v. Sridhar, 5 A. L. J., 214	35, 37
Menedex v. Holt, 128 U. S., 514	658
Menight v. Robbins, 1 Halstead, Ch., 229	130
Menzies v. Breadalbane, 3 Bligh, N. S., 414	641
Merchants Trading Co. v. Banner, 12 Eq., 18	172, 355, 356
Mercier v. Mercier, 50 Geo., 566	307
Meredith v. Wynne, Eq. Abr., P. 70, Ca. 15	259
Merriam Co. v. Ogilvie, 16 L. R. A., N. S., 549	646
Merritt v. Brown, 21 N. J. Eq., 401	381
Mersey Steel Co. v. Naylor Benzon & Co., 9 A. C., 434	458
Mesraw v. Girjanundan, 12 C. W. N., 857	485
Messageries Imperiales v. Baines, 11 W. R. (Eng.), 322	394
Mestaer v. Gillespie, 11 Ves., 621	250, 357, 52
Metropolitan Asylum v. Hill, [1881] 6 A. C., 196	634
Coal Consumers' Assn., re, [1892] 3 Ch., 1	456
Ex. Co. v. Ewing, 7 L. R. A., 381	627
Mewa Kunwar v. Hulas Kunwar, 13 B. L. R., 312, P. C.	261, 431
Meyers v. Catterson, 43 Ch. D., 470	661
Meynell v. Surtees, 3 Sm. & Gif., 101	165, 192, 194
Micklethwait v. Micklethwait, 1 DeG. & J., 504	637
v. Nightingale, 12 Jur., 638	373
Middleton v. Brown, 47 L. J. Ch., 411	73
v. Dodswell, 13 Ves., 266	550

	PAGE.
Middleton v. Greenwood, 2 DeG. J. & S., 142 ...	418
v. Magnay, 2 H. & M., 233 ...	426
Midland G. W. Railway v. Johnson, 6 H. L. C., 798 ...	338
Milbank v. Rivett, 2 Mer., 405 ...	551
Mildmay v. Hungerford 2 Vern., 243 ...	338
Miles v. Dover Furnace Co., 125 N. Y., 294 ...	312
v. Fox, 37 Ch. D., 153 ...	425
v. Newzealand etc. Co., 32 Ch. D., 266 ...	405
v. Thomas, 9 Sim., 606 ...	618, 156
Milkman v. Ordway, 106 Mass., 232 ...	415
Millburn v. Lyons, 1 Ch., 34 ...	363, 393
Miller v. Bear, Paige Ch., 466 ...	381
v. Tool, 86 Pac. R., 224 ...	650
v. Whittier, 32 Me., 203 ...	406
v. Ramranjan Chakravarti, 10 Cal., 1014 ...	582
Millican v. Vanderplank, 11 Hare, 135 ...	424
Millington v. Fox, 3 My. & Cr., 338 ...	646
Mills v. Haywood, 6 Ch. D., 202 ...	379, 381
Milnes v. Grey, 14 Ves., 100 ...	164, 165
Milward v. Earl Thanet, 5 Ves., 720 ...	271, 375
Minakshi v. Subramaniya, 11 Mad., 26, P. C. ...	396
Minatoonesha v. Khatoonesha, 21 Cal., 479 ...	571, 586
Mine Hill R. R. v. Lippincott, 86 Pa. St., 468 ...	300
Miners' Ditch Co. v. Zellerbach, 37 Calif., 543 ...	205
Mioshall v. Oakes, 27 L. J., Ex., 194 ...	386
Mir Sarwarjan v. Fakharuddin, 34 Cal., 136 ...	200, 349
Miraj v. Mohamed, 8 P. R., 1869 ...	113
Miran v. Atra, 111 P. R., 1900 ...	117
Mishaw v. Mi Mi, 12 I. C., 198 ...	583
Mitchell v. Condy, [1873] W.N., 232 ...	580
v. Dors, 6 Ves., 147 ...	157
v. Reynolds, 1 Sim. L. C., 391 ...	150
Mithibai v. Limji, 5 Bom., 45 ...	583
Mizner v. Kussell, 29 Mich., 229 ...	219
Modhusudun v. Rakhal, 15 Cal., 140 ...	122
Modisett v. Johnson, 2 Black, 431 ...	320
Mohabeer Pershad Singh v. Mohabeer Singh, 7 Cal., 591 ...	54, 55, 33
Mohabharat v. Abdul Hamid, 1 C. L. J., 73 ...	531, 533
Mohadeo v. Nundan, 12 W. R., 22 ...	429
Mohadin v. Shivlingappa, 23 Bom., 666 ...	648
Mohamed Isuh v. Bashotappa, 27 Bom., 302 ...	66
Mohammad v. Amar, 16 O. C., 238 ...	135
v. Asan Mohidin, 17 M. L. J. R., 421 ...	507, 649
Obaid v. Mohammad Ibrahim, 10 I. C., 906 ...	200
Mohan v. Bilaso, 14 All., 512 ...	129
v. Potts, 5 C. P. L. R., 112 ...	163
Mohanlall v. Amartlal, 3 Bom., 174 ...	42
v. Chunni Lal, 2 N. L. R., 4 ...	653, 155
Mohari Bibi v. Shyama Bibi, 30 Cal., 937 ...	571, 573
Mohecoodden v. Ahmed Hossein, 14 W. R., 384 ...	583
Mohendra v. Kali, 30 Cal., 265 ...	398, 405, 71, 74, 76
v. Kedar, 9 A. L. J. R., 788 ...	118
Mohendra v. Sannu, 7 C. W. N., 229 ...	406
Mohesh v. Nawbut, 32 Cal., 837 ...	638
Mohima Chunder v. Jugul Kishore, 7 Cal., 736 ...	478, 483, 112, 114
Mohini v. Ram Narayan, 14 C. L. J., 445 ...	574
v. Surendra, 21 C. L. J., 68 ...	144, 149
v. Thinandi, 19 C. L. J., 15 ...	122
Mohkam Singh v. Rup Singh, 15 All., 352 P. C. ...	143
Moholal v. Jivkore, 28 Bom., 472 ...	641
Mohori Bibee v. Dhurmodas Ghose, 30 Cal., 539, P. C. ...	134, 199, 349, 408
	485, 41, 109, 115
Mohr v. Missen, 47 Minn., 228 ...	153
Mohun v. Beharee, 3 N. W. P., 336 ...	59

	PAGE.
Mohun <i>v.</i> Gungaji Cotton Mills Co., 4 C. W. N., 369	104
Mokund Lall <i>v.</i> Chotay Lall, 10 Cal., 161	379, 71, 89
Mollineux <i>v.</i> Powell, 3 P. Wms., 268 <i>n.</i>	636
Molloy <i>v.</i> Egan, 7 Ir. Eq., 590	371
Molyneux <i>v.</i> Richard, 70 L. J., K. B., 434	106
Money <i>v.</i> Gour, 11 Cal., 146	163
<i>v.</i> Jordan, 2 DeG. M. & G., 318	190, 191
Monindra <i>v.</i> Troyluckho, 21 C. W. N., 750	409, 91
Moniram <i>v.</i> Keri, 5 Cal., 776, P. C.	500
Monmohini <i>v.</i> Basanta Kumar, 28 Cal., 751	137
Monmohini Guha <i>v.</i> Bunga Chandra Das, 31 Cal., 375	137
Monmotha <i>v.</i> Girish, 17 C. W. N., 75	45
Monohar <i>v.</i> Ananta, 17 C. W. N., 802	36
Monosseh <i>v.</i> Shapurji, 10 Bom. L. R., 1004	25, 109, 115
Monro <i>v.</i> Taylor, 8 Hare, 51	281, 380
Monson <i>v.</i> Tussaude, 1 Q. B., 671	648
Montacute <i>v.</i> Maxwell, 1 P. Wms., 618	191
Montague <i>v.</i> Flockton, 16 Eq., 189	623
Montefiori <i>v.</i> Montefiori, 1 W. Bl., 363	190
Montgomery <i>v.</i> Reilly, 1 Bligh. N. S., 364	190
<i>v.</i> Pickering, 116 Mass., 227	475
Montgomery & Co. <i>v.</i> Chapman & Co., 126 Fed., 68	6
Moore <i>v.</i> Blake, 1 Ball. & B., 62	379
<i>v.</i> Manoranjan, 7 C. L. J., 547	34
<i>v.</i> Monoranjan, 12 C. W. N., 696	66, 31
<i>v.</i> Marrable, [1866] 1 Ch., 217	88
<i>v.</i> Williams, 115 N. Y., 586	359, 362, 364
Moran <i>v.</i> Mittu Bibee, 2 Cal., 70	573
<i>v.</i> Motihari Municipality, 17 Cal., 329	138
<i>v.</i> River Steam Nav. Co., 14 B. L. R., 352	613
More <i>v.</i> Bonnet, 40 Calif., 251	356
<i>v.</i> Skidmore, 6 Litt., 453	367
Morehouse <i>v.</i> Colvin, 15 Beav., 341	190
Morgan <i>v.</i> Government of Haiderabad, 11 Mad., 419	236, 95
<i>v.</i> Hart, 2 K. B., 183	547
<i>v.</i> McAdam, 36 L. J. Ch., 228	606, 168
<i>v.</i> Milman, 10 Hare, 279	411
<i>v.</i> Scott, 26 Pa. St., 51	314
Morland <i>v.</i> Richardson, 22 Beav., 596	635
Morley <i>v.</i> Clavering, 29 Beav., 84	303, 338
<i>v.</i> Loughnan, [1893] 1 Ch., 736	213, 214, 460, 22
Morocco Land Trading Co. <i>v.</i> Fry, 13 W. R., (Eng.) 310	438
Moro Mahadev <i>v.</i> Anant Bhimaji, 21 Bom., 821	635, 154
Morphett <i>v.</i> Jones, 1 Sw., 172	253
Morris <i>v.</i> Colman, 18 Ves., 437	120, 618, 622
<i>v.</i> Kelly, 1 J. & W., 481	646
Morrison <i>v.</i> Moat, 9 Hare, 241	648
<i>v.</i> Skerne Iron Works Co., 6 L. T., 588	585
Morse <i>v.</i> Faulkner, 1 Anst., 11	409
<i>v.</i> Merest, 6 Madd., 26	164, 165, 380
<i>v.</i> Royal, 12 Ves., 355	471
<i>v.</i> Woodworth, 155 Mass., 233	213, 457
Morshead <i>v.</i> Frederick, Unrep., Sugden V. & P. 120	464
Mortimer <i>v.</i> Bell, [1865] 1 Ch., 10	240
<i>v.</i> Capper, 1 Bro. Ch. C., 156	279, 282, 295, 319, 48
<i>v.</i> Shortall, Dr. & W., 363	440, 445
Mortlock <i>v.</i> Buller, 10 Ves., 292	119, 173, 179, 208, 365, 49, 66
Mosely <i>v.</i> Virgin, 3 Ves., 184	106, 291, 108
Moss <i>v.</i> Bainbrigge, 13 Beav., 478	403
<i>v.</i> Barton, 1 Eq., 574	353
Motee <i>v.</i> Lachmun, 160 P. R., 1868	71
<i>v.</i> Mudhoo, 1 W. R., 4	66
Moti <i>v.</i> Kaunsilla, 16 All., 308	117
Motilal <i>v.</i> Ghilabhai, 17 Bom., 6	412

	PAGE.
Motilal v. Gobindram, 7 Bom. L. R., 388	153
v. Karrabuddin, 25 Cal., 179	485
Motivahu v. Premvahu, 16 Bom., 511	572, 579, 583
Moulis v. Owen, 1 K. B., 746	172
Moulton v. Edmonds, 1 DeG. F. & J., 246	407
v. Kershaw, 59 Wis., 316	190
Mousi v. Kashi, 17 A. W. N., 145	67
Moxey v. Bigwood, 8 J. N. S., 803	345, 86
Moxhay v. Inderwick, 1 DeG. & Sm., 708	305
Moxone v. Payne, 8 Ch., App., 881	471
Mra Paw v. U. Pyin, 14 Bur. L. R., 277	121
Mt. Rosa Min. Co. v. Palmer, 50 L. R. A., 289	495
Muckleston v. Brown, 6 Ves., 52	154
Mudden v. Chunder, 18 W. R., 379	153
Muhammad v. Abdulla, 77 P. R., 1891	120
v. Ahmad, 451 P. L. R., 1900	69
v. Akbar, 7 A. L. J. R., 797	498
v. Faiz, 18 All., 361	654
v. Gulab Rai, 20 All., 345	657, 160, 161
v. Habib, 113 P. L. R., 1905	120
v. Mangra, 7 I. C., 318	119
v. Mulchand, 27 All., 395	32
v. Munna, 17 I. C., 315	127
v. Ottagil, 1 Mad. H. C. R., 390	108
v. Qurban, 26 All., 119, P. C.	19
v. Secy. of State, 89 P. L. R., 1910	491
Muhammad Askari v. Radha Ram, 22 All., 307	412
Muhammad Mashuk Ali v. Khuda Baksh, 9 All., 622	530, 127
Muhammad Newas Khan v. Alam Khan, 18 Cal., 414, P. C.	104, 105
Muhammad Umar v. Muhammad Niaz, 31 Cal., 418, P. C.	534
Muhammad Yusufuddin, re, Q. E., 25 Cal., 20, P. C.	171
Muhammad Zohuruddeen v. Md. Noorooddeen, 21 Cal., 85	561
Muhammadi v. Jiwani, 42 P. R., 1898	125
Muhiuddin v. Majlis, 6 All., 231	20, 430, 46
Mulji v. MacLeod, 5 Bom., L. R., 991	393
v. Ransi, 11 Bom. L. R., 273	69
Mulkunnisa v. Munl. Com., Delhi, 118 P. L. R., 1904	122, 149
Mullens v. Miller, 22 Ch. D., 194	231, 243, 95
Mullet v. Halfpenny, Prec. in Ch., 404 (cited)	256
Mullings v. Trinder, 10 Eq., 449	83
Mulnk v. Bharat, 12 C. W. N., 694	34
Mumford v. Stohwasser, 18 Eq., 556	410
Mumtaz v. Kasim, 19 I. C., 250	618, 153, 155, 166
Mumtazuddin v. Barkatullah, 2 C. L. J., 1	36
Muncha Ram v. Pran Shunkar, 6 Bom., 298	141
Muncherji v. Noor Mahomedbhoy, 17 Bom., 711	610, 61, 163
Muncie Natural Gas Co. v. Muncie, 60 L. R. A., 822	28, 78
Mundanchery v. Mundanchery, [1911] M. W. N., 353	507
Mundy v. Joliffe, 5 Myl. & Cr., 167	253
Muneshar v. Jagan Nath, 10 O. C., 268	581
Mungle Chand v. Gopal Ram, 34 Cal., 101	590, 144
Munia v. Linge, 15 M. C. C. R., 139	599
Municipal Commrs. of Madras v. Branson, 3 Mad., 201	542, 590, 138, 139, 164
Munni Kumar v. Madan Gopal, 38 All., 62	200
Munl. Bd. v. Dakkhan, 30 All., 70	150
Munl. Corp. v. Vasudeo, 6 Bom. L. R., 899	636, 151
Munisami v. Subbarayar, 31 Mad., 97	413, 118, 169
Muniswamy v. Murugappa, 7 M. L. T., 45	131
Munnee Dutt Singh v. Campbell, 12 W. R., 149	418, 59
Munroe v. Taylor, 3 M. & G., 713	380
Murdfeldt v. New York R. R. Co., 102 N. Y., 703	312
Murdin v. Asha, 20 I. C., 660	139
Murphy v. Christian P. A. Publishing Co., 38 N. Y., Ap., Div., 426	394
v. Clark, 9 Miss., 221	72

	PAGE.
<i>Murray v. Duke</i> , 46 Calif., 644	247
<i>v. Hall</i> , 7 C. B., 441	43
<i>v. Nickerson</i> , 90 Minn., 197	175
<i>v. Palmer</i> , 2 Sch., & L., 489	472
<i>v. Parker</i> , 19 Beav., 305	443, 445
<i>Murrel v. Geodyear</i> , 1 DeG. F. & G., 432	352
<i>Murti v. Bhola Ram</i> , 16 All., 165, F. B.	395
<i>Murugesu v. Jotharam</i> , 22 Mad., 478	68, 39, 40
<i>Musselman's Appeal</i> , 65 Pa. St., 408	359
<i>Mussoorie Bank v. Raynor</i> , 4 All., 500 P. C.	22
<i>Mustafa v. Phulja</i> , 27 All., 526	104, 105
<i>Mustapha Saheb v. Santha Pillai</i> , 23 Mad., 179	54
<i>Muta Ali v. Mehtab</i> , 48 P. R., 1892	128
<i>Muthaya v. Sivaraman</i> , 6 Mad., 229	145
<i>Muthia v. Orr</i> , 20 Mad., 224	136
<i>Muthoora v. Kanoo</i> , 21 W. R., 287	109
<i>Muthu Kanun v. Shanmugavilu</i> , 28 Mad., 413	139
<i>Muthukaruppan v. Kasinathan</i> , 2 M. L. T., 67	521
<i>Muthukrishna v. Somalinga</i> , 21 M. L. J. R., 742	603, 652, 661
<i>Muthusawmi v. Masilamani</i> , 20 M. L. J. R., 49	532
<i>Muthuveera v. Vythilinga</i> , 19 M. L. J. R., 88	501
<i>Muttakke v. Thimmappa</i> , 15 Mad., 186	517
<i>Mutty Lall Ghose, re</i> , 19 Cal., 192	538
<i>Mutual Life Assurance Society v. Langley</i> , 32 Ch. D., 460	258
<i>Muzhar Hossan v. Dinobondo Sen</i> , Bourke O. C., 8 Cor., 94	507
<i>Myers v. Catterson</i> , 43 Ch. D., 470	661, 161
<i>v. League</i> , 62 Fed. R., 654	271
<i>v. Watson</i> , 1 Sim. N. S., 523	247, 372, 95

N

<i>Naba v. Atul</i> , 40 Cal., 150	134
<i>Nabin v. Amir</i> , 9 I. C., 132	37
<i>Nadir v. Zainulabdin</i> , 20 A. W. N., 196	654
<i>Nagappa v. Badruddin</i> , 26 Bom., 353	66, 31
<i>v. Devu</i> , 14 Mad., 55	255, 26
<i>Nagappa Chetty v. Ma. U.</i> , 3 L. B. R., 42	142
<i>Nagardas v. Ahmed Khan</i> , 21 Bom., 175... ..	420, 421
<i>Narain v. Jodoo</i> , 5 C. W. N., 147	648
<i>Nagendra v. Jogendra</i> , 15 I. C., 491	563
<i>v. Probat</i> , 17 C. W. N., 764	500, 596
<i>Nagin Lal v. Official Assignee</i> , 14 Bom. L. R., 1148	149
<i>Naipal v. Bachani</i> , 6 A. W. N., 140	126
<i>Nait Ram v. Shib Dat</i> , 5 All., 238	60
<i>Najib Ullah v. Gulsher</i> , 64 L. J. R., 343, F.B.	511
<i>Najju v. Intiazuddin</i> , 18 All., 115	654
<i>Nallappa Reddi v. Ramalingachi Reddi</i> , 20 Mad., 250	159
<i>Namasivayam v. Nallayappa</i> , 18 Mad., 43	409, 90
<i>Nanabhai v. Janardhan</i> , 16 Bom., 636	151
<i>Nanak v. Mehin</i> , 1 All., 487	282, 22
<i>Nanak Chand v. Ram Narayan</i> , 2 All., 181	104
<i>Nandaram v. Naibad</i> , 12 C. P. L. R., 59	36
<i>Nandi v. Trimmakka</i> , 14 M. L. T., 477	91
<i>Nandkishor v. Bhagubhai</i> , 8 Bom., 95	659, 152, 159, 160, 161
<i>Nandkishore v. Ahmad</i> , 18 All., 69	406
<i>Nangle v. Fingal</i> , 1 Hog., 142	566
<i>Nanji v. Umatul</i> , 13 I. C., 40	121, 125, 131
<i>Nannhi Devi v. Daulat Singh</i> , 2 A. L. J. R., 256	45, 46, 47, 655
<i>Nanomi Babuasin v. Modun Mohan</i> , 13 Cal., 21 P. C.	200
<i>Naoroji v. Kazi Sidick</i> , 20 Bom., 636	265
<i>v. Rogers</i> , 4 Bom. H. C. R., O. C., 1	44, 51, 55
<i>Naragiri v. Suthapalli</i> , 19 M. L. J. R., 220	395
<i>Narain v. Mohendra</i> , 15 C. L. J., 332	118, 37

	PAGE.
Narain v. Dhanial, 14 A. L. J. R., 65	200
Narainbhai v. Ranchod, 26 Bom., 141	46
Narain Das v. Lalta Prasad, 21 All., 269	41
Narain Pattra v. Aukhoy Narain Manna, 12 Cal., 152	209, 246, 248, 25, 66, 85
Naraina v. Aya Putter, 7 Mad. H. C. R., 372	113
Narna v. Rudravaram, [1912] M. W. N., 414	131
Narasayya v. Ramabadra, 15 Mad., 474	98
Narasimma v. Raghupati, 6 Mad., 176	130, 132
v. Suryanarayana, 12 Mad., 481	125
Narayana v. Alamelu, 27 I. C., 449	51
v. Bhimaji, 6 I. C., 926	129
v. Chengalamma, 10 Mad., 1	118, 120
v. Dharmachar, 26 Mad., 514	51, 54, 55
v. Kandasami, 22 Mad., 24	480
v. Shankunni, 15 Mad., 255	532, 130
Narayanan v. Kannammai, 28 Mad., 338	484
v. Muthiah, [1910] 21 M. L. J., 44	255, 26
v. Ramasami, 19 M. L. J., 669	584
Narayaniasami v. Ramsami, 14 Mad., 172	114
Narayanrav v. Balkrishna, 4 Bom., 529, F. B.	494, 514, 130
Narendra v. Basudeo, 14 I. C., 81	111, 127
Narsi Tricum v. Callianji, 18 Bom., 702	662
Nasarbhai v. Badruddin, 16 Bom., 533	162, 167
Nash v. Dix, 78 L. T., 445	336
Nasibun, re, 8 Cal., 534	19
Nasir v. Aman, 17 C. L. J., 118	530, 117
v. Govt., 3 Agra, 394	43
Nasir Ali v. Meher Ali, 22 Cal., 830	66, 67, 37
Nasiruddin v. Venkatesh, 5 Bom., 382	34
Natabur Parue v. Kubir Parue, 18 Cal., 80	64
Nataraja v. Subramania, 5 M. L. T., 294	164
Chetty v. Kolandavelu Chetty, 15 M. L. J. R., 456	506, 518, 130
Natesa v. Appavu, 20 M. L. J. R., 230	273
Natha v. Gurbuksh, 10 P. R., 1882	118
v. Sadiq, 20 P. R., 1900	124
Nathaji v. Sitaram, 4 Bom. L. R., 587	408
Nathu v. Balwantrao, 27 Bom., 390	109
v. Budhu, 18 Bom., 537	430, 58, 98
v. Buta, 27 P. R., 1881	123
Nathu Singh v. Gumani Singh, 18 All., 320	495, 515, 120
National Bank v. Petrie, 189 U. S., 423	203
National Exch. Co. v. Drew, 2 Macq., 103	233
National Phonograph Co. v. Edison-Bell C. P. Co., [1908] 1 Ch., 335	624
National P. P. G. Insurance Co. v. Prudential Assurance Co., 6 Ch. D., 757	660
National Pro. Bank v. Marshall, 60 L. T., N. S., 341	171
Natusch v. Irving, 2 Coop., t. Cott., 358	629, 156
Naunihal v. Rameshwar, 16 All., 329	475
Naushani Begum v. Intizar Begum, 19 A. W. N., 25	476
Navasivaya v. Kadir Ammal, 17 Mad., 168	398
Navroji v. Dastur, 28 Bom., 20	654, 161
Nawab Begam v. Creet, 27 All., 678	343, 379, 380, 68, 71
Nawab Nazim v. Amrao Begam, 21 W. K., C. R., 59	415, 530
Nawaz Jung v. Rastomji Nanabhoy, 20 Bom., 704	608, 161
Naylor v. Winch, 1 S. & S., 555	344
Nazareth v. Jaffer, [1914] M. W. N., 839	416
Nazir v. Abid, 8 A. L. J. R., 1910	66, 35, 37
Neale v. Mackenzie, 1 Keen, 474	182, 208, 371
Neap v. Abbot, C. P. Coop., 833	246, 345
Neate v. Pink, 15 Sim., 450	586
Neblett v. Macfarland, 92 U. S., 101	470, 473
Neel v. Bealey, 3 Sim., 103	126
Neel Comul v. Bipro Dass, 28 Cal., 597	601
Neesom v. Clarkson, 4 Hare, 97	425

	PAGE.
Neill v. Shamburg, 158 Pa. St., 263	229
Neilson v. Betts, 5 H. L., 1	668
Nelson v. Wood, 62 Alabama, 175	246
Nelthrope v. Holgate, 1 Coll., 203	180
Nemai v. Kokil, 6 Cal., 534	26, 44, 90
Nemava v. Devandrappa, 15 Bom., 177	168
Nesbitt v. Meyer, 1 Sev., 223	170
Nesham v. Selby, 13 Eq., 191	198
Neti Ram v. Venkatacharlu, 26 Mad., 450	518, 128
Nevans v. Walker, 1 Ch., 413	171
Neville v. Wilkinson, 1 Bro. C. C., 543	190
New v. Swain, 34 R. R., 767	69
New Beerbhoom Coal Co. v. Bularam Mehta, 5 Cal., 932, P. C.	293, 429, 43, 64
Newbery v. James, 2 Mer., 446	161, 63
Newhigging v. Adam, 34 Ch. D., 582	129, 471
New Brunswick & C. Ry. Co. v. Conybeare, 9 H. L. C., 711	336
New Brunswick Co. v. Muggeridge, 1 Dr. Sm., 363	170, 240
Newman v. Rogers, 4 Bro. Ch., 391	271
Newmarch v. Brandling, 3 Sw., 99	652
New Sombrero Phosphate Co. v. Earlander, 5 Ch. D., 73	209
Newton v. Ricketts, 10 Beav., 525	551
v. Tolles, 66 N. H., 136	473
Nga Hla v. Nsa Aung, [1908] U. B. R., 3rd Q. R., 3	395
Nicholls v. Nicholls, 1 Atk., 409	457
Nicholson v. Rose, 4 DeG. & J., 10	617
v. Smith, 22 Ch. D., 640	99, 80
Nickels v. Hancock, 7 DeG. M. & G., 300	104, 298, 355, 383
Nickoll v. Ashton, 2 K. B., 126	276
Nicoll v. Chambers, 11 C. B., 996	183
Nicol's Case, 3 DeG. & J., 387	232
Nidhi Lal v. Mazhar Hussain, 7 All., 230 F. B.	396
Nil v. Jujoo, 20 W. R., 328	168
Nilmadhub v. Gillander, 2 Sev., 955	570
Nilmony v. Kalee, 2 I. A., 83, 14 B. L. R., 382	488, 523
Nims v. Vaughan, 40 Mich., 356	304
Nirmal v. Mahomed, 26 Cal., 11, P. C.	514
Nisa Chand Gaita v. Kanchiram Bagani, 26 Cal., 579	54, 35
Nistarini v. Makhan, 9 B. L. R., 11	119
Nityanand v. Bishan Lal, 33 All., 634	428
Nobin v. Kailash, 12 C. L. J., 483	61, 62, 32
Noble v. Gookings, 99 Mass., 231	292
Nobo v. Hari, 10 Cal., 1102	120
Nobokishore v. Ramkishen, 9 W. R., 131	119
Noggendro v. Kishen Soondory, 19 W. R., 133, P. C.	59, 112, 127
Noel v. Hoy, Sug. V. & P., 217	359, 83
Nokes v. Kilmorey, 115 U. S., 189	271
Nonoo v. Anand, 12 Cal., 291	129
Noorooden v. Sowden, 15 M. L. J. R., 45, F. B.	645, 157
Norcross v. James, 140 Mass., 188	360, 386
Nordenfelt v. Maxim Nordenfelt Guns & Co., [1894] A. C., 536	1, 0, 150
Normandy v. Devonshire, 2 Freeman, 216	76
Norrington v. Wright, 115 U. S., 189	271
Norris v. Fox, 45 Fed. R., 406	351
v. Irish Land Co., 8 El. & Bl., 512	535, 536
North v. Great Northern Railway Co., 2 Giff., 64	93, 592
v. Percival, 2 Ch., 128	337, 464
North L. Ry. Co. v. Great N. Ry. Co., 11 Q. B. D., 38	148, 150
Northam Bridge Co. v. London & S. Ry. Co., 9 L. J. Ch., 277	659
Norton v. Mascall, 2 Vern., 24	103
Nosarbhavi v. Badrudin, 16 Bom., 533	152
Nottingham Patent Brick and Tile Co. v. Butler, 16 Q. B. D., 778	363, 392, 454
Notaille v. Flight, 77 Beav., 521	363
Nowbut v. Lad Kooer, 5 N. W. P., 102	163, 65
Noyna v. Rupikun, 9 Cal., 609	161, 168

	PAGE.
Nritto Lal <i>v.</i> Rajendro, 22 Cal., 562 ...	60, 66, 32, 35
Nuffur <i>v.</i> Khoodeeram, 24 W. R., 434 ...	53, 63
Nufsa <i>v.</i> Mahomed, 24 W. R., 335 ...	111, 124
Nugent <i>v.</i> Nugent, 76 L. J. Ch., 614 ...	567
<i>v.</i> Smith, 1 C. P. D., 423 ...	452
Nukehad <i>v.</i> Hunooman, 10 W. R., 69 ...	42, 43-4
Nundo Kishore <i>v.</i> Ramsookhee Koer, 5 Cal., 215 ...	266
Nur <i>v.</i> Mawaz, 1 P. L. R., 214 ...	126
Nur Ali Dubash <i>v.</i> Abdul Ali, 19 Cal., 765 ...	151
Nur Buksh <i>v.</i> Fajjo, 121 P. R., 1876 ...	120
Nur Khanam <i>v.</i> Bani, 90 P. R., 1894 ...	120
Nurdin <i>v.</i> Alavudin, 12 Mad., 134 ...	524, 112
Nurse <i>v.</i> Lord Seymour, 13 Beav., 254 ...	373, 429
Nursing <i>v.</i> Tulsiram, 2 Bom., 558 ...	581
Nusserwanji <i>v.</i> Gordon, 6 Bom., 266 ...	162, 615, 63, 144, 165
Nussey <i>v.</i> Provincial B. P. Co., 1 Ch., 734 ...	656
Nutbrown <i>v.</i> Thornton, 10 Ves., 159 ...	68, 72, 94, 105, 156
Nuttall <i>v.</i> Bracewell, 2 Ex., 10 ...	386
N. Y. Bank Note Co. <i>v.</i> Hamilton Bank Note Co. 83 Hun., 593 ...	394
Nye <i>v.</i> Clark, 55 Mich., 599 ...	643
Nynakka <i>v.</i> Vavana, 5 Mad. H. C. R., 123 ...	256, 26

O

Oakes <i>v.</i> Turquand, 2 H. L. 326 ...	461, 471
Oakes & Co. <i>v.</i> Jackson, 1 Madd., 134 ...	150
Obhoya <i>v.</i> Mohesh, 23 W. R., 22 ...	124
O'Brien <i>v.</i> Pentz., 48 Md., 562 ...	31, 289
<i>v.</i> Wheelock, 184 U. S., 450 ...	376
Oceanic Co. <i>v.</i> Sutherland, 16 Ch. D., 236 ...	182
Odesa Tramway Co. <i>v.</i> Mendel, 8 Ch. D., 235 ...	356, 52
O'Donnell <i>v.</i> Clinton, 145 Mass., 461 ...	12
Offord <i>v.</i> Davies, 12 C. B., N. S., 748 ...	195
Ogilvie <i>v.</i> Foljambe, 3 Mer., 53 ...	197, 198, 290
<i>v.</i> Jeaffreson, 2 Giff., 353 ...	112
Ogden <i>v.</i> Fossick, 4 DeG. F. & J., 426 ...	162
O'Keefe <i>v.</i> Armstrong, 2 Ir. Ch. R., 115 ...	580
Okill <i>v.</i> Whittaker, 2 Ph., 338 ...	441
Okilmoney Dossee, In the goods of, Fulton, 90 ...	582
Olde <i>v.</i> Olde, [1904] 1 Ch., 35 ...	107
Oldfield <i>v.</i> Cobbett, 4 L. J. Ch., 272 ...	550
Oldfield <i>v.</i> Round, 5 Ves., 508 ...	176
Oldham <i>v.</i> James, 15 Ir. Ch. R., 81 ...	244
Oliver <i>v.</i> Oliver, 8 Jur., N. S., 512 ...	70
<i>v.</i> Oliver, 32 L. J., C. P., 4 ...	39
Ollendorff <i>v.</i> Black, 4 DeG. and Sm., 209 ...	596
Olley <i>v.</i> Fisher, 34 Ch. D., 367 ...	325, 429, 447, 450
Olson <i>v.</i> Lovell, 91 Calif., 506 ...	366
Omar, <i>re</i> , 11 W. R., 229 ...	35
Omar Chand <i>v.</i> Nawab Nazim, 11 W. R., 229 ...	62, 66, 34, 35
Omed Ali <i>v.</i> Nidhee, 21 W. R., 367 ...	22
Omerod <i>v.</i> Hardman, 5 Ves., 722 ...	31, 248
Omrinissa <i>v.</i> Dilawar Ally, 10 Cal., 350 ...	528
Ononanda Nation <i>v.</i> Thacher, 65 N. Y., Supp. 1014 ...	72
Oomur <i>v.</i> Luchee, 10 W. R., 47 ...	112
Oppenheimer <i>v.</i> Levi, 66 L. R. A., 729 ...	499
Ord <i>v.</i> Johnson, 1 Jur., N. S., 1063 ...	82, 83, 157
<i>v.</i> Noel, 5 Madd., 438 ...	209
O'Reilly <i>v.</i> N. Y. Elev. R. Co. 148 N. Y., 347 ...	602
Ori <i>v.</i> Mohammad, 17 O. C., 354 ...	506, 125
Oriental Bank Corp. <i>v.</i> Govinloll Seal, 10 Cal., 713 ...	549
Oriental Inland Steam Navigation Co. <i>Ld. v.</i> Briggs, 4 DeG. F. and J., 191 ...	192
Oriental Steamship Co. <i>v.</i> Taylor, 2 Q. B., 518 ...	197

	PAGE.
Ormond v. Anderson, 2 Ball and B., 363	198
O'Rourke v. Percival, 3 Ba. and Be., 58	95
Orr v. Mnthia, 17 Mad., 501	558, 559, 136
v. Raman, 18 Mad., 320	150
v. Sundra, 14 Mad., 255	475
Osborne v. Bradly, [1903] 2 Ch., 466	372, 392
v. Rowlett, 13 Ch. D., 781	362
v. Williams, 18 Ves., 379	466
Osbourne v. Barter, [1583] Choyce, Cas. Ch., 176	639
Osgood v. Franklin, Johns. Ch., 1	320
Ostoche v. Hari, 2 Ali., 869	122
Ouseley v. Plowden, Boulois, 161-2	18
Owen v. Homan, 4 H. L. C., 997	549
Owens v. McNally, 33 L. R. A., 369	299
Oxford v. Crow, 3 Ch., 535	290
v. Provand, 2 P. C., 135	293, 372

P

Pachamuthu v. Chinnappan, 10 Mad., 213	122
Padammah v. Themana, 17 Mad., 232	513, 645, 649, 516, 130
Paddock v. Davenport, 107 N. C., 710	93, 156
Pagani, re, [1892] Ch., 236	91
Page v. Adams, 4 Beav., 269	452
v. Broom, 4 Russ., 6	118, 173
v. Higgins, 150 Mass., 27	441, 101
Paget v. Marshall, 28 Ch. D., 225, 255	228, 442
Pahlwan Singh v. Ram Bharose, 27 All., 162	51
Paine v. Hutchinson, 3 Ch., 388	90, 91, 279
v. Meller, 6 Ves., 349	279, 354, 422, 47
v. Upton, 87 N. Y., 327	177, 337, 447
Pal Ahir v. Ashger, 8 A. L. J. R., 404	67
Palmer v. Graham, 1 Pars. Eq., 476	119, 623, 171
v. Johnson, 13 Q. B. D., 351	183, 337
v. Locke, 18 Ch. D., 381	361
v. Paul, 2 L. J., Ch., 154	618, 156
v. Scott, 1 Russ. and M., 391	352
Pana v. Ana, 8 I. C., 1191	546, 557
v. Sadik, 3 N. W. P., H. C., 268	109
Panama Telegraph Co. v. India Rubber Co., 10 Ch., 515	108
Panchananda v. Nilakanda, 7 Mad., 191	119
Panga v. Unnikutti, 24 Mad., 275	510, 517
Pangborn v. Westlake, 36 Iowa, 546	138
Panna v. Habiba, 6 I. C., 891	118
Papireddi v. Narasareddi, 16 Mad., 464	433
Paradine v. Jane, [1648] Aleyn., 26	275
Paran v. Karunamayi, 7 B. L. R., 90	109
Parangodan v. Perumtoduka, 27 Mad., 380	427, 97
Paras v. Muhammad, 13 I. C., 953	123
Paras Ram v. Bhimbhai, 5 Bom. L. R., 195	509
v. Sherjit, 9 All., 661	654
Parbatibai v. Visvanath, 29 Bom., 207	485, 111, 113
Paris Chocolate Co. v. Crystal Palace Co., 3 Sim. & Giff., 119	291, 61, 65
Parish v. Wheeler, 22 N. Y., 498	206
Park Bros. and Co. v. Blodgett and Clapp Co., 64 Conn., 28	341, 445
Parker v. Dhanji Boy, 53 P. L. R., 1907	595
v. Garrison, 61 Ill., 250	80, 85, 129, 45
v. Nightingale, 6 Allen., 341	392
v. Palmer, 1 Cas. Ch., 42	295, 301
v. Serjeant, [1674] Rep. Fin., 146	195
v. Shannon, 121 Ill., 452	524
v. Siddons, 16 Eq., 34	551
v. Taswell, 2 DeG. and J., 559	247, 369

TABLE OF CASES CITED.

lxiii

	PAGE.
Parkin v. Thorold, 16 Beav., 59, 329	270, 271, 273
Parkinson v. Lee, East., 314	224
Parsons v. Baker, 18 Ves., 476	22
Partab v. Bhabnti v. 35 All., 487, P. C.	117
Partap Chunder v. Mohendranah, 17 Cal., 291, P. C.	219
Partington v. Booth, 3 Mer., 148	601
Partridge v. Hood, 120 Mass., 403	142
Parvati Bai v. Vishvanath, 29 Bom., 207	485
Patel v. Ahmedabad Municipality, 22 Bom., 230	161
Paterson v. Gas Light Co., 2 Ch., 476	565
Pattison v. Skillman, 34 N. J., Eq., 344	89
Pattle v. Anstruther, 69 L. T., 175	196
v. Hornibrook, 1 Ch., 25	199
Patton v. Nixon, 33 Oregon, 159	459
v. McClure, Mart. and Yerg., 333	254
Paulk v. Sycamore, 41 L. R. A., 772	608
Pavesich v. New England, L. I. Co., 20 S. E., 68	647
Paxton v. Newton, 2 Sm. and G., 437	131
Peabody v. Norfolk, 98 Mass., 452	161
Peacock v. Peacock, 16 Ves., 49	553
v. Penson, 11 Beav., 355	308, 309, 373, 75
Peake v. Highfield, 1 Russ., 559	112
Pearce v. Bastable's Trustee, [1901] 2 Ch., 122	286, 410
v. Brooks, 1 Ex., 213	188, 465
v. Gardner, 1 Q. B., 688	196
v. Verheke, 2 Beav., 333	102
v. Watts, 20 Eq., 492	290
Peari v. Durlavi, 20 I. C., 815	133
Pearisundari v. Hari, 15 Cal., 211	59, 98
Pearne v. Lisle Ambl., 77	72, 73
Peck v. Conway, 119 Mass., 546	388
v. Tribune Co., 214 U. S., 185	647
Peddammuthulaty v. Zimma Reddy, 2 Mad. H. C. R., 270	377
Pedda Vencatapa v. Aroovala, 6 W. R., P. C., 13	29
Peek v. Gurney, 6 H. L., 390	221, 227, 233
v. Peek, 1 L. R. A., 185	256
Peeler v. Levy, 26 N. J. Eq., 330	181
Peer Mahomed v. Mahomed, 29 Bom., 234	314, 44, 71, 72, 74
Peers v. Lambert, 7 Beav., 546	175, 51
Pegler v. White, 33 Beav., 403	309
Pembroke v. Thrope, 3 Sw., 437	106, 305, 74
Pemraj v. Narayan, 6 Bom., 215, F. B.	54, 33
Pence v. Langdon, 99 U. S., 581	475
Pengall v. Ross, 2 Eq. Abr., 46 pl. 12	253
Penn v. Baltimore, 1 Ves. Sr., 444	171
v. Bibby, 3 Eq., 308	668
Pennie v. Hildreth, 81 Calif., 127	496
Pennington v. Brinks of Hall Coal Co., 5 Ch. D., 769	609
v. Brinsop Co., 5 Ch. D., 769	641
Pennsylvania Lead Co's. Appeal, 96 Pa. St., 116	603
Penny v. Martin, 4 Jon. Ch., 566	478
Pennybacker v. Laidley, 33 W. Va., 624	234, 453
People's Bank v. Bogart, 81 N. Y., 101	229
Percival v. Phipps, 2 V. & B., 19	647
v. Wright, [1902] 2 Ch., 421	230
Perhiad v. Rajendur, 12 M. I. A., 292	33
Periasami v. Seetharama, 27 Mad., 243	572
Perin v. Megibben, 53 Fed., 86	94
Perkins Ede, 16 Beav., 193	175, 49
Perosha v. Manekji, 22 Bom., 899	153
Perry v. Clissold, [1907] A. C., 73	50, 29
v. Oriental Hotels Co., 5 Ch. Ap., 420	583
v. Truefitt, 6 Beav., 66	606, 168
Pertap v. Mohendra, 17 Cal., 291, P. C.	95

	PAGE.
Petchakutti v. Kamala, 1 Mad. H. C. R., 153	44
Peter v. Nicolls, 11 Eq., 391	84
Peters v. Delaplaine, 49 N. Y., 362	379
v. Grim., 149 Pa. St., 163	153
Peterson v. Chase, 115 Wis., 239	348
Peto v. Brighton Ry. Co., 1 H. & M., 468	63
Petherpermal v. Muniandy, 35 Cal., 551	413, 113
Pethey v. Parsons, 1 Ch., 704	160
Phani Singh v. Nawab Singh, 28 All., 161	44, 45, 46, 655
Phelan v. Tedcastle, 15 L. R. (1r.), 169	198
Philadelphia Club v. Lajoie, 58 L. R. A., 227	626
Philip v. Pennell, 76 L. J. Ch., 663	647
Phillips v. Atkinson, 2 Bro. C. C., 272	553
v. Berger, 2 Barb., 609	97
v. " 8 " 527	101, 114, 121
v. Bordman, 4 Allen, 147	644
v. Duke of Bucks, 1 Vern., 227	414, 80
v. Homfray, 6 Ch., 770	182
v. Mullings, 7 Ch., 244	448
v. Thomas, 62 L. T., 793	664
v. Thompson, 1 Johns., 131	119
Phillipson v. Kerry, 32 Beav., 628	448
Phipps v. Child, 3 Dr., 709	374
v. Jackson, 56 L. J. Ch., 550	165, 168
Phosphate Sewage Co. v. Hartmont, 5 Ch. D., 39.	209
Phul v. Ghanshyam, 35 Cal., 202, P. C.	524, 122
Phulehand v. Chand Mal, 30 All., 252	61
Phulwa v. Jaimal, 6 A. L. J., 103	131
Phuman v. Chhanga, 153 P. L. R., [1914]	37
Piare v. Ganeshi, 46 P. R., 1909	136
Pickard v. Sears, 6 A. & E., 475	11
Pickering v. Bishop of Ely, 2 Y. & C. Ch., 249	162, 348
v. Dowson, 4 Taunt., 779	224
v. Ilfracombe Ry. Co., 3 C. P., 250	356
v. Pickering, 2 Beav., 31	100
Pidding v. How, 8 Sim., 477	606
Piedmont Land Improvement Co. v. Piedmont & Co., 96 Alabama, 389...	459
Pierce v. Webb, 3 Bro. Ch., 16u	114
Piersoll v. Elliott, 6 Peters, 98	481
Piggot v. Stratton, 1 DeG. F. & J., 33	192
Pigot's Case, 11 Coke, 26b.	262, 263
Pirithi v. Jawahir, 14 Cal., 493, P. C.	452
Pirthy Pal Kunwar v. Guman Kunwar, 17 Cal., 933, P. C.	525, 124
Pitaniber v. Cassibai, 11 Bom., 272	420
v. Jagjivan, 13 Bom., 131	149
Pitcairn v. Oghourne, 2 Ves Sr., 375	434, 439
Pitche v. Maung, 8 L. C., 608	117, 127
Pitcher v. Hennessey, 48 N. Y., 415	435
Pittenger v. Pittenger, 208 Ill., 582	459
Pittsburgh R. Co. v. Keokuk Bridge Co., 131 U. S., 371	204
Pixley v. Huggins, 15 Calif., 127	494, 528
Planters' Bank v. Union Bank, 16 Wall., 483	467
Plimpton v. Malcolmson, 20 Eq., 37	598, 601
v. Spiller, 4 Ch. D., 286	599
Pokhar v. Ram, 7 A. W. N., 231	119
Polini v. Gray, 12 Ch. D., 438	594
Pollard v. Clayton, 1 K. & J., 462	92, 122, 168, 379
v. Photographic Co., 40 Ch. D., 345	647, 151
v. Rousse, 33 Mad., 288	208
Pollock v. Lester, 11 Hare, 266	640
Pomeroy v. Scale, 23 T. L. R., 170	623
Ponaka v. Vadamadi, 20 M. L. J. R., 828	181, 50, 51, 55, 56, 88
Ponnapa v. Pappuvapyangar, 4 Mad., 1	117
Ponnuswami v. Coll. of Madura, 5 Mad. H. C. R., 6	150-1

	PAGE.
Ponnuswami v. Vithilingam, 8 I. C., 258	...416, 138
Pool v. Middleton, 29 Beav., 646	... 90, 91
Poole v. Adams, 33 L. J. Ch., 639	... 284
v. Shergold 2 Bro. C. C., 118	... 281, 319, 357
Pooley v. Budd, 14 Beav., 34	... 85
Poonoo Bibee v. Fyez Buksh, 15 B. L. R., Ap., 5	... 211
Pope v. Bell, 35 N. J., 1	... 617
v. Curl, 2 Atk., 342	... 647
v. Roots, Bro. P. C., 370	... 279
Puran v. Parbutty, 3 Cal., 612	... 126
Poresh Nath v. Omerto Nath, 17 Cal., 614	546, 552, 559, 569, 571, 585, 135
Port Clinton Ry. Co. v. Cleveland & T. R. Co., 13 Ohio St., 544	113, 168, 169
Porter v. Frenchman's Bay Co., 84 Me., 195	... 103
v. Lopes, 7 Ch. D., 358	...552, 584
Portman v. Mill, 2 Russ., 570	...176, 363
Post v. Marsh, 16 Ch. D., 395	... 244, 79
v. Westshore & B. Ry. Co., 123 N. Y., 580	... 111
Potter v. Brown, 6 East., 131	... 172
v. Duffield, 18 Eq., 4	... 196
Powell v. Sanders, 6 Hare, 1	... 410
v. Taggart, 59 Wis., 1	... 221
Powell v. Elliott, 10 Ch., 424	...177, 243
v. Hemsley, 2 Ch., 252	... 166
v. Knowler, 2 Atk., 224	... 154
v. Lloyd, 1 Y. & J., 427	... 596
v. Smith, 14 Eq., 85	... 338
, &c. Coal Co. v. Taff Vale Ry. Co., 9 Ch., 331	...210, 168
Powers v. Longbridge, 38 N. J. Eq., 396	... 576
Powys v. Blagrove, 18 Jur., 462	... 584
P. R. & Co. v. Bhagwandas, 10 Bom. L. R., 1113	... 338
Prag v. Rameshar, 28 I. C., 921	... 201
Prag Das v. Ori, 21 A. W. N., 23	... 662
Prag Dat v. Chote Sing, 9 O. C., 55	... 506, 91
Pragji v. Pranjivan, 5 Bom. L. R., 878	...615, 170
Prag Narain v. Mulchand, 19 All., 535	... 425
Prahlad v. Budhu, 2 B. L. R., 111, P. C....	... 81
Pramatha v. Jagannath, 16 I. C., 359	... 592
Pramatha Nath v. Khetra Nath, 32 Cal., 270	...562, 585
Pran v. Bajju, 4 Bom., 34	... 55
Pranjivan v. Mayaram, 1 Bom. H. C., O. C., 148	...150, 162
Prankristo v. Huro, 10 W. R., 435	... 150
Prannath v. Madhu, 13 Cal., 96	... 507
Pranputtee v. Futteh, 2 Hay, 608	... 522
Pratap v. Durga, 9 C. W. N., 1061	... 36
v. Maheshwar, 12 O. C., 45	... 32
Pratap Singh v. Dehli and London Bank, 5 A. L. J. R., 583	... 550
Prate v. Carroll, 8 Cranch., 471	... 380
Pratt v. Brett, 2 Madd., 62	...618, 156
Prebble v. Boghurst, 1 Sw., 309	...117, 306
Prem v. Huree, 22 W. R., 259	... 36
v. Ramon, 11 P. R., 1888	... 119
Premdeo v. Gobind 58 P. R., 1873	... 126
Premji v. Madhowski, 14 Bom., 447	... 400
Prem Lal Mullick v. Sumbhoo Nath Roy, 22 Cal., 960	559, 573, 578
Premsook v. Dhurum Chand, 17 Cal., 320	... 151
Prendergast v. Eyre, 2 Hog., 78	... 363
Preonath v. Ashutosh, 27 Cal., 358	... 409
Prescott v. Jones, 69 N. H., 305	... 190
Preston v. Liverpool etc. Ry. Co., 5 H. L. C., 605	... 207, 93
v. Luck, 27 Ch. D., 497	11, 325, 370
Price v. Assheton, 1 Y. & C. Ex., 82	... 197
v. Dyer, 17 Ves., 356	...248, 267
v. Griffith, 1 DeG. M. & G. 80	196, 292, 356
v. Jenkins, 4 Ch. D., 492	... 404

	PAGE.
Price v. Macaulay, 3 DeG. M. & G., 339	239
v. Mayor, etc. of Penzance, 4 Ha., 506	107, 109, 258
v. Neault, 12 A. C., 110	424
Prince v. Lamb, 128 Calif., 120	319
v. Oriental Bank, 3 A. C., 325	263
Prince Albert v. Strange, 1 M. & G., 25	646
Pringle v. Jafar Khan, 5 All., 443	153
Printing Co. v. Sampson, 19 Eq., 462	123, 140
Pritchard v. Ovey, 1 J. & W., 396	199
Probhooram v. Robinson, 11 W. R., 398	43
Procter v. Bayley, 42 Ch. D., 390	416, 663
Proctor v. Benniss, 36 Ch. D., 740	607
Prokash v. Adlum, 30 Cal., 696	560, 572
Promotho v. Kali, 28 Cal., 744	17
Promotho Nath Ghose v. Jodoo Nath Sen, 1 Ind. Jur., N. S., 293	507
Proprietors etc. of Eng. & For. Credit Co. v. Arduin, 5 H. L., 64	194
Prosad De v. Calcutta Corp., 40 Cal., 836	540
Prosonnomoyi v. Benimadhab, 5 All., 556	547, 550, 551, 557
Prospect Park & C. J. R. Co. v. Coney Island & B R. Co., 144 N. Y.	152, 112, 313
Prosser v. Mendi, 8 O. C., 356	151
v. Watts, 6 Madd., 570	362
Prosuono v. Jagun, 10 C. L. R., 25	159
v. Mothoora, 15 W. R., 487	112
Protab v. Kantaeswuree, 2 W. R., 250	34
Protap v. Ishan, 4 C. W. N., 266	495
v. Sarat, 5 C. W. N., 386	404, 77
Prothero v. Phelps, 7 DeG. M. & G., 722	418
Protima Aurat v. Dukhia Sirkar, 9 B. L. R., App., 38	138
Provabutty v. Mohendro, 7 Cal., 453	159, 160
Prudential Assurance Co. v. Knott, 10 Ch. A., 142	648
Prytherch, re, 42 Ch. D., 590	549, 554
Pudar Bindoo v. Mohesh Chunder Sen, 20 W. R., 183	62
Pudmanund v. Hayes, 5 C. W. N., 886, P. C.	76
Pudyshary v. Karampally, 7 Mad. H. C., 378	212
Pulin v. Bolal, 12 C. W. N., 837	508
Pullen v. Ready, 2 Atk., 587	340
Pullman Palace Car Co. v. Central Transportation Co., 65 Fed. R., 158	467, 468
Pulsford v. Richards, 17 Beav., 87, 96	233
Puna v. Gargi, 1 C. P. L. R., 151	166
Punardeo v. Ramsarup, 25 Cal., 858	18
Purre v. Bykunt, 9 W. R., 380	126
Pureeag v. Kheer, 8 W. R., 280	70
Purmeshar Chowdhury v. Brojo Lal Chowdhury, 17 Cal., 256	54, 29
Purna Chandra Dutt, re, 12 C. W. N., 873	538
Purshottam v. Purshottam, 8 Bom., 532	595
Purshotamdas v. Purshotamdas, 21 Bom., 23	451
Purseshotam v. Ponnurungam, [1913] M. W. N., 897	286, 410
Pusey v. Pusey, 2 Wh. & T., 454, 1 Vern., 273 [1684]	72, 40
Pushong v. Munia Halwani, 1 B. L. R., A. C., 95	214, 105
Putnam v. Ritchie, 6 Paige, Ch., 390	424
Puttanna v. Ramakrishna, 30 Mad., 195	504
Pya v. British Automobile Commercial Syndicate Ltd., 1 K. B., 425	117
Pyari v. Raja, 11 I. C., 45	652, 160
Pyatt v. Lyons, 51 N. J., Eq., 308	368
Pyrke v. Waddingham, 10 Hare, 1	359, 360, 361

Q

Q. v. Justices of the Peace, Calcutta, 2 Ind. Jur., N. S., 152	137, 139
Q. E. v. Indrajit, 11 All., 262	17
v. Ramanjiyya, 2 Mad., 5	19
Quartz Hill Con-Min. Co. v. Beall, 20 Ch. D., 501	646

	PAGE.
Queen v. Clarke, 1 Ind. Jur., O. S., 137 ...	137
Quin v. Salmon, 78 L. J. Ch., 506 ...	144
Quinn v. Leathem, [1901] A. C., 495 ...	302
v. Roath, 37 Conn., 16 ...	188, 270
Qumar Ara v. Peari, 2 O. C., 57 ...	118, 132

R

R. v. Askew, 2 Burr., 2188 ...	535
v. Bank of England, 2 B. & Ald., 620 ...	535, 138
v. Barker, 1 W. Bl., 352 ...	535, 536
v. Brown, 3 T. R., 574 ...	538
v. Jeyes, 3 Ad. & E., 416 ...	140
v. Justices of Middlesex, 9 Ad. & E., 546 ...	540
R. v. Ledgard, 1 Q. B., 616 ...	537
v. Mayor of Peterborough, 44 L. J., Q. B., 85 ...	139
v. Severn Ry. Co., 2 B. & Ald., 646 ...	140
v. St. Lukes, 31 L. J., Q. B., 50 ...	139
v. Stepney Borough Council, [1902] 1 K. B., 317 ...	140
v. Stewart, 1 Q. B., 552 ...	535
v. Univ. of Cambridge, 2 Burr., 552 ...	535
Rabeholm v. Smith, 34 Cal., 336 ...	578
Radcliffe v. Portland, 8 Jur., N. S., 1007 ...	663
Radha v. Joy, 1 W. R., 228 ...	168
v. Juggernath, 14 W. R., 183 ...	130
v. Nabin, 5 B. L. R., 708, F. B. ...	67
Radha Churn v. Zumuroonissa, 11 W. R., 83 ...	66, 36
Radha Kristo Chaklanavis v. Kaleeprasanna Roy, 15 W. R., 268 ...	65, 35
Radhamoni v. Collector of Khulna, 27 Cal., 943, P. C. ...	59
Radha Prosad v. Esuf, 7 Cal., 414 ...	43
Radhe v. Angne, 16 O. C., 213 ...	100, 102
v. Itragul, 17 I. C., 375 ...	125
Raghavelu v. Aditnarayan, 32 Mad., 323 ...	203
Raghu v. Chandra, 17 C. W. N., 100 ...	426, 97
Raghubar v. Akhtar, 5 A. L. J. R., 366 ...	115
v. Bhikya, 12 Cal., 69 ...	113
v. Mahesh, 20 I. C., 147 ...	123, 129
v. Rampal, 3 O. C., 365 ...	126
Raghubar Dial v. Madan Mohan Lal, 16 All., 3 ...	261
Raghunandan v. Jarao, 15 O. C., 170 ...	150, 155, 160
Raghunath v. Gangadhar, 10 Bom., 60 ...	122
v. Gopinath, 25 A. W. N., 110 ...	586
v. Nathu Hirji, 19 Bom., 626 ...	137
v. Rahiman, 14 I. C., 776 ...	129
v. Sarosh Kama, 23 Bom., 266 ...	527, 129
v. Thakuri, 4 All., 16 ...	501, 503
Raghupati v. Tirumalai, 15 Mad., 422 ...	502
Rahman Chaudhri v. Salamat Chaudhri, 21 A. W. N., 48 ...	44
Rahmatullah v. Mojizullah, 28 I. C., 472 ...	35
v. Shamsuddin, 11 A. L. J. R., 877 ...	533
Rai Charn v. Pyari Mani, 3 B. L. R., (O. C. J.) 70 ...	515
Railroad Co. v. Prudden, 5 C. E. Grey, 530 ...	598
Raj v. Bepin, 40 Cal., 251 ...	556
v. Kanhiya, 18 C. W. N., 138 ...	551
Raja v. Krishnabhat, 3 Bom., 232 ...	167
v. Ummed, 34 All., 207 ...	502
Raja Vurmah Valia v. Ravi Vurma Kunhi, 1 Mad., 235, P. C. ...	141
Rajanikant v. Ram Nath, 10 Cal., 244 ...	44
Raja of Venkatagiri v. Muddu Krishna, 28 Mad., 15 ...	652
Raja Ram v. Dharam Das, 2 A. L. J. R., 601 ...	590, 612, 143, 164
Raja Ram v. Lalji, 2 A. L. J. R., 481 ...	46
v. Moti Ram, 26 A. W. N., 221 ...	657
v. Sheorani, 7 J. C., 344 ...	549, 557

	PAGE.
Rajaram <i>v.</i> Ganesh, 21 Bom., 91	31
<i>v.</i> Nanchand, 5 Bom. L. R., 225	54, 60
Rajasingh <i>v.</i> Jhingrao, 6 C. P. L. R., 51...	126
Rajdhur Chowdhury <i>v.</i> Kali Kristna, 8 Cal., 963	418, 59
Rajender <i>v.</i> Bhoobun, [1884] W. R., 65	105
Rajkrishna <i>v.</i> Bepin, 40 Cal., 245	122
<i>v.</i> Muktaram, 12 C. L. J., 605	60, 62, 33
Rajkumari <i>v.</i> Bamasundari, 23 Cal., 610...	165
Rajlukhee <i>v.</i> Gokool, 13 M. L. A., 209	500
Rajnarain <i>v.</i> Ekadasi, 27 Cal., 793	132
Raj Narayan Das <i>v.</i> Shama Nando, 26 Cal., 845	517, 532
Rakhal <i>v.</i> Emperor, 15 I. C., 655	159
Raknsen <i>v.</i> Ellis, Munday and Clarke, 1 C. L., 831	156
Rala Ram <i>v.</i> Bir Singh, 43 P. R., 1887	120
Raleigh <i>v.</i> Goschin, [1898] 1 Ch., 73	611
Ralli <i>v.</i> Fleming 3 Cal., 430	645, 155
<i>v.</i> Walaiti, 80 P. R., 1906	70
Rallia Ram <i>v.</i> Sundar, 83 P. R., 1883	113
Ralston <i>v.</i> Ihmsen, 204 Pa. St., 588	94
Ram <i>v.</i> Bhikibai, 6 Bom., 477	66, 31
<i>v.</i> Bindeshari, 8 A. L. J. R., 940	121
<i>v.</i> Jaikishan, 33 All., 647	37
<i>v.</i> Kallu, 22 All., 135	69
<i>v.</i> Kishen, 4 P. R., 1890	121
<i>v.</i> Madhab, 3 W. R., 118	45
<i>v.</i> Maharaj, 3 P. R., 1904	123
<i>v.</i> Miria, 25 Cal., 46	396
<i>v.</i> Muhammad, 135 P. R., 1888	122
<i>v.</i> Nakched, 4 All., 261	117
<i>v.</i> Narinjan, 182 R. R., 1883	119
<i>v.</i> Narsinh, 24 Bom., 251, F. B.	31
<i>v.</i> Newaz, 9 C. L. J., 125	144
<i>v.</i> Prayag, 8 Cal., 138	54
<i>v.</i> Rakhal, 41 Cal., 19	63, 165
<i>v.</i> Ranjit, 27 Cal., 242	534
<i>v.</i> Rughoo, 1 Cal., 457	111
<i>v.</i> Sheodihal, 15 All., 384	30, 35
<i>v.</i> Sukhadai, 2 All., 720	122
<i>v.</i> Upendra, 17 C. W. N., 501	37
Rama <i>v.</i> Subramania, 31 Mad., 171	641, 152, 153
Ramabal <i>v.</i> Rangrav, 19 Bom., 614	501, 132
Ramachandra <i>v.</i> Sundaramurthi, 4 M. L. J. R., 9	66, 94
Ramadhur <i>v.</i> Ram Shankar, 26 All., 215	510, 531, 129
Ramalinga <i>v.</i> Samiappa, 13 Mad., 15	425
Ramanadhan <i>v.</i> Anuamati, 29 I. C., 132	131
<i>v.</i> Zemindar of Ramnad, 16 Mad., 407	632, 154, 159
Ramanand <i>v.</i> Raghunath, 8 Cal., 769, P. C.	127
Ramanjulu <i>v.</i> Aparanji, 21 M. L. T. R., 313	604, 148, 166
Ramanuja <i>v.</i> Devanayka, 8 Mad., 361...	497, 510, 516, 119, 132
<i>v.</i> Krishnasawmi, 31 Mad., 169	641
<i>v.</i> Ramakisore, 22 Mad., 189	498, 121, 154
Ramanund <i>v.</i> Nakched, 8 O. C., 5	157, 61
Ramaraja <i>v.</i> Ramalingam, 26 Mad., 74	408
Ramara <i>v.</i> Raja Rau, 2 Mad. H. C. R., 114	377
Ramarow <i>v.</i> Venkoba, 17 M. L. J. R., 282	534
Ramasami <i>v.</i> Chinnan, 24 Mad., 449	431, 90
<i>v.</i> Lachmi, 17 C. L. J., 239	145
<i>v.</i> Lakshmi, 24 M. L. J. R., 231	144, 145
<i>v.</i> Paraman, 25 Mad., 448	67, 35
<i>v.</i> Ramasami, 30 Mad., 255	127, 54
<i>v.</i> Srirangachariar, 6 I. C., 681	534
Ramaswami <i>v.</i> Chinnan, 11 M. L. J. R., 132	393
<i>v.</i> Muninandy, 5 I. C., 343	510, 130
<i>v.</i> Pavadai, 23 I. C., 813	136

	PAGE.
Ramaswami v. Vythinatha, 26 Mad., 760	395
Ramautar v. Jogan Nath, 10 O. C., 204	496
Ramayyar v. Shanmugum, 15 Mad., 70	263
Ram Bahadur Pal v. Ram Shankar Prasad Pal, 27 All., 688, F. B.	188, 596, 654
Rambharose v. Kallu Mal, 22 All., 135	146, 69
Rambhat v. Collector, 1 Bom., 592	33
Rambhowan v. Rambaran, 10 A. W. N., 166	43
Rambutty v. Kamesur, 22 W. R., C. R., 36	514
Ramechand v. Muhammad, 135 P. R., 1888	113
v. Radha, 63 P. R., 1882	131
Ramechandar v. Madho Rao, 11 A. W. N., 45	43
Ramechandar Dutt v. Chunder Coomar Mundul, 3 M. I. A., 181	43
Ramechandra v. Damodhar, 20 Bom., 467	44
v. Dharmo, 7 B. L. R., 341	125, 54
v. Narayan, 27 Bom., 614	123
v. Narsinhacharya, 24 Bom., 251, F. B.	66
v. Ram Chandra, 22 Bom., 46	63, 90
Ramechandra Apaji v. Balaji, 9 Bom., 137	49
Ramechandra Subrao v. Ravji, 20 Bom., 351	42
Ramechand Sen v. Audaita Sen, 13 Cal., 1054	149
Ramecharan v. Ram, 5 A. I. J. R., 614	117
Ramecharan Rai v. Kauleshar Rai, 27 All., 153	45, 47
Ramcoomar Condoo v. Chunder Kanto Mookerjee, 2 Cal., 238	143
Ramdas v. Secretary of State, 17 C. L. J., 75	490, 117
Ram Deehul v. Chukhoo, 1 N. W. P., H. C. R., 208	507
Ram Devi v. Bindesri, 8 A. L. J. R., 940	520
Ramdhan v. Mohan Lal, 1 A. L. J. R., 688	117
Ramdhone v. Nobeemmony, Bourke, 218	46
Ramdial v. Budha, 115 P. R., 1883	121
Rameshwar v. Lachmi, 31 Cal., 111	405
v. Raghunandan, 5 I. C., 266	126
Rameswar Singh v. Secy. of State, 34 Cal., 470	132
Ramghulam v. Partab, 10 O. C., 173	260
Ram Harakh v. Sheodihal, 15 All., 384	67, 35
Ramiah v. Ambalam, 29 I. C., 449	88
Ramjas v. Brojomohan, 19 C. W. N., 887	153
Ram Jatan v. Jaisar, 14 A. W. N., 166	47
Ramji v. Saligram, 14 C. W. N., 248	546, 547, 551
Ramjiwan v. Oghur, 2 C. W. N., 188	199
Ramkanaye Chukerbutty v. Prasunno Sein, 13 W. R., C. R., 176	532
Ram Khelawan Singh v. Oudh Koer, 21 W. R., 101	507, 124
Ram Kishan v. Jai Kishan, 33 All., 647	67
Ramkomal v. Bank of Bengal, 5 C. W. N., 91	567
Ramkrishna v. Narayana, 27 M. L. J., 634	121
Ramnandan v. Sheoparsan, 11 C. L. J., 623	504, 121, 129
Ramkumar v. Jagmohan, 33 All., 315, F. B.	146, 69, 70
Ramlal v. Dalganjan, 5 All., 369	165
v. Nilkanth, 20 I. A., 112	143
Ram Lal Mookerjee v. Secretary of State, 7 Cal., 304, P. C.	521, 133
Ram Lochan v. Beni, 36 All., 252	595
Ram Lochan Sircar v. Hogg, 10 W. R., 430	567
Ram Manorata v. Dibrabi, 12 A. L. J. R., 66	511
Ram Munder v. Janki Pershad, 12 C. L. R., 139	517
Ram Narain v. Dwarka Nath, 27 Cal., 264	357
Ram Nirunjun v. Prayag Singh, 8 Cal., 138	125, 126, 405
Rampal v. Balbhaddar, 25 All., 1, P. C.	484, 538, 90, 111, 125
v. Dalthamman, 2 O. C., 35	124
v. Ram Prasad, 17 All., 37	133
Rampe v. Buchler, 203 Ill., 384	290
Ramsaran v. Chatar Singh, 23 All., 465	669, 150
v. Dalip, 6, I. C., 704	82
Ram Sarup v. Gulzar Bannu, 25 A. W. N., 160	44
v. Ram Dei, 29 All., 239	485
v. Rukmin Kuar, 7 All., 884	526, 118

	PAGE.
Ramsbottom v. Gosden, 1 V. & B., 165	345
Ramsden v. Dyson, 1. H. L., 129	532, 658
Ramsgate Victoria Hotel Co. v. Montefiore, 1 Ex., 109	194
Ramsunder v. Kamal Jha, 32 Cal., 741	547, 549
Ramcharan v. Durga, 4 A. W. N., 72	130
Ranchhod v. Lallu, 10 Bom., H. C. R., 95	657, 662, 100, 166
v. Manmohandas, 32 Bom.	421
Ranchod v. Mithabhai, 28 Bom., 428	159
Randall v. Hall, 4 DeG. & Sm., 343	373
v. Morgan, 12 Ves., 67	190
v. Newsom, 2 Q. B. D., 102	224
v. Thompson, 1 Q. B. D., 748	69
Rand Co. v. Burlington, 97 N. W. R., (Iowa) 1096	652
Randfield v. Randfield, 3 DeG. F. & J., 766	562
Ranelaugh v. Hayes, 1 Vern., 189	114
Ranga v. Suba, 4 Bom., 473	68
Ranganayagamal v. Mahali, 4 L. B. R., 356	136
Ranganayakama v. Alwar Seti, 13 Mad., 214	212
Rangappa v. Kamti, 18 M. L. J. R., 309, F. B.	508, 120
Rangasawmy v. Krishna, 1 M. W. N., 838	62, 65, 34
Ranger v. Great Western Railway Company, 5 H. L. C., 72	118
Rangnath v. Govind, 28 Bom., 639	214
Rani Anand Kunwar v. Court of Wards, 6 Cal., 764, P. C.	501, 505
Rani Bhagoti v. Ram Chander, 11 Cal., 386, P. C.	105
Ranjit v. Radha, 34 Cal., 564	260
Rank v. Garvey, 92 N. W., 1025	293
Rankin v. Huskisson, 4 Sim., 13	617, 655
Ran Lakshmi v. Inuganti, 21 Mad., 344, P. C.	432
Raoji v. Shakuji, 34 Bom., 321	122
Raper v. Birbeck, 15 East., 17	263
Raphael v. Thames Valley Ry. Co., 2 Ch. Ap., 147	111, 301, 616
Raritan Co. v. Delaware Co., 18 N. J. Eq., 546	644
Rashbehari Shaw v. Nriya Gopal Nundy, 3 C. L. J., 249	380, 458, 105
Rashbehary v. Bhowani, 34 Cal., 97	590, 144
Rashdall v. Ford, 2 Eq., 750	219
Rashmoni v. Surja Kanta, 32 Cal., 832	409, 54
Rassonada v. Sitharama 2 Mad. H. C. R., 171	54, 58
Rasul v. Pirubhay, 16 Bom. L. R., 288	599, 145
Ratanji v. Edalji, 18 Bom., H. C., O. C., 181	144, 162
Ratansi v. Kalianji, 2 Bom., 148	18-9
v. Umerbai, 9 I. C., 997	157
Rathnasabapathy v. Ramasami, 33 Mad., 452	62, 511, 512, 608, 131
Ratnamasari v. Akilandammal, 26 Mad., 291	511, 534, 121
Rattigan v. Munl. Com., Lahore, 106 P. R., 1888	165
Rau v. Von Zedlitz, 132 Mass., 164	475
Ravji v. Gangadhar, 4 Bom., 29	104
v. Mahadev, 22 Bom., 672	406
Rawlings v. Lambert, 1 J. & H., 458	427
Rawlins v. Wickham, 3 DeG. & J., 304	455
Ray Chowdhry v. Noliniprokash, 18 C. W. N., 289	135
Raymond v. Minton, 1 Ex., 244	458
v. Russell, 143 Mass., 295	648
Raymond Syndicate v. Brown, 124 Fed., 80	94
Rayner v. Preston, 18 Ch. D., 1	284
v. Stone, 2 Eden., 128	165, 63
Raza Ali v. Fida Ali, 4 O. C., 17	70
Razeekour v. Zalim, 29 P. R., 1866	133
Re Adams and Kensington Vestry, 27 Ch., 394	22
Re Adhur Shah, 11 B. L. R., 250	138
Re Andrews, 8 Q. B., 153	148
Re Anstis, 31 Ch. D., 596	89
Re Appleby, 3 Ch., 422	479
Re Arbil & Class's Contract...	453
Re Arnold, 14 Ch. D., 279	407

TABLE OF CASES CITED.

lxxi

	PAGE.
Re Artistic Colour Printing Co., 14 Ch. D., 502	612, 613
Re Bailie's Case, 1 Ch., 110	461
Re Beyfus Contract, 39 Ch. D., 110	97
Re Bignell, 1 Ch., 59	560, 573
Re Birt, 22 Ch. D., 604	561
Re Bole's and British Land Co's. Contract, [1902] 1 Ch., 244	457
Re Bombay Fire Insurance Co., 16 Bom., 398	538, 540, 140
Re Bristol Joint Stock Bank, [1890] 44 Ch., 703	618
Re Briton Life Assn., 32 Ch. D., 503	614
Re Cartright, 41 Ch. D., 532	637
Re Chando Bibi, 26 All., 311	595
Re Chandrakanta, 6 Cal., 445	150
Re Chertsey Market, 6 Price, 279	629, 156
Re Clarke, [1898] 1 Ch., 339	561
Re Coalport China Co., [1895] 2 Ch., 404	91
Re Colvin, 3 Md. Ch., 297	578
Re Corkhill 22 Cal., 717	539
Re Crichton Corp., 2 K. B., 738	531
Re D'Angiban, 15 Ch. D., 228	210, 404
Re Darasha Rustomji, 23 Bom., 465	538
Re Debs, 158 U. S., 564	642
Re Devji, 18 Bom., 581	163
Re Deighton and Harris's Contract, [1898] 1 Ch., 458	452
Re Deptford Creek Bridge Co. v. Bevan, 28 Sol. Jour., 327	175
Re Diggles, 39 Ch. D., 253	22
Re Dunn Brinklow v. Singleton, [1904] 1 Ch., 648	564, 566
Re Dutton and Jesson's Contract, [1898] 1 Ch., 419	197
Re Empress Eng. Co., 16 Ch. D., 128	93
Re Ethel & Mitchells & Butler's Contract, [1901] 1 Ch., 945	447
Re Fawcett and Holmes, 42 Ch. D., 150	454
Re Garnett, 31 Ch. D., 1	379
Re Gieve, 1 Q. B., 794	153
Re Gloag and Miller's Contract, 23 Ch. D., 320	198, 358, 476
Re Gunpat Narain Singh, 1 Cal., 74	163, 615, 144
Re Haedicke and Lipski's Contract, [1901] 2 Ch., 666	228
Re Haji Hassan, 4 Bom. L. R., 773	537, 139
Re Halifax Commer. Bank & Wood, 79 L. T., 536	197
Re Hallet's Estate, Knatchbull v. Hallett, 13 Ch. D., 710	187
Re Handman and Wilcox, [1902] 1 Ch., 599	362
Re Highett and Bird's Contract, [1903] 1 Ch., 287	359
Re Hoare, Hoare v. Owen, [1892] 3 Ch., 94	558
Re Holland, Gregg v. Holland, [1902] 2 Ch., 374	196
Re Jackson and Haden, [1906] 1 Ch., 412	452
Re Jackson and Oakshott, 14 Ch. D., 851	452
Re Jamnabhai, 13 Bom. L. R., 487	550
Re Jogendro Mukhuti, 36 Cal., 271	540, 138
Re Jones, [1893] 2 Ch., 461	56
Re Kesho Prasad, 38 Cal., 553	538, 139, 140, 141
Re Lal Gopal, 13 I. C., 873	71
Re Leney and Sons Ltd., 1 K. B., 79	548
Re Lindsay Forder's Contract, 72 L.T., 832	373
Re Maidstone Palace of Varieties, 2 Ch., 283	562
Re Makins, 1 Ch., 133	560
Re Manilal Hurgovan, 35 Bom., 353	41
Re McGraith, [1893] 1 Ch., 143	648
Re Metropolitan Coal Consumers' Assn., [1892] 3 Ch., 1	456
Re Mutty Lal Ghose, 19 Cal., 192	538, 539, 139
Re Nana, 16 Bom., 729	165
Re Nasibun, 8 Cal., 534	19
Re Newdigate Colliery Co. Ltd., 1 Ch., 468	571
Re Nisbet and Pott's Contract, [1906] 1 Ch., 386	389, 494, 410
Re Nisith Sen, 39 Cal., 754	138
Re Nursey Spinning and Weaving Co., Ltd., 5 Bom., 92	227
Re Omar, 11 W. R., 229	35

	PAGE.
Re Pacaya Rubber Co., 1 Ch., 542 ...	453
Re Parkin, [1892] 3 Ch., 510 ...	86
Re Puckett and Smith's Contract, [1902] 2 Ch., 258 ...	219
Re Purna Chandra Dutt, 12 C. W. N., 873 ...	538, 540
Re Prytherch, 42 Ch. D., 590 ...	549, 554
Re Rajendra, 19 Cal., 195 ...	139
Re Rasul, 18 C. W. N., 430 ...	538, 139
Re Reis, 2 K. B., 769 ...	286
Re Riley to Streatfield, 34 Ch. D., 388 ...	422
Re Riviere's Trade Mark, 26 Ch. D., 48 ...	646
Re Romesh Sen, 39 Cal., 598 ...	140
Re Rotherham Alum Co., 25 Ch. D., 103 ...	93
Re Roundwood Colliery Co., [1897] 1 Ch., 373 ...	585
Re Rudra Narain Rai, 28 Cal., 479 ...	538, 139
Re Rustam, 3 Bom. L. R., 653 ...	538
Re Scott and Alvares' Contract, [1895] 2 Ch., 603, 615 ...	32, 187, 359, 83
Re Scottish Petroleum Co., 23 Ch. D., 429 ...	461
Re Shah Callander, 1 Ind. Jur., N. S., 263 ...	138
Re Sharafly, 34 Bom., 649 ...	538, 138
Re Shepherd v. Croft, 1 Ch., 521 ...	454
Re Sheppard, 43 Ch. D., 131 ...	555
Re Sivaji Rajah Sahib, 29 M. L. J., 209 ...	551
Re Skirrels, 2 Hog., 192 ...	575
Re Stack, 13 Ir. Ch., 213 ...	587
Re St. George's Estate, 19 L. R., Ir., 566 ...	580
Re Swan's Estate, Ir. R., 4 Eq., 207 ...	581
Re Tarabai, 7 Bom. L. R., 161 ...	538, 539, 139
Re Terry and White, 32 Ch. D., 14 ...	180, 183
Re Tewkesbury Gas Co., 2 Ch., 279 ...	554
Re Thackvray and Young, 40 Ch. D., 34 ...	361
Re Thomas' Case, 5 Manson, 282 ...	461
Re Tilak, 26 Bom., 785 ...	165
Re Tirathdas, 19 I. C., 920 ...	566
Re Toolsee Dass Seal, 7 W. R., 228 ...	137, 138
Re Turner and Skelton, 13 Ch. D., 130 ...	183
Re Vijiaraghavalu, 26 M. L. J., 510 ...	537, 138
Re Wells, 45 Ch. D., 569 ...	580
Re Weston & Thomas, 76 L. J. Ch., 179 ...	452
Re Wheateroft, 6 Ch. D., 97 ...	647
Re Williams, Williams v. Williams, [1897] 2 Ch. 12, 18 ...	84, 384, 20
Read v. Anderson, 13 Q. B. D., 779 ...	153
v. Brown, 22 Q. B. D., 128 ...	395
Ready v. Noakes, 29 N. J., Eq., 497 ...	318
Rearich v. Swinehart, 11 Pa. St., 223 ...	245
Rebati v. Ahmad, 9 C. L. J., 50 ...	54
Rector of St. David's v. Wood, 41 Am. St. Rep., 860 ...	91
Reddaway v. Banham, [1896] A. C., 221 ...	217
v. Schroder Smidt, 8 C. W. N., 151 ...	596
v. Schroder Smidt, 9 C. W. N., 281 ...	645
Reddington, in re, 1 Moll., 256 ...	571
Rede v. Oakes, 4 DeG. J. & S., 505 ...	361, 455
Redgrave v. Hurd, 20 Ch. D., 1 ...	232, 234, 236, 238, 239, 243, 95
Redin v. Branham, 43 Minn., 283 ...	495
Reed v. Reed, 68 S. W., 385 ...	157
Rees v. Dacre, 9 Ves., 332 (cited) ...	98
v. De Barnardy, [1896] 2 Ch., 437 ...	457
Reese River Silver Mining Co. v. Smith, 4 H. L., 79 ...	232
Reeve v. Dennett, 145 Mass., 23 ...	233
Reeves v. Greenwich Tanning Co., 2 H. & M., 54 ...	372
Ref. under Stamp Act, 7 Mad., 349, F. B. ...	23
Reg. v. Rahimat, 1 Bom., 147 ...	21
v. E. I. Ry. Co., Ind. Jur., N. S., 244 ...	137, 139
Regent's Canal Co. v. Ware, 23 Beav., 576 ...	267
Reid v. Explosives Co., 19 Q. B. D., 264 ...	567

	PAGE.
Reilley v. Roberts, 34 N. J., Eq., 299	114
Remer v. Mackay, 35 Fed., 86	482
Renals v. Cowlishaw, 9 Ch. D., 125	391
Renard v. Fiedler, 3 Duer., 318	340
Rennyson v. Rozell, 106 Pa., 407	294, 313
Renshaw v. Gans, 7 Pa. St., 117	247
Revell v. Hussey, 2 Ball & Beat., 280	279, 300
Rewa v. Vrijvalabh, 6 Bom. L. R., 41	657, 160
Rex v. Merchant Taylors Co., 2 B. & Ad., 115	544
Rey v. Leconturier, [1908] 2 Ch., 715	157
Reynell v. Sprye, 1 DeG. M. & G., 660	203, 227, 236, 237, 239, 466
Reynolds v. Davis, 17 L. R. A., N. S., 162	649
Reynolds v. Waller's Heir, 1 Wash. Va., 745	456
Rhodes v. Bate, [1866] 1 Ch., 252	202
v. Rhodes, 3 Sandf. Ch., 279	253
Rice v. D'Arville, 162 Mass., 559	371
v. Gibbs 40 Neb., 264	398
Rich v. Gale, 24 L. T., N. S., 745	379
v. Jackson, 4 Bro. Ch., 514	247
Richard's Appeal, 57 Pa., 105	602, 665
Richards v. Dower, 64 Calif., 62	601, 634
Richardson v. Mallish, 2 Bing., 252	139-40
v. Silvester, 9 Q. B., 34	219
v. Smith, 5 Ch., 648	165, 49
v. Ward, 6 Madd., 266	580
Richmond v. Dubuque etc., R. R. Co., 26 Iowa, 191	154
v. Dubuque Railroad, 33 Iowa, 428	159
Ricket v. Metropolitan Ry. Co., 2 H. L., 175	657
Rickets v. Bell, 1 DeG. & Sm., 335	198, 245
Rider v. Powell, 28 N. Y., 310	442
Ridgway v. Wharton, 6 H. L. C., 238	194, 196, 380
Ridout v. Fowler, [1904] 2 Ch., 93	561, 585
Riegel v. American Life Insurance Co., 153 Pa., St., 134	462
Riesz's Appeal, 73 Pa., 485	128, 181
Rigby v. Connol, 14 Ch. D., 482	162, 210
v. Great Western Ry. Co., 15 L. J., Ch., 266	357, 616
Rigdon v. Shirk, 127 Ill., 412	491
Ripon v. Hobart, 3 M. & K., 169	663
Rivier's Trade Mark, re, 26 Ch. D., 48	646
Rob v. Butterwick, 2 Pr., 190	434
Robb v. Green, [1895] 2 Q. B., 315	158
v. Mann, 1 Pa. St., 300	357
Roberson v. Rochester Folding Box Co., 59 L. R. A., 478	647
Roberts v. Berry, 3 DeG. M. & G., 284	271
v. Eberhardt, Kay, 148	552
Robertson v. Skelton, 12 Beav., 260	279, 423
Robinson v. Davison, 6 Ex., 269	277
v. Harman, 1 Ex., 850	420
v. Lord Byron, 1 Bro. C. C., 588	599
v. Page, 3 Russ., 114	248
v. Pickering, 16 Ch. D., 636	591
v. Ridley, 6 Madd., 2	425
Robinson & Co. v. Hener, [1898] 2 Ch., 451	624
Robson v. Drummond, 2 B. & Ad., 303	398
Rochdale Canal Co. v. King, 2 Sim., N. S., 78	607, 668
Rochefoucauld v. Bonstead, [1897] 1 Ch., 206	256
Rodger v. Ashutosh, 6 C. W. N., 829	562, 564
Rod Haldane v. Harvey, 4 Burr., 2487	50
Roehm v. Horst, 178 U. S., 1	451
Roffey v. Shallcross, (Shatcross) 4 Madd., 227	175, 356, 363
Rogers v. Challis, 27 Beav., 175	157, 158
v. Hosegood, [1900] 2 Ch., 394	386, 388
v. Humphrey, 4 A. & E., 299	403
v. Ingham, 3 Ch. D., 351	338, 435

	PAGE.
Rogers v. Nowill, 3 DeG. M. & G., 614 ...	658
v. Spence, 13 M. & W., 581 ...	58
Rogers Manufacturing Co. v. Rogers, 58 Conn., 356 ...	626
Roghobur v. Bhekdharee, 11 W. R., 455 ...	111
Rohimunnissa v. Mirza 10 C. L. R., 103... ..	59, 61
Roimoni v. Mathura, 39 Cal., 1016 ...	85, 96
Rolfe v. Rolfe, 15 Sim., 88 ...	623
Rolin v. Stewards, 14 C. B., 595 ...	158
Rolls v. Miller, 25 Ch. D., 206 ...	618
Rolt v. Lord Somerville, 2 Eq., C. Abr., 759 ...	653
v. White, DeG. J. & S., 360 ...	233
Romans v. Langevin, 34 Minn., 312 ...	196
Rooke v. Lord Kinsington, 2 K. & J., 753 ...	440, 487
Rooke's Case, 5 Rep., 996 ...	31
Roots v. Shelling, 48 L. T., 216 ...	232
Ropes v. Upton, 125 Mass., 253 ...	116
Rose v. Calland, 5 Ves., 186 ...	360
v. Watson, 10 H. L. C., 672 ...	372, 425
Roshan v. Bhanpirtala, 2 C. P. L. R., 75... ..	163
Roshanulla v. Hazir, 181. C., 727 ...	31
Rosher v. Williams, 20 Eq., 210 ...	384
Ross v. Butler, 19 N. J., Eq., 294 ...	634
v. Butler, 4 C. E. Gr., 302 ...	639
v. Purse, 17 Colo., 24 ...	292
v. Union Pacific Ry. Co., 1 Woolw., 26 ...	108, 167
Rossiter v. Miller, [1878] 3 A. C., 1124 ...	194, 196
Rothery v. N. Y. Rubber Co., 90 N. Y., 30 ...	652
Rourke v. McLaughlin, 38 Calif., 196 ...	172
Roushan Bibee v. Hurray Kristo, 8 Cal., 926 ...	266
Rousillon v. Rousillon, 14 Ch. D., 351 ...	150
Roussac v. Thacker, 1 Hyde, 9 ...	645
Routledge v. Grant, 4 Bing., 653 ...	195
Routh v. Webster, 10 Beav., 561 ...	646, 158
Rowe v. Wood, 2 J. and W., 553 ...	555
Rowell v. Satchell, [1903] 2 Ch., 212. ...	392
Rowland v. Mitchell, 75 L. T., 65 ...	606
Roy v. Duke of Beaufort, 2 Atk., 190 ...	117
Royal Baking Powder Co. v. Royal, 122 Fed., 337 ...	646
Royal Bristol Building Society v. Bomash, 35 Ch. D., 390 ...	417
Royal British Bank v. Turquand, 5 E. & B., 248 ...	206
Royal Warrant Holders Assn. v. Edward D. & B. Ltd., 1 Ch., 10 ...	646
Rudd v. Lacelles, [1900] 1 Ch., 815 ...	177, 178, 179
Rudisill v. Whitener, 15 L. R. A., N. S., 81 ...	74
Rudrappa v. Narasingrao, 29 Bom., 213 ...	62, 67, 31, 34, 37
Rudra Perakash v. Krishna Mohun, 14 Cal., 241 ...	290
Ruffles v. Wichelhaus, 2 H. & C., 906 ...	133
Rugg v. Minett, 11 East., 210 ...	278
Rugunath v. Rahiman, [1912] P. R. No. 23 ...	131
Ruhumutoallah v. Shurutoolah, 10 W. R., 51, F. B. ...	43
Rummens v. Robins, 3 DeG. J. & S., 88 ...	196
Runjeet v. Goburdhun, 20 W. R., 25, P. C. ...	33
Rup v. Fateh, 8 A. L. J. R., 821 ...	121-2
Rup Narain v. Badri, 12 O. C., 225 ...	126
v. Gopal, 6 A. L. J. R., 567 ...	120
Rushbrook v. O'Sullivan, 1 Ir. R., 232 ...	291
Rushmer v. Polsue, [1907] A. C., 121 ...	640
Rushworth's Case, 2 Freem., 13 ...	22
Russell v. Merchants Bank, 47 Minn., 286 ...	638
v. Watts, 25 Ch. D., 559 ...	607
Rust v. Conrad, 47 Mich., 449 ...	331, 350, 352
Rustom v. Kennedy, 26 Bom., 396 ...	537, 538, 539, 139
Rutland Marble Co. v. Ripley, 10 Wall., 339 ...	168
Ryall v. Rowles, 2 Wh. & T., 141 ...	142
Ryan v. Mutual T. W. C. Assn., [1893] 1 Ch., 116 ...	106, 109, 168, 52

TABLE OF CASES CITED.

LXXV

	PAGE.
Ryder v. Bentham, 1 Ves. Sr., 543	599
Ryno v. Darby, 20 N. J., Eq., 231	267

S.

Sabapathi Chetti v. Subraya Chetti, 3 Mad., 250	62, 34
Sabt v. Bashir, 5 A. W. N., 194	117
Sachit v. Budhua, 8 All., 429	132
Sackville-West v. Viscount Holmesdale, 4 H. L., 543	385
Sadabarat v. Foolbash, 3 B. L. R., 31, F. B.	201
Sadagopa. v. Mackenzie, 15 Mad., 79	151
Sadashiv v. Dhakubai, 5 Bom., 450	105, 107, 109
Sadhu v. Ram, 16 Bom., 608	129
v. Sarbamangala, 8 I. C., 65	150
Sadut Ali v. Abdool Gunny, 11 B. L. R., 165	488
Safdar v. Akbar, 5 I. C., 497	113
Safden v. Shankar, 13 P. R., 1903	37
Safford v. Grout, 120 Mass., 20	239
Safiur Rahman v. Maharamunissa Bibi, 24 Cal., 832	356, 412, 52, 76
Sagarjirao v. Smith, 20 Bom., 736	524, 121
Sahee v. Mahomed, 6 N. W. P. H. C., 268	109
Sahib v. Achhru, 5 I. C., 587	120
v. Lajpat, [1912] P. R. No. 12 (cir)	128
Sahiban v. Madho Lal, 4 A. L. J., 198	463
Sahibrahio v. Jumromal, 12 I. C., 190	61, 34
Sailendra v. Karali, 2 C. L. J., 534	530, 128
Sainter v. Ferguson, 1 Mac. & G., 286	81
Sajad Husain v. Wazir Ali, 34 Mad., 455, P. C.	214
Sajawal v. Sodagar, [1913] P. R., No. 2	117
Sajjad v. Baker, 11 O. C., 93	449
Sakarlal v. Parvatibai, 26 Bom., 283	669, 150
Sakharam v. Secy. of State, 28 Bom., 332	511, 512, 129
Sakhyahani v. Bhavani, 27 Mad., 588	532
Salamat v. Tulsi, 22 I. C., 517	293, 51, 53, 64
Sale v. Lambert, 18 Eq. 1	196
Sale v. Moore, 1 Sim., 534	22
Saligram v. Jhuna Kuar, 4 All., 546	147, 60, 70
Salisbury v. Hatcher, 2 Y. & C., 65	352
Salomon v. Hertz, 40 N. J., Eq., 400	591, 648
Salvin v. North Brancepeth Coal Co., 9 Ch. Ap., 705	663
Salway v. Salway, 2 R. & M., 215	567
Samarandra v. Birendra, 35 Cal., 777, F. B.	500, 522, 119
Sambayya v. Gangayya, 13 Mad., 308	26
Sambhasheo v. Mahadeo, 10 N. L. R. 188, 27 I. C., 506	31
Saminatha v. Rangathammal, 12 Mad., 285	124
Samiya v. Minammal, 23 Mad., 490	113, 122
Sample v. Bridgforth, 72 Miss., 293	464
Sampson v. Shaer, 101 Mas., 145	467
v. Smith, 8 Sim., 272	157
Samsuddin v. Abdul Husain, 31 Bom., 166	125, 499
Samuda v. Lawford, 4 Giffard, 42	115, 418
Sanders v. Rodway, [1852] 16 Beav., 207	120
Sanderson v. Cockermouth Ry. Co., 11 Beav., 497	111
v. Graves, 10 Ex., 234	248
Sandford v. Washburn, 2 Root, 499	346
Sangappa v. Shivbasawa, 24 Bom., 38	557, 583, 135
Sankar v. Bejoy, 13 C. W. N., 501	77
Sankara v. Secy. of State, 28 Mad., 72	160
Sankaralingam v. Ralli, 29 Mad., 500n	168
Sankarappa v. Secy. of State, 20 M. L. J. R., 977	123
Sankaravadelu v. Secy. of State, 28 Mad., 72	636, 657, 669
Sankata v. Jagat, 2 O. C., 24	45
Sant v. Husaini, 60 P. R., 1882	105
v. Ram, [1910] P. R., No. 36	549, 551

	PAGE.
Sant Ram v. Ganga Ram, 4 P. L. R., 122	123
Santa Clara Valley M. L. Co. v. Hayes, 76 Calif., 387	311
Santaya v. Narayan, 8 Bom., 182	91
Santkumar v. Deo Saran, 8 All., 365	530, 119, 121, 127
Sanwal v. Narpal, 11 O. C., 151	601, 145
Sarabject v. Gourree Pershad, 7 W. R., 269	104
Sarabjit v. Madho, 4 O. C., 180	125
Sarala Dassi v. Bhuvan Neogi, Unrep., Cited, Woodroffe, Rec., 90	563
Sarala Sundari v. Saroda Prosad, 2 C. L. J., 602	559
Sarasuti v. Mannu, 2 All., 134	131
Saraswati v. Dhanpat, 9 Cal., 431	33
Sarat v. Apurva, 15 C. W. N., 925	562, 563
v. Bhuban, 3 C. W. N., 182	47
v. Bhupendra, 25 Cal., 103	400
Sarbesh v. Hari, 14 C. W. N., 451	208, 209, 66, 111
Sardar v. Mehr, [1913] 82 P. R.	122
Sardarsingji, v. Ganpatsingji, 14 Bom., 395	519, 531
" " 17 Bom., 56	149
Sargeant v. Read, 1 Ch. D., 600	584
Sarju v. Gaya, 10 I. C., 11	123
Sarju Prasad v. Wazir Ali, 23 All., 119	126, 54
Sarnath v. Butler, 4 A. L. J. R., 11	157
Sarter v. Gordon, 2 Hill Ch., 121	89
Sarwarjan v. Fakhruddin, 34 Cal., 163, F. B.	200, 408, 71
Sashannah v. Ramasamy, 4 Mad., H. C. R., 7	139
Sassoon v. Musaji, 9 I. C., 485	559
v. Tokersey, 28 Bom., 616	153
Sat Behari v. Sat, [1913] 65 P. R.	531
Sathianama v. Saravanabagi, 18 Mad., 266	70, 38
Satish v. Jnanada, 1 I. C., 364	66
v. Satya, 14 C. W. N., 576	514, 129
Satoor v. Satoor, 2 Mad. H. C. R., 8	545
Satterthwait v. Marshall, 4 Del. Ch., 337	170
Satya v. Keshabati, 18 C. W. N., 537	565, 135
Satya Kirpal v. Satya Bhupal, 18 C. W. N., 546	562, 563
Satyendra v. Anil, 14 C. W. R., 65	255
Saull v. Browne, 10 Ch. Ap., 64	613, 614
Saundby v. City of London Water Comrs., 75 L. J., P. C.	657
Saunders v. Cramer, 3 Dr. and W., 187	190
v. Smith, 3 My. and Cr., 711	645
Saunderson v. Cockermouth and Worthington Ry. Co., 11 Beav., 497	292
Savile v. Savile, 1 P. Wms., 745	316
Saville v. Tancred, 1 Ves. Sr., 101	73
Sarvanji v. Chinki, 5 N. L. R., 33	51
Sayaji v. Ramaji, 5 Bom., 446	66 31, 35
Sayers v. Collier, 28 Ch. D., 103	372, 393, 415
Scaramanga v. Stamp, 5 C. P. D., 295	148
Scarf v. Jardine, 7 A. C., 345	265
Schmaltz v. Avery, 16 Q. B., 655	400
Schneider v. Heath, 3 Camp., 506	456
School Dt. v. Dauchy, 68 Am. Dec., 371	275
Schuyler v. Curtis, 64 Hun., 594	647
Scott v. Alvarez, 2 Ch. D., 732	182
v. Avery, 5 H. L. C., 811	148
v. Corporation of Liverpool, 3 DeG. & J., 334	268
v. Coulson, 2 Ch. D., 249	478
v. Hanson, 1 Rus. & M., 128	175, 176
v. Hanson, 1 Sim., 13	219, 237
v. Onderdonk, 67 Am. Dec., 106	481
v. Rayment, 7 Eq., 112	170, 65
Scottish N. E. Ry. Co. v. Stewart, 3 Me. Q., 382	268
Scottish Petroleum Co., re, 23 Ch. D., 429	461
Seager v. Hukmakessa, 24 Bom., 458	69, 40
Seagram v. Tuck, 18 Ch. D., 296	575

	PAGE.
Searle <i>v.</i> Choat, 25 Ch. D., 723 ...	585, 587
<i>v.</i> Smales, 3 W. R., (Eng.) 437 ...	551
Sears <i>v.</i> Grand Lodge, 163 N. Y., 374 ...	439
<i>v.</i> Leland, 145 Mass., 277 ...	463
Seaton <i>v.</i> Mapp., 2 Coll., 556... ..	271, 272
Seawell <i>v.</i> Webster, 29 L. J., Ch., 73 ...	364, 366
Sebag <i>v.</i> Abitbol, 4 M. & S., 462 ...	71
Secombe <i>v.</i> Steele, 20 Howard, 94 ...	374
Secretary of State <i>v.</i> Gajanam, 35 Bom., 362 ...	149
<i>v.</i> Jethabhai Kalidas, 17 Bom., 293 ...	494, 509, 125
<i>v.</i> Kale Khan, 23 M. L. J. R., 181 ...	149
<i>v.</i> Ma Dwe, 24 I. C., 911 ...	45
Seenii Chettiar <i>v.</i> Santhanathan, 20 Mad., 58 ...	605, 168
Setharam <i>v.</i> Gopal, 1 M. L. W., 166 ...	160
Seetul <i>v.</i> Indro, 25 W. R., 180 ...	31
Sellers <i>v.</i> Greer, (Ill.) 4 L. R. A., 589 ...	359
Sellors <i>v.</i> Local Board, 14 Q. B. D., 928 ...	652
Sells <i>v.</i> Sells, 1 Dr. & Sm., 42 ...	440, 478
Sena <i>v.</i> United States, 189 U. S., 233 ...	379
Senior <i>v.</i> Pawson, 3 Eq., 330 ...	657, 662
Seshadri <i>v.</i> Arayar, 7 I. C., 558 ...	149
Sethuram <i>v.</i> Gopal, 23 I. C., 785 ...	155
Sethurayar <i>v.</i> Shanmugam, 21 Mad., 353 ...	511, 612, 164
Seton <i>v.</i> Slade, 7 Ves., 269 ...	271, 278, 47, 48
Sevay <i>v.</i> Drake, 62 N. H., 893 ...	250
Severn <i>v.</i> Wye Co., [1896] 1 Ch., 559 ...	629
Seymour <i>v.</i> Delany, 6 Johns. Ch., 622, Revd. in 3 Cowen., 445 ...	316
Shackleton <i>v.</i> Sutcliffe, 1 DeG. & Sm., 609 ...	176, 236
Shade <i>v.</i> Olroyd, 18 Pac., 198 ...	309
Shadi <i>v.</i> Anup Singh, 12 All., 436, F. B....	549, 596, 654, 155, 159
Shadi Ram <i>v.</i> Abdul, 1 A. L. J. R., 527 ...	600
Shah Alum <i>v.</i> Mahmud, 2 P. R., 1889 ...	121
Shahbaz Khan <i>v.</i> Umrao Puri, 5 A. L. J. R., 147 ...	506, 666
Shah Muhammad <i>v.</i> Kashi Dass, 7 All., 199 ...	506, 124-5
Shakel <i>v.</i> Duke of Marlborough, 4 Mad., 463 ...	558
Sham <i>v.</i> Amarendra, 23 Cal., 460 ...	113
<i>v.</i> Ram, 5 C. W. N., 865 ...	135
Shama Charan <i>v.</i> Babu Lal, 24 A. W. N., 70 ...	657, 161
Shama Churn Roy <i>v.</i> Abdul Kabear, 3 C. W. N., 158 ...	54
Shambati Koeri <i>v.</i> Jago Bibi, 29 Cal., 749 ...	214
Sham Chand <i>v.</i> Bhaya Ram, 5 C. W. N., 365 ...	548
Shamnugger Jute Factory Co. <i>v.</i> Ram Narain, 14 Cal., 189 ...	205, 604, 654, 664, 67, 156, 160
Sham Sundar <i>v.</i> Achhan Kunwar, 21 All., 71 P. C. ...	200, 500
Shamuldhun <i>v.</i> Lakhimani, 13 C. L. J., 459 ...	574, 584
Shanker <i>v.</i> Dulo, [1913] 40 P. L. R. ...	415
<i>v.</i> Mohanlal, 11 Bom., 704 ...	69, 40
<i>v.</i> Sadashiv, 7 Bom. L. R., 926... ..	548
<i>v.</i> Sarup, 34 All., 140... ..	111
Shan Maun <i>v.</i> Madras Building Co., 15 Mad., 268 ...	409
Shannon <i>v.</i> Bradstreet, 1 Sch. & Lef., 52 ...	402, 411, 92
Shanto <i>v.</i> Nain Sukh, 23 All., 355 ...	453
Shanton <i>v.</i> Miller, 58 N. Y., 192 ...	291
Shappirio <i>v.</i> Goldberg, 192 U. S., 232 ...	472
Sharfudin <i>v.</i> Govind, 27 Bom., 452 ...	91
Sharon <i>v.</i> Hill, 20 Fed., 1 ...	478
<i>v.</i> Tucker, 144 U. S., 533 ...	489, 494, 529
Sharp <i>v.</i> Adcock, 4 Russ., 374 ...	360
<i>v.</i> Carter, 3 P. Wms., 375 ...	567
<i>v.</i> Taylor, 2 Ph., 801 ...	467
Shaw <i>v.</i> Fisher, 2 DeG. & Sm., 11 ...	90, 91
<i>v.</i> Fisher, 5 DeG. M. & G., 596 ...	102
<i>v.</i> Foster, 5 H. L., 321... ..	284
<i>v.</i> Jersey, 4 C. P. D., 359 ...	600

	PAGE.
Shaw v. Livermore, (Iowa) 2 Green, 338	173
v. Rhodes, 2 Russ., 539	574, 575
v. Thackray, 1 Sm. & G., 537	298
Sheard v. Venables, 36 L. J. Ch., 922	223
Sheffield v. Lord Mulgrave, 2 Ves., 526	360
Sheffield Gas Consumers Co. v. Harrison, 17 Beav., 294	170
Sheffield Nickel Co. v. Unwin, 2 Q. B. D., 214	472
Selburne v. Inchiquin, 1 Bro. C. C., 350, 388	247, 374, 443, 444
Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch.,	602, 609, 461
Shelley v. Westbrook, [1817] Jac., 266n	287, 648
Sheo v. Chandrabhal, 10 I. C., 181	153
v. Injore, 21 W. R., 438...	61
v. Shunkur, 16 W. R., 190	124
Sheoamber v. Deodat, 9 All., 168	147, 69, 70
Sheobaran v. Bhairo Prasad, 7 All., 880, F. B.	523
Sheoharat v. Bhagwati, 17 All., 523	120
Sheodat v. Sheo Shankar Singh, 27 All., 53	147, 69
Sheodin v. Godhi, 4 N. L. R., 14	128-9
Sheokumar v. Narain Das, 24 All., 501	66, 36
Sheo Lal v. Goor Narain, 7 I. C., 218	406, 55
Sheomurat v. Ram, 8 A. W. N., 178	120
Sheo Narain v. Beni Madho, 23 All., 285	261
v. Bishhunath, 7 O. C., 369	261, 99
v. Damodar, 1 A. L. J. R., 330	502, 530
v. Mata Prasad, 27 All., 73	154
Sheonath v. Ali Hossain, 1 A. L. J. R., 118	654, 159, 161
v. Monohar, 6 O. C., 324	119
Sheo Niwaj v. Gopal, 1 A. W. N., 22	58
Sheopalsing v. Bundoo Kuar, 8. O. C., 81	503, 120
Sheopher v. Deonarain, 10 A. L. J. R., 413	123
Sheo Prasad v. Udai, 2 All., 718	260, 430, 55
Sheoraji v. Ramjas, 33 All., 430	502, 123
Sheoratan v. Lappu, 1 A. W. N., 160	119
Sheo Singh Rai v. Dakho, 1 All., 688, P. C.	488, 111, 119
Shepherd v. Walker, 20 Eq., 659	380
Shepherd v. Croft, 1 Ch., 521...	234
v. Kain, 5 Barn., and Al., 240...	456
v. Trustees of Bombay Port, 1 Bom., 132	542, 630, 139, 162, 168
Sheppard, re, 43 Ch. D., 131...	555
v. Doolan, 3 Dr. & War., 8	362
Sher Singh v. Devi Dayal, [1913] 302 P. L. R.	496
Shewak v. Mohammad, 3 B. L. R., A. C., 196	127
Shiamlal v. Chhakilal, 22 All., 220	154
Shib v. Abdool, 3 W. R., 103	43
v. Hira, 8 A. W. N., 133	69
v. Hira, 1 All., 622	112
v. Krishna, 9 I. C., 576	613, 148
v. Niranjan, [1912] 226 P. L. R.	122
Shibbomol v. Lachman Das, 23 All., 165	153
Shib Charan v. Raghu Nath, 17 All., 174	517, 532
Shib Dial v. Hira Nand, 100 P. R., 1890	43, 79
Shib Lal v. Collector of Bareilly, 16 All., 423	100, 258, 301, 42, 72, 75
Shib Saran v. Ameri, 20 A. W. N., 191	660, 160
Shi Gopal v. Aisha, 3 A. L. J. R., 775	51
Shirajdee Pramanick v. Emam Buksh, 13 W. R., 104	65, 35, 36
Shirley v. Stratton, 1 Bro. Ch., 440	220, 73
Shiro v. Govind, 2 Cal., 418	128
Shiva v. Soma, 7 Bom., 341	138
Shivram Chintaman v. Jivn, 13 Bom., 34	404, 125
Shore v. Shore, 4 Dr., 501	573
v. Wilson, 9 Cl. & F., 355	197
Shornomoyee v. Watson & Co., 20 W. R., 211, P. C.	29
Shotts Co. v. Inglis, [1882] 7 A. C., 518	640
Shrewsbury v. North S. Ry. Co., 1 Eq., 593, 614	79, 93

	PAGE.
Shrewsbury Co. v. N. W. Ry. Co., 6 H. L. C., 113 ...	312, 628
Shrewsbury Ry. Co. v. S. & B. Ry. Co., 20 L. J. Ch., 574 ...	597
Shrinivas v. Balwant, 37 Bom., 513 ...	534
v. Hanmant, 24 Bom., 260, F. B. ...	534
Shrivaktuba v. Agarsingji, 34 Bom., 676 ...	488, 491, 118, 124
Shumshare Ali v. Lutafut Kureem, 18 W. R., 504 ...	159
Shuumugam v. Moidin, 8 Mad., 229 ...	583
Shyama v. Mahomed, 13 C. W. N., 835 ...	32
Sia Ram Das v. Mohabir Das, 27 Cal., 282 ...	547, 548, 125
Sichel v. Mosenthal, 30 Beav., 371 ...	157
Sidheswari v. Abhoyeswari, 15 Cal., 823 ...	547, 550, 557, 134
Sikandar v. Bahadur, 39 P. R., 1876 ...	121
Sikher v. Dulputty, 5 Cal., 363 ...	113
Siliman v. Bontala, 25 M. L. J. R., 125 ...	129
Simmonds v. Swaine, 1 Tant., 549 ...	366
Simmons Creek Co. v. Doran, 142 U. S. ...	443
Simonds v. Hallet, 24 Ch. D., 346 ...	596
Simpson v. Hughes, 66 L. J. Ch., 334 ...	194
v. Lord Howden, 3 My & C., 97 ...	480, 106
v. Westminster Palace Hotel Co., 8 H. L. C., 712 ...	541
Sims v. Ferrill, 45 Ga., 585 ...	219
v. Marryat, 17 Q. B., 281 ...	123
Sinaya Pillai v. Munisami Ayyar, 22 Mad., 289 ...	471, 169
Singam v. Darupadi, 31 Mad., 153 ...	501
Singaran Coal Syndicate v. Indra Nath Chatterjee, 10 C. W. N., 173 ...	597
Singrappa v. Talari, 28 Mad., 349 ...	112
Singer v. Wilson, [1873] 3 A. C., 376 ...	646
Singer Mfg. Co. v. Loog, 18 Ch. D., 395... ..	645
Singer Sewing Machine Co. v. Union Buttonhole Co., 1 Holmes 253	311, 352, 625, 627, 645
Sini v. Sangili, 1 Mad., 65	124
Sircar v. Baraboni Coal Concern, 16 C. W. N., 289 ...	63, 170
Sirdar Kuar v. Chandrawati, 4 All., 330... ..	266
Sita v. Jagan, 17 I. C., 469	31
v. Jagan, 15 O. C., 317	32
Sital v. Jagdat, 7 N.-W. P. H. C., 254... ..	121
Sital Prasad v. Parbhu Lal, 10 All., 535... ..	213, 94, 105, 112
Sitaram v. Aheeree Heerahnee, 11 B. L. R., 129 ...	137
v. Harihar, 12 Bom. L. R., 910	125
Sitla v. Thakurdin, 11 A. L. J., 456	66
Sito v. Christian, 17 C. W. N., 318	143
Sivagnana v. Periasami, 1 Mad., 312, P. C. ...	29
Sivagnanathammal v. Arunuchalam, 21 M. L. J. R., 821 ...	546, 547, 548, 557
Sivaji v. Aiswari, 29 I. C., 485	135
Sivasami v. Sivugan, 25 Mad., 389	130
Siva Subramanya v. Secretary of State, 9 Mad., 285 ...	62, 32, 33
Sivaraman v. Muthaya, 12 Mad., 241	145, 168
Sivithri v. Vasudevan, 3 Mad., 215	106
Skeate v. Beale, 11 Adol. & E., 990	213
Skelton v. Cole, 1 DeG. & J., 587	190
Skinner v. Morris Canal and Banking Co., 27 N. J., Eq., 364 ...	83
v. Shanker Lal, 5 A. L. J. R., 638	583
Sikinner's Co. v. Irish Society, 1 M. & C., 162	547
Skip v. Harwood, 3 Atk., 564	38, 549, 585
Slaughter's Admr. v. Gerson, 13 Wall., 379	235
Sloane v. Clauss, 59 N. E. R., 884	89
Sloman v. Walter, 1 Bro. Ch., 418	118
Sloper v. Fish, 2 V. & B., 145	360
Smallman v. Onions, 3 Bro. C. C. 621	610, 638
Smart v. Flood, 49 L. T., 467	585
Smidt v. Reddaway, 32 Cal., 401	646, 157
Smith v. Aykewell, 3 Atk., 566	593
v. Baker, 1 Y. & C. Ch., 223	126
v. Beatty, 2 Ired. Eq., 456	455

	PAGE.
Smith <i>v.</i> Brown, 48 L. J. Ch., 694	635
<i>v.</i> Butler, 1 Q. B., 694	268, 425
<i>v.</i> Chadwick, 20 Ch. D., 27; 9 A. C., 187	218, 238, 425, 95
<i>v.</i> Clarke, 12 Ves., 477	233, 240, 94
<i>v.</i> Colbourne, 2 Ch., 538	238
<i>v.</i> Day, 21 Ch. D., 421	601
<i>v.</i> „ 13 Ch. D., 651	600
<i>v.</i> Death, 5 Mad., 371	362
<i>v.</i> Eliffe, 20 Eq., 666	450
<i>v.</i> Garland, 2 Mer., 123	384
<i>v.</i> Greenlee, 2 Dev., 126	240
<i>v.</i> Hughes, 6 Q. B., 607	11, 133, 223, 228
<i>v.</i> Harrison, 26 L. J. Ch., 412	296, 73
<i>v.</i> Jeyes, 4 Beav., 503	552
<i>v.</i> Kay, 7 H. L. C., 750	213, 231, 239, 244, 22
<i>v.</i> Land & House Property Corp., 28 Ch. D., 7	219, 220, 238, 454
<i>v.</i> Lyster, 4 Beav., 227	578
<i>v.</i> Macnally, 1 Ch., 816	615
<i>v.</i> Nichols, 21 Wallace, 112	644
<i>v.</i> Osborne, 6 H. L. C., 375	126
<i>v.</i> Oxenden, 1 Ch. Ca., 25	29
<i>v.</i> Peters, 20 Eq., 511	165, 596, 49, 63
<i>v.</i> Phillips, 1 Ke., 694	92
<i>v.</i> Richards, 13 Pet., 26	456
<i>v.</i> Smith, 20 Eq., 500	602, 603, 648, 651, 659, 660
<i>v.</i> Vaughan, Ridg., 251	579, 580
<i>v.</i> Waguelin, 8 Eq., 198	171
<i>v.</i> Wallace, 1 Ch., 385	453
<i>v.</i> Wheatecroft, 9 Ch. D., 233	336, 428
Smull <i>v.</i> Jones, 1 Watts & Serg., 122	240
Smyth <i>v.</i> Carter, 18 Beav., 78	638
Sneesby <i>v.</i> Thorn, 7 DeG., M. & G., 399	208, 330, 97
Snell <i>v.</i> Atlantic Insurance Co., 98 U. S., 85	435
<i>v.</i> Mitchell, 65 Me., 48	364
Snyder <i>v.</i> Hopkins, 31 Kan. ...	598
Soames <i>v.</i> Edge, [1860] Johns., 669	199, 357, 415, 418
Sobha Pandey <i>v.</i> Sahodra Bibi, 5 All., 322	485, 494, 113
Sofaoll Khan <i>v.</i> Wopean Khan, 9 W. R., 123	60, 63, 34
Sohara <i>v.</i> Ahmad, 57 P. R., 1899	163
Sohel Singh <i>v.</i> Shadi, 99 P. R., 1888	118, 133
Sohochurry <i>v.</i> Hurree, 2 Boul., 62	601
Soliappa <i>v.</i> Soliappa, 11 I. C., 897	155, 166
Solomon <i>v.</i> Abdool, 6 Cal., 687	68
Soltau <i>v.</i> DeHeld, 2 Sim., N. S., 133	640, 157
Som <i>v.</i> Vinayak, 25 Bom., 395	162
Soma <i>v.</i> Thiruvengkatachariar, 15 I. C., 409	648
Somasundaram <i>v.</i> Bappu, 10 M. L. T., 473	653, 660
<i>v.</i> Vadivelu, 31 Mad., 531	128
Somerby <i>v.</i> Buntin, 118 Mass., 279	170
Somerville <i>v.</i> Chapman, 1 Bro. Ch., 61	98
Somkali <i>v.</i> Bhairo, 5 All., 55	515, 119, 131
Somu Pillai <i>v.</i> Municipal Council, Mayavaram, 28 Mad., 520	151
Sonaton <i>v.</i> Helim, 6 C. W. N., 616	61, 32
Sonu <i>v.</i> Daryai, 4 P. R., 1896	120, 126
Sooltan Chund <i>v.</i> Schiller, 4 Cal., 252	458, 105
Sooraparaaju <i>v.</i> Veeravadradi, 17 M. L. J. R., 505	55
Sooruj <i>v.</i> Moheput, 16 W. R., 18	124
Soper <i>v.</i> Arnold, 14 A. C., 429	273, 425
Sornavalli Ammal <i>v.</i> Muthayya, 23 Mad., 593	261, 98
Soshi Ghose <i>v.</i> Gonesh Ghose, 29 Cal., 500	655, 155
„ Mohan Pal <i>v.</i> Nobokristo, 4 Cal., 801	237, 278
Soundara <i>v.</i> Velayudam, 4 M. L. J. R., 275	485
South <i>v.</i> Webster, 10 Beav., 561	646
South India Export Co. <i>v.</i> Subba, 8 M. L. T., 149	170

1xxxi

11

	PAGE.
Steinmeyer v Schroepffel, 10 L. R. A., N. S., 114 ...	465
Stent v. Bailis, 2 P. Wms., 217 ...	47
Stephenson v. Harris, 131 Alabama, 470 ...	447
Sternberg v. O'Brien, 48 N. J. Eq., 270 ...	162, 625, 662
Stetson v. Cook, 39 Mich., 750 ...	495
Stevens v. Bagwell, 15 Ves., 139 ...	142
v. Keating, 2 Phil., 333 ...	598
v. Stevens, 24 T. L. R., 20 ...	634
Stevenson v. Maxwell, 2 Sandf. Ch., 302 ...	423
Steward v. Winters, 4 Sandf. Ch., 628 ...	617, 632
Stewart v. Aliston, 1 Mer., 16 ...	119
v. Conyngham, 1 Ir. Ch. R., 534 ...	175
v. Great Eastern Ry. Co., 2 Dr. and Sm., 438 ...	239
v. Kennedy, 15 A. C., 75 ...	20, 131, 326, 63
v. Stewart, 6 Cl. and F., 911 ...	26, 343, 404, 439, 463
Stiff v. Cassell, 2 Jur., N. S., 348 ...	628
Stitwell v. Williams, 6 Mad., 49 ...	557
Stock v. Vinning, 25 Beav., 235 ...	448, 450
Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass., 290 ...	435
Stocker v. Brockelbank, 3 Mac. and G., 250 ...	162
v. Wedderburn, 3 K. and J., 393 ...	131, 348, 355, 356, 627
Stockley v. Stockley, 1 V. and B., 23 ...	100, 343, 405
Stone v. Godfrey, 5 DeG., M. and G., 76 ...	323, 338, 435, 439
v. Smith, 35 Ch. D., 188 ...	468, 407
v. Pratt, 25 Ill., 25 ...	301, 302
Storer v. G. W. Ry. Co., 2 Y. and C. Ch., 48 ...	106, 110, 169, 259, 305, 44, 75
Stout v. Smith, 5 Am. R., 632 ...	457
Strachey v. Municipal Board of Cawnpore, 21 All., 348 ...	544, 137
Stangways v. Bishop, 29 L. T., O. S., 120 ...	219
Strapp v. Ball, 2 Ch., 1 ...	572
Stratford v. Bosworth, 2 V. and B., 341 ...	190
Street v. Rigby, 6 Ves., 815 ...	145
Strickland v. Hayes, 51 J. P., 629 ...	541
v. Turner, 7 Ex., 208 ...	133, 319
Strinivasa Ayyangar v. Strinivasa Swami, 16 Mad., 31 ...	518
Strobridge Co. v. Crane, 35 N. Y. St. R., 473 ...	626
Stuart v. Hayden, 36 U. S. Ap., 462 ...	472
v. Diplock, 43 Ch. D., 343 ...	622
v. London and N. W. Ry., Co., 15 Beav., 513 ...	290, 292, 313
Studholmes v. Mandell, 1 Ld. Ryam, 276 ...	366
Sturges v. Bridgman, 11 Ch. D., 865 ...	639
Stuyvesant v. Mayor of New York, 11 Paige Ch., 414 ...	107
Subba v. Badsha, 26 Mad., 168 ...	170
v. Hari, 5 O. C., 140 ...	430, 46
Subba Ram v. Devushetti, 18 Mad., 126 ...	451, 471, 105
Subba Reddi v. Chengalamma, 22 Mad., 126 ...	157
Subbaraya v. Devandra, 7 Mad., 301 ...	153
v. Sadasiva, 20 Mad., 490 ...	98
v. Vedantachariar, 23 Mad., 23 ...	119
Subbarayar v. Subammal, 24 Mad., 214, P. C. ...	118
Subbaroya v. Aiyaswami, 23 Mad., 86 ...	29
Subbramanyan v. Vengn, 18 M. L. J. R., 302 ...	590
Subhadra v. Dhajadhari, 15 C. L. J., 147 ...	150
Subnom Abdul v. Jadu, 18 C. L. J., 344 ...	66
Subrahmanya v. Krishna, 23 Mad., 137 ...	255, 262
v. Narayan, 24 Mad., 130 ...	400
Subrahmanian v. Muthuswami, 17 M. L. J. R., 401 ...	565
v. Perumal, 18 Mad., 454 ...	90
Subramania v. Muthulakshmiammal, 17 I. C., 583 ...	280
Subramanian v. Gangaya, 4 L. B. R., 365 ...	570
Subramanyan v. Paramaswarn, 11 Mad., 116 ...	509
Subraya Pillai v. Subraya Mudali, 4 Mad. H. C. R., 14 ...	142, 172
Suddasoök v. Ramchandra, 17 Cal., 620 ...	20
Sudharam v. Rudharam, 3 B. L. R., A. C., 91 ...	118

	PAGE.
Sudisht Lal v. Sheobarat Koer, 7 Cal., 245	214
Suffell v. Bank of England, 9 Q. B. D., 555	263
Sukhdeo v. Nihal, 29 All., 740	154
Sukho Bibi v. Ram Sukh Das, 5 All., 263	261
Sullivan v. Finnegan, 101 Mass., 447	513
v. Jennings, 44 N. J., Eq., 11	339
v. Jones Steel Co., 66 L. R. A., 712	151
Sultan v. Hashmat, 29 I. C., 804	115
Sultani v. Ram Saran, 49 P. R., 1900	153, 155, 160
Sumbhoolall v. Collector of Surat, 8 M. I. A., 40	49
Summers v. Bean, 13 Gratt., 404	89
v. Griffiths, 35 Beav., 27	320, 455, 456
Sumosuddin v. Abdool, 31 Bom., 165	54
Sundar v. Ghasi, 18 All., 410	527
v. Parbati, 12 All., 51, P. C.	51, 56
v. Ram Ghulam, 3 A. L. J. R., 316	511, 130
Sundar Koer v. Sham Krishna, 34 Cal., 150, P. C.	217, 420
Sundarasastri v. Govinda, 31 Mad., 528	31
Sunders v. Rodney, 16 Beav., 207	120
Sunkara v. Sunkara, [1912] M. W. N., 70	504
Sunker v. Juddoobuns, 9 W. R., 285	112
Suprasanna v. Vupendra, 18 C. W. N., 533	552, 560, 134
Surat City Municipality v. Chunnalal, 30 Bom., 409	508, 538, 135
Surbomohan v. Surat, 16 W. R., 34	66, 36
Surendra v. Hari Misser, 31 Cal., 147	608, 618, 152
Surendranarain Sinha v. Hari Mohan Misser, 33 Cal., 1201	46
Surendro v. Doorga Sundery, 17 Cal., 513	406, 572
v. Gopal, 12 C. L. J., 464	255
Suresh v. Nesa Bibi, 11 C. L. J., 433	35
Suriaprakasa v. Lakshminara, 26 M. L. J. R., 518	378
Surjan v. Baldeo, 20 A. W. N., 172	510, 129
v. Kharak, P. W. R., 79	534
Surjan Singh v. Buldeo Prasad, 20 A. W. N., 172	510
Suryanarain v. Gammana, 25 Mad., 504	531
Suryanarayana v. Tammanna, 25 Mad., 504	514, 518, 531
Sutherland v. Heathcote, [1892] 1 Ch., 475	103
Suthianama v. Sarabanabagi, 18 Mad., 266	38
Sutliff v. Smith, 58 Kan., 559	496
Suttya Sankar Ghosal v. Golapmoni, 5 C. W. N., 27	563, 574
Swab v. Swab, 22 Beav., 584	556
Swain v. Smith Seton, Ed., 6, 809	580
Swaine v. Great Northern Ry. Co., 4 DeG., J. & S., 211	609
Swain's Estate, re, 1r. R., 4, Eq., 207	581
Swaisland v. Dearsley, 29 Beav., 430	326, 327, 335
Sweet v. Cater, 11 Sim., 572	123
Sweeting v. Turner, 7 Q. B., 310	278
Swift v. Swift, 3 Ir. Eq., 267	122
Swinburne v. Milburn, 9 A. C., 844	99
Swimm v. Bush, 23 Mich., 99	230
Syam v. Luchman, 15 Cal., 353	33
Syama v. Jogobundhu, 16 Cal., 186	33
Sykes v. Beadon, 11 Ch. D., 170	139
v. Hastings, 11 Ves., 363	556
v. Sheard, 2 DeG., J. & S., 6	83
Synge v. Synge, 1 Q. B., 486	85, 190

T.

Tadcaster Tower Brewery Co. v. Wilson, 1 Ch., 709	271
Taddy v. Sterions, 1 Ch., 306	394
Taggart v. Taggart, 1 S. & L., 88	385
Tagore Case, 9 B. L. R., 377, P. C.	521

	PAGE,
Tahal v. Bisheshar, 8 All., 57	146, 147, 69, 70
Tailby v. Official Receiver, 13. A. C., 523	21, 94
Talbot v. Ford, 13 Sim., 173	310, 75
v. Hope-Scott, 4 K. & J., 96	557
Taleb v. Ameer, 22 W. R., 529	105, 108
Talewar v. Bahore, 26 All., 497	261, 99
Talkrah v. Haas, 119 U. S., 499	456
Tamarasherri v. Maranat, 3 Mad., 215	466
Tamizuddin v. Ashrub Ali, 31 Cal., 647, F. B.	54, 63, 34, 36
Tamplin v. James, 15 Ch. D., 215	228, 246, 328, 332, 335, 442
Tanfield v. Irvine, 2 Russ., 149	555
Tapessier v. Nasiruddin, [1912] P. R. No. 37	70
Tapp v. Lee, 3 Bos. & P., 267	227
Tara v. Boti, 19 I. C., 751	123
Tarabai, re, 7 Bom. L. R., 161	538
Tara Singh v. Chandi, 51 P. L. R., 1908...	505, 126
Tarini Mohun Mazumdar v. Gunga Prosad Chuckerbutty, 14 Cal., 649	58, 61, 30, 32
Tarkinton v. Purvis, 9 L. R. A., 607	472
Tarling v. Baxter, 9 Dow. & Ryl., 276	278
Tassaduq Husain v. Wazir Ali, 6 P. L. R., 9	491, 118
Taskar v. Small, 2 My. & Cr., 63	397
Tatayya v. Pichayya, 13 Mad., 316	44, 45
Tate v. Williamson, 2 Ch., 56	202, 31
Taunton v. Royal Ins. Co., 2 H. & M., 135	542
Tawakul v. Jiwa, [1913] 129 P. L. R.	521
Taylor v. Asmedh Koenwar, 4 W. R., 86	22
Tayloe v. Merchants' Fire Insurance Co., 9 How., 390	114, 123, 449
Taylor v. Brown, 2 Beav., 180	273
v. Caldwell, 32 L. J., Q. B., 164	276
v. Chapter, 4 Q. B., 309	467
v. Chichester Ry. Co., 2 Ex., 356	206
v. Cole, 1 Sm., L. C., 133	59
v. Eckersley, 2 Ch. D., 302	99, 560
v. Fleet, 4 Barb., 95	220
v. Florida E. C. R. Co., 16 L. R. A., N. S., 307	591, 596
v. Glens Falls Ins. Co., 9 Howard, 390	449
v. Longworth, 14 Pet., 172 (cited)	271, 272
v. Neville, (cited) 1 K. & J., 462...	121
v. Portington, 7 DeG., M. & G., 328	115, 291, 292, 64
v. Stibbert, 2 Ves., 447	409, 23
v. Virasami, 6 Mad., 110	645
Tejbal v. Ramrav, 11 J. C., 703	551
Tejpal v. Ganga, 25 All., 59...	471
Tejmal v. Chabilomal, 2 Sind L. R., 65	151, 167
Telegraph Despatch Co. v. McLean, 8 Ch. Ap., 658	627
Telford v. Metropolitan Board of Works, 13 Eq., 574	611
Tendring v. London, 2 Eq., Ca. Ab., 680	358
Ten Eyck v. Manning, 52 N. J. Eq., 47	348
Terry v. Tuttle, 24 Mich., 206	134
" & White's Contract, 32 Ch. D., 20...	288
Tewart v. Lawson, 18 Eq., 490	578
Texeira v. DaCosta, 2 Daniell Ch. P., 1565 Y.	553
Thacker v. Hardy, 4 Q. B. D., 685	152, 153
Thackrah v. Haas., 119 U. S., 499	456, 474
Thakur v. Fakirullah, 17 All., 106, P. C.	37
v. Pnnkal, 8 C. L. J., 485	531, 131
v. Sitla, 12 A. L. J. R., 52	90
Thamballa v. Thamballa, 5 I. C., 119	121
Thambi v. Hamid, 2 M. W. N., 534	149
Thamman v. Vizianagram, 29 All., 593	32
Thattoli v. Kunhammad, 20 M. L. J. R., 946	125, 201
Thayammal v. Venkatarama, 7 Mad., 401	120
The Clandeboye, 70 Fed. R., 636	225, 229

	PAGE.
Thirukumaresan v. Subaraya, 20 Mad., 313	588
Thirumala v. Kodlekar, [1914] M. W. N., 197	123, 124
Thirunvenkata v. Venkatachariar, 26 M. L. J. R., 218	90
Thithi Pakunibaon v. Bheemdu, 26 Mad., 430	187
Thollapa v. Venkata, 19 Mad., 62	507
Thomas v. Blackman, 1 Coll., C. C., 301...	192
v. Davies, 11 Beav., 29	550
v. Dering, 1 Keen., 729	178, 180, 208, 299, 365
v. Oakley, 18 Ves., 184	633
Thompson v. Etowah Iron Co., 91 Ga., 538	528
v. Gould, 20 Pickering, 134	278
v. Guyon, 5 Sim., 65	369
v. Hickman, 76 L. J. Ch., 254...	447
v. Stanhope, Amb., 737	647
v. Whitmore, 1 J. & H., 268	440, 448, 449
v. Winter, 42 Minn., 121	288
Thomson v. University of London, 10 Jur. N. S., 669	630
Thomson's case, re, 5 Manson, 282	461
Thorburn v. Barnes, 2 C. P., 384	105
Thorn v. Commissioners of Works, 32 Beav., 490	88
Thornton v. Knight, 16 Sim., 509	114
Thoroughgood's case, 2 Co. Rep., 9 A., 9 B	134
Thrope v. Brumfith, 8 Ch. Ap., 650	644
Thurstan v. Nottingham, P. B. Soc., [1903] A. C., 6	109
Tiel v. Abdool, 19 W. R., 37	136
Tilak Chandra Dass v. Fatik, 25 Cal., 803	65, 66, 35
Tidesley v. Clarkson, 30 Beav., 419	369, 81
Tilghman's Co. v. Societe Anon., 25 Ch. D., 1	598
Tilley v. Thomas, 3 Ch., 61	32, 271, 288
Tillis v. Smith, 108 Alabama, 264	447
Timmerman v. Stanley, 1 L. R. A., N. S., 379	472
Tinkler v. Wandsworth District Board, 2 D. & J., 261	541
Tinsley v. Lacy, H. & M., 747	645
Tipping v. Eckersley, 2 K. & J., 264	116, 617, 664
v. Clarke, 2 Hare, 383	648, 158
v. St. Helen's S. Co., [1865] 1 Ch., 66	639
Tirbhuwan v. Rameshar, 28 All., 727, P. C.	534
Tirumalai v. Bungaru, 21 Mad., 310	552
Tiruvenkatachariar v. Venakatachariar, 26 M. L. J., 218	88
Tituram v. Cohen, 33 Cal., 203, P. C.	664, 149
Tobey v. County of Bristol, 3 Story 800	302
v. Moore, 130 Mass., 448	393
Tod v. Lakhmidas, 16 Bom., 441	153
Toft v. Stephenson, 1 DeG., M. & G., 28	572
Toldervy v. Colt, 1 Y. & C. Ex., 621	557
Tolhurst v. Associated Cement Manufacturers, 2 K. B., 660...	399
Tomkins v. Halleck, 133 Mass., 32	646, 647
Tomlin v. Luce, 43 Ch. D., 191	97
Toolse v. Mohadeo, 10 W. R., 483	43
Toomey v. Rama Sahi, 17 Cal., 115	398
Torrance v. Bolton, 8 Ch. Ap., 118	218, 95
v. Bolton, 14 Eq., 124	462
Touche v. Metropolitan Ry. Warehousing Co., 6 Ch., 671	406
Towner v. Ticknor, 112 Ill., 217	175
Townsend v. Vanderworker, 160 U. S., 171	253, 380
Townshend v. Stangroom, 6 Ves., 238	25, 177, 330, 429, 439, 444
Tracy v. Talmage, 14 N. Y., 162	467
v. Wheeler, 6 L. R. A., N. S., 516...	485
Traill v. Baring, 4 DeG., J. & S., 318	227
Treacher & Co. v. Mahamad Ali, 12 Bom. L. R., 597	83
Trego v. Hunt, [1896] A. C., 7	623
Tribhoban v. Jamuna, Bom. P. J., 184	554
Tribhuwan Sundar v. Srinarain Singh, 20 All., 341	559
Trigg v. Read, 42 Am. Dec., 447	341, 462

	PAGE.
Trimbak <i>v.</i> Krishnarao, 33 Bom., 387 ...	119, 154
Tripoora <i>v.</i> Russick, 15 W. R., 189 ...	43
Trist <i>v.</i> Child, 21 Wall, 441 ...	141
Tritton <i>v.</i> Foote, 2 Bro. Ch., 636 ...	98
Trower <i>v.</i> Newcome, 3 Mer., 704 ...	238
Truman <i>v.</i> Redgrave, 18 Ch. D., 547 ...	582
Trustees of Columbia College <i>v.</i> Lynch, 70 N. Y., 440 ...	389, 617
<i>v.</i> Thacher, 87 N. Y., 311 ...	313, 314
Tryce <i>v.</i> Dittus, 199 Ill., 189 ...	353
Tucke <i>v.</i> Bucholz, 43 Iowa, 415 ...	214
Tucker <i>v.</i> Bennett, 38 Ch. D., 1 ...	446
<i>v.</i> Howard, 123 Mass., 361 ...	644, 652, 664, 668
<i>v.</i> Newman, 11 Ad. & E., 40 ...	641
Tukabai <i>v.</i> Vinayak, 15 Bom., 422 ...	533
Tukroonissa <i>v.</i> Mogal Jan, 8 W. R., 370 ...	53
Tulk <i>v.</i> Moxhay, 2 Ph., 774 ...	387, 656
Tulla <i>v.</i> Gopi, 51 P. R., 1904 ...	37
Tulsa <i>v.</i> Baru, 4 A. L. J. R., 677 ...	508
Tulsha <i>v.</i> Mahadeo, 1 O. C., 272 ...	129
Tulsi <i>v.</i> Ganga, 1 All., 252 ...	129
Tumula <i>v.</i> Koppula, 16 I. C., 412 ...	657, 160, 161
Turnbull <i>v.</i> Duval, 6 C. W. N., 809 ...	91
Turner <i>v.</i> Collings, 7 Ch., 329 ...	448
<i>v.</i> Green, 2 Ch., 205 ...	128, 221, 225, 294, 296, 335
<i>v.</i> Goldsmith, 1 Q. B., 544 ...	275
<i>v.</i> Harvy, [1821] Jac., 169 ...	230, 455
<i>v.</i> Houpt, 53 N. J. Eq., 526 ...	234
<i>v.</i> Marriott, 3 Eq., 744 ...	426
<i>v.</i> Mirfield 34 Beav., 390 ...	607
<i>v.</i> Skelton, 13 Ch. D., 130 ...	337
<i>v.</i> Wight, 4 Beav., 40 ...	597
<i>v.</i> Wright, 2 DeG., F. & J., 234 ...	636, 637
Turpin <i>v.</i> Dennis, 139 Ill., 274 ...	652
Tuttle <i>v.</i> Moore, 16 Minn., 123 ...	89, 124
Twedde <i>v.</i> Atkinson, 1 Best and Sm., 393 ...	403
Twinning <i>v.</i> Morrice, 2 Bro. C. C., 326 ...	298, 73
Twort <i>v.</i> Twort, 16 Ves., 128 ...	638
Twyford <i>v.</i> Wareup, [1677] Rep. Finch., 310 ...	176
Tyngleden <i>v.</i> Warham, 2 Cal. Ch. I, IV ...	115
Tyson <i>v.</i> Fairclough, 2 S. & S., 142 ...	551
<i>v.</i> Passmore, 2 Pa. St., 122 ...	242

U

Uda Begam <i>v.</i> Imamuddin, 1 All., 82 ...	379, 657, 19, 168
Udell <i>v.</i> Atherton, 7 H. & N., 181 ...	217
Uderam <i>v.</i> Hyderally, 10 Bom., L. R., 1141 ...	590, 144
Udhe <i>v.</i> Bishen, [1911] P. R., No. 25 ...	70
Udit <i>v.</i> Muhammad, 25 All., 618 ...	59, 64
Ulagappan <i>v.</i> Chidambram, 29 Mad., 407 ...	657, 161
Ulfat <i>v.</i> Gauri, 33 All., 657 ...	200, 349
Umamba <i>v.</i> Dipamba, 19 Mad., 120 ...	134
Uman <i>v.</i> Bhagwan, 7 A. L. J. R., 1064 ...	125
Umar <i>v.</i> Kewalmal, 3 Sind L. R., 30 ...	157
Umatul Batul <i>v.</i> Nanji Koer, 6 C. L. J., 427 ...	669
Umed <i>v.</i> Nagindas, 7 Bom., H. C., O. C., 122 ...	163, 65
Umrao <i>v.</i> Hardeo, 29 All., 418 ...	131
<i>v.</i> Jan Ali, 20 All., 465 ...	112
Umesh <i>v.</i> Nibaran, 19 C. L. J., 805 ...	141, 160
<i>v.</i> Ramji, 11 A. L. J. R., 1012 ...	32
Underhay <i>v.</i> Read, 20 Q. B. D., 209 ...	562
Underwood <i>v.</i> Barker, [1899] 1 Ch., 300 ...	52
Ungley <i>v.</i> Ungley, 5 Ch. D., 887 ...	253

	PAGE.
Union Bank v. Munster, 37 Ch. D., 51 ...	232, 299
Union Pacific Ry. Co. v. Chicago R. S. P. Ry., 163 U. S., 564 ...	131
United Co. v. Stewart, [1888] 13 A. C., 401 ...	668
United Shoe Mfg. Co. v. Brunet, 78 L. J., P. C., 101 ...	171
United Telephone Co. v. Sharpler, 29 Ch. D., 164 ...	645
Unni v. Kunchi Amma, 14 Mad., 26 ...	484, 494, 113
Ununto v. Brojo, 11 W. R., 136 ...	33
Ununtoram v. Ramlochan, 14 W. R., O. C., 15 ...	49, 53
Upendra v. Goopee, 9 Cal., 817 ...	127
Urquhart v. Macpherson, [1878] 3 A. C., 831 ...	471, 472
Usborne v. Usborne, [1740] Dick., 75 ...	638

V

Vachhani v. Vachhani, 11 Bom. L. R., 30 ...	122
Vacoma Water Supply Co. v. Dumermuth, 99 Pac., 741 ...	273
Vaghoji v. Camaji Bomanji, 29 Bom., 249 ...	172
Vail v. Reynolds, 118 N. Y., 297 ...	451, 474
Vaithyanathan v. Gangarazu, 17 Mad., 9 ...	149
Valli v. Madras Corporation, 38 Mad., 41 ...	154
Valparaíso v. Hagen, 48 L. R. A., 707 ...	665
Vaman v. Municipality of Sholapur, 22 Bom., 646 ...	605, 630, 168
Van Campen v. Knight, 63 Barbour, 205 ...	381
Van Couver v. Bliss, 11 Ves., 458 ...	362
Van Dyne v. Vreeland, 11 N. J. Eq., 370 ...	406
Vane v. Lord Barnard, 2 Vern., 738 ...	637, 652
Van Joel v. Hornsey, [1895] 2 Ch., 744 ...	600
Vankata v. Basivi, 29 M. L. J., 457 ...	554, 555
Vann v. Barnett, 2 Bro. C. C., 158 ...	556
Van Praagh v. Everidge, [1902] 2 Ch., 266, Revsd. [1903] 1 Ch., 484 ...	332
Vansittart v. Vansittart, 4 K. and J., 62 ...	124, 356
Varick v. Edwards, 11 Paige Ch., 290 ...	126
Vathiar v. Aiyannachariar, 23 M. L. J. R., 316 ...	144
Vaughan v. Clerk, 87 L. T., 144 ...	101
Vavasseur v. Krupp., 9 Ch. D., 351 ...	611
Vedanayaga v. Vedammol, 27 Mad., 591 ...	515
Veera v. Poonambala, 9 M. L. J. R., 137 ...	280, 430
Velaga v. Bandlamudi, 30 Mad., 308 ...	584
Vellai v. Court of Wards, 7 M. L. T., 73 ...	540, 138
Vellammal v. Vavammal, 20 M. L. J. R., 349 ...	514
Velu v. Pakarvoor, 6 I. C., 289 ...	669
Vemavarapu v. Karedla, 21 M. L. J. R., 952 ...	510
Vengan v. Patchamuthu, 14 M. L. J. R., 290 ...	514
Venkappa v. Akku, 7 Mad. H. C. R., 219 ...	431
Venkata v. Kadambi, 7 M. L. T., 270 ...	111, 114
v. Kotayya, 12 Mad., 374 ...	162
v. Malraju, 5 M. L. T., 108 ...	253
Venkatachala v. Narayana, 24 M. L. J. R., 455 ...	532
Venkatachalam v. Gaurivallaba, 27 Mad., 509 ...	641
v. Sivaganga, 27 Mad., 409 ...	167
v. Veerappa, 29 Mad., 314 ...	150
Venkatachalapati v. Subbarayadu, 13 Mad., 293 ...	153
Venkatacharyulu v. Rangacharyulu, 14 Mad., 316 ...	151
Venkatagiri v. Chinna, 5 M. L. T., 204 ...	94
v. Muddukrishna, 28 Mad., 15 ...	641, 160
Venkatanarayana v. Subbammal, 38 Mad., 406, P. C. ...	533
Venkatappa v. Subba, 29 Mad., 179 ...	111
Venkatarama v. Venkata, 24 Mad., 27 ...	97
Venkataramana v. Ramalakshamma, 2 M. W. N., 194 ...	526
Venkatasami v. Kristayya, 16 Mad., 341 ...	26
v. Stridavamma, 10 Mad., 179 ...	583
Venkatesa v. Ramasami, 18 Mad., 338 ...	612, 143, 155, 163, 164
Venkatesh v. Baba, 15 Bom., 44 ...	263

	PAGE.
Venezuela Ry. Co. v. Kisch, 2 H. L., 99 ...	456
Vernon v. Stephens, 2 P. Wms., 66 ...	271, 272, 375
Very v. Levy, 13 How., 345 ...	120
Vezey v. Rasbleigh, 1 Ch., 634 ...	267
Vibudapriya v. Esuf, 20 M. L. J. R., 879 ...	642
Vickers v. Hand, 26 Beav., 630 ...	421
v. Vickers, 4 Eq., 529 ...	164, 63
Vigers v. Pike, 8 Cl. & F., 562 ...	294, 316, 319, 472
Vijiasamy v. Sasivarma, 28 Mad., 560 ...	520, 524, 525, 126
Vinayak v. Govind, 25 Bom., 129 ...	501
Vincent v. Berry, 46 Iowa, 571 ...	322
v. Spicer, 22 Beav., 380 ...	636
Vine v. Raleigh, 24 Ch. D., 243 ...	567
Viney v. Bignold, 20 Q. B. D., 172 ...	148
Viola v. Anglo-American Co., 2 Ch., 305 ...	568, 569
Virasami v. Ramasami, 3 Mad., 87 ...	429, 431, 44, 46
Virayya v. Hanumanta, 14 Mad., 459 ...	127, 55
Virdachala v. Ramasvami, 1 Mad. H. C. R., 341 ...	172, 53, 65, 152
Virjivandas Madhabdas v. Mahomed Ali Khan, 5 Bom., 208 ...	56, 59, 61, 66, 31
	32, 35
Vishnu v. Kashinath, 11 Bom., 174 ...	68
Visram v. Sultan, 11 L. C., 25 ...	429, 431
Visvanathan v. Saminathan, 13 Mad., 83 ...	149
Vithal v. Balkrishna, 10 Bom., 610 ...	121
Vithaldas v. Secretary of State, 26 Bom., 416 ...	59
Vithoba v. Gangaram, 12 Bom. H. C. R., 180 ...	32
v. Mendosa, [1888] Bom., P. J., 212 ...	154
Von Heydon v. Neustadt, 14 Ch. D., 230 ...	645
Voorhees v. D. Mayer, 2 Barb., 37 ...	119
Voss v. Murray, 50 Ohio St., 28 ...	496
Vouillon v. States, 25 L. J., Ch., 875 ...	439
Vreeland v. N. F. Stone Co., 29 N. J. Eq., 188 ...	217
Vrijbhukandas v. Dayaram, 32 Bom., 32 ...	425
Vulcan Iron Works v. Bisshumbhur, 36 Cal., 233 ...	144, 164
Vulley Mahomed v. Dathubhoy, 25 Bom., 10 ...	477, 480, 111, 114
Vuraraghava v. Krishnasamy, 28 M. L. J. R., 638 ...	556
Vurmah Valia v. Vurmah Kunhi, 1 Mad., 235, P. C. ...	430
W	
W. v. B., 31 L. J., Ch., 755 ...	467
Wagner v. Baird, 7 Howard, 234 ...	377
Wahid Alam v. Safat Alam, 10 A. W. N., 130 ...	43
Wahid Ali v. Ashruff Hossain, 8 Cal., 732 ...	141
Wainscott v. Occidental Loan Assn., 98 Calif., 253 ...	456
Waite v. O'Neill, 72 Fed., 348 ...	310
Wajid v. Dargahi, 9 O. C., 161 ...	49
Wajid Ali v. Dianatullah, 8 All., 31 ...	493, 506, 508, 528, 118
v. Ramsaran, 4 A. W. N., 39 ...	67
Wajid Khan v. Ewaz Ali, 18 Cal., 545 ...	214
Wakefield v. Llanelly Ry. & Dock Co., 3 DeG., J. & S., 11 ...	104
v. Sunday Lake Min. Co., 85 Mich., 605 ...	495
Walcot v. Walker, 7 Ves., 1 ...	644, 157
Waldron v. Jacob, 5 Eq., 131 ...	290
v. Leston, 15 N. J. Eq., 126 ...	447
Wali Ahmed v. Ajudbia, 13 All., 537, F. B. ...	51, 54, 57, 58, 30
Walker v. Armstrong, 8 DeG., M. & G., 531 ...	103
v. Barnes, 3 Mad., 247 ...	127, 364
v. Bartlett, 18 C. B., 845 ...	91, 101
v. Brewster, 5 Eq., 25 ...	640
v. Eastern Counties Ry. Co., 6 Hare, 594 ...	101, 131
v. Jeffreys, 1 Hare, 341 ...	367, 374
v. Mottram, 19 Ch. D., 355 ...	623

	PAGE.
Walker v. Perkins, 3 Burr., 1568	139
Wall v. Meeilk, 89 Minn., 232	445
v. Stubbs, 1 Madd., 80	242
Walpole v. Orford, 3 Ves., 402	85
Walter v. Ashton, [1902] 2 Ch., 282	645, 646
v. Lane, [1900] A. C., 541	647
v. Selfe, 4 DeG., G. & S., 315	663
Walters v. Morgan, 2 Cox, 369	103
v. Morgan, 3 DeG., F. & J., 721	187, 220, 221, 230
Waman v. Dhondiba, 4 Bom., 126	90
Wamanrao v. Rustomji Edalji, 21 Bom., 701	496, 117, 129
Ward v. Buckingham, 10 Ves., 161 (cited)	94, 617
v. Hobbs, 4 A. C., 13	224
Ward v. Turner, 2 Ves. Sr., 431	41
Warde v. Dixon, 28 L. J. Ch., 315	362
Ware v. Egmont, 4 DeG., M. and G., 460	23
v. R. C. Co., 32 L. J., Ch., 136	658
Waring v. Manchester S. & L. Ry. Co., 7 Hare, 482	348, 350, 355, 52
v. Thompson, 29 T. L. R., 154	293
Warne v. Seebohm, 39 Ch. D., 73	652
Warner v. Daniels, 1 Woodb. and Minot, 90	323
Warner v. Wellington, 3 Drew., 523	192, 196
Waryam v. Phemon, 50 P. R., 1901	118
Wason v. Walter, 4 Q. B., 73	33
Wasudeo v. Sakharam, 13 C. P. L. R., 153	45
Waterman v. Banks, 144 U. S., 394	269, 271
Waters v. Taylor, 15 Ves., 10	571
v. Travis, 9 Johns., 450	378
Wa Tha v. Pe Hlaw, 3 L. B. R., 27	54
Wathawa W. v. Nga Po, [1906] U. B. R., 30	104
Watkins v. Maule, 2 J. and W., 237	129, 45
Watson v. Cox, 15 Eq., 219	468
v. Earl of Charlemont, 12 Q. B., 856	239
v. Lion Brewing Co., 61 Mich., 596	495
v. Marston, 4 DeG., M. and G., 230	339, 343, 346
v. McAllum, 87 L. T., 547	193
v. Neel, 10 W. R., 330	112
v. Southerland, 5 Wallace, 74	609, 610
Watson & Co. v. Ramchund Dutt, 18 Cal., 10, P. C.	45, 47, 153, 166
Watts v. Kellar, 56 Fed. R., 1	353
Wauton v. Coppard, 1 Ch., 92	242, 455
Wavel v. Watson, W. N. (Eng.), 344	659
Way v. Hearn, 13 C. B., N. S., 292	233
Waziran v. Babu Lal, 26 All., 391	669, 149
Weale v. W. M. Waterworks Co., 1 J. & W., 558	157
Weatherall v. E. M. A. Co., 13 C. L. J., 495	554
v. Geering, 12 Ves., 504	308, 399
Webb v. Direct London and Portsmouth Ry. Co., 1 DeG., M. & G., 521	103
v. England, 29 Beav., 44	162
v. Hughes, 10 Eq., 281	273
v. Portland Co., 3 Sumn., 190	641
Webster v. Cecil, 30 Beav., 62	328
v. Dillon, 3 Jur., N. S.,	622
Wedgwood v. Adams, 6 Beav., 600	294, 305, 310, 74
Weeding v. Weeding, 1 J. & H., 424	353
Wehrman v. Conklin, 155 U. S., 314	489
Weis v. Meyer, 1 S. W., 679	403
Wekett v. Raby, 2 Bro. P. C., 386	479
Well, re, 45 Ch. D., 569	580
Weller v. Smeaton, 1 Bro. C. C., 572	639
Welles v. Yates, 44 N. Y., 525	442
Wells v. Calnan, 107 Mass., 514	278
v. Maxwell, 32 Beav., 408	107, 108, 271
v. Smith, 7 Paige, 22	272

	PAGE.
Wells v. Smith, 2 Edward Ch., 78	367
Wenlock v. River Dee Co., 36 Ch. D., 684 <i>n</i>	206
Wentworth v. Cock, 10 A. & E., 45	398
Werdorman v. S. G. D'Electricite, 19 Ch. D., 246	93
Werner Motors v. Gamage, [1904] 1 Ch., 264	645
West v. Sudda, 69 Conn., 60	443
Westby v. Westby, 2 Dr. & War., 503	100
Western v. Macdermott, [1866] 2 Ch., 72	393
v. Russell, 3 V. & B., 187	182
Western Bank of Scotland v. Addie, 1 Sc. & D., 145	233, 470, 471, 473
Western Railroad Corp. v. Babcock, 6 Mat., 346	328, 338
West Cumberland Iron & Steel Co. v. Kenyon, 11 Ch. D., 782	635
West London Com. Bank v. Kitson, 13 Q. B. D., 360	219
Westmacott v. Robins, 4 DeG., F. & J., 390	177
Westmeath v. Salisbury, 5 Bli., N. S., 339	124
West Midland Ry. Co. v. Nixon, 1 H. & M., 176	413
Weston v. Savage, 10 Ch. D., 736	363
Weston & Thomas, re, 76 L. J., Ch., 176	452
Wetherbee v. Bennett, 2 Allen., 428	426
Wethered v. Wethered, 2 Sim., 183	125
Wetmore v. Bruce, 118 N. Y., 319	363
Wharton v. Stoutenburgh, 35 N. J. Eq., 266	131
Whatman v. Gibson, 9 Sim., 196	392
Wheatcroft, re, 6 Ch. D., 97	647
Wheatley v. Chrisman, 24 Pa., 302	639
v. Slade, 4 Sim., 126	182
v. Westminster B. C. Co., 9 Eq., 538	167, 168
Wheelock v. Noonan, 108 N. Y., 179	610, 654, 660
Whitaker v. Bond, 63 N. C., 290	314
Whitbread & Co. v. Watt, [1902] 1 Ch., 835	274, 425, 452
White v. Blaugh, 9 Bli., N. S., 181	576
v. Butcher, 6 Jones Eq., 231	81
v. Cuddon, 8 Cl. & F., 766	299
v. Damon, 7 Ves., 30	31, 186
v. Equitable Nuptial Benefit Union, 76 Ala., 251	148
v. Franklin Bank, 22 Pick., 181	203
v. Garden, 10 C. B., 919	460
v. Lincoln, 8 Ves., 363	574
v. Morris, 21 L. J., C. P., 185	38
v. Nutt, 1 P. Wms., 61	277, 278
v. Southern Hotel Co., [1897] Ch., 767	386
v. White, 15 Eq., 247	447, 448, 450
White Church v. Cavanagh, [1902] A. C., 117	190, 191
v. Hide, 2 Atk., 391	664
Whitehouse v. Jones, 12 L. R. A., N. S., 49	481, 527
Whitley v. Lowe, 25 Beav., 421	572
Whitlock v. Ashurn Lumber Co., 12 L. R. A., N. S., 1214	284
Whitmel v. Farrel, 1 Ves., Sr., 256	407
Whitney v. Eox, 166 U. S., 637	379
v. Port Huron, 88 Mich., 269	492
v. Union Ry., 11 Gray, 359	392
Whittaker v. Howe, 3 Beav., 383	152, 623
Whittemore v. Farrington, 76 N. Y., 452	439
v. Whittemore, 8 Eq., 603	183
Whittenton Mfg. Co. v. Staples, 165 Mass., 319	394
Whitwood Chemical Co. v. Hardman, [1891] 2 Ch., 416	615, 623, 624, 625, 170
Whitworth v. Whyddon, 2 M. & G., 52	550
Whympster v. Buckle, 3 All., 469	194
Wilbraham v. Snow, 2 Wms. Saund., 87	70
Wileox v. Steele, [1904] 1 Ch., 212	644
Wilde v. Gibson, 1 H. L. C., 605	454
Wildgoose v. Wayland, [1601] Gould., 147	23
Wilding v. Sanderson, [1887] 2 Ch., 534	11, 323, 342, 462
Wilkinson v. Clements, [1872] 8 Ch., 96	352, 356, 52

	PAGE.
Wilkinson <i>v.</i> Colley, 164 Pa., St., 35 ...	615
<i>v.</i> Gangadhar Sirkar, 6 B. L. R., 486 ...	558, 559, 565, 566, 76
<i>v.</i> Haygarth, 12 Q. B., 837 ...	45
<i>v.</i> Nelson, 7 Jur. N. S., 480 ...	449, 703
<i>v.</i> Stitt, 175 Mass., 581 ...	72
Willan <i>v.</i> Willan, 16 Ves., 72 ...	98, 112
Willard <i>v.</i> Tayloe, 8 Wall., 557 ...	31, 188, 300, 313, 314
<i>v.</i> Wood, 164 U. S., 502 ...	380
Willets <i>v.</i> Busby, 5 Beav., 193 ...	413
Williams, <i>re</i> , 2 Ch., 12, 18 ...	84, 384, 20
<i>v.</i> Babcock, 25 Barb., 109 ...	565
<i>v.</i> Bayley, 1 H. L., 200 ...	142, 106
<i>v.</i> Bland, 2 Col., 575 ...	366
<i>v.</i> Brisco, 22 Ch. D., 441 ...	268
<i>v.</i> Gibbes, 20 Howard, 535 ...	424
<i>v.</i> Hamilton, 65 Am. St. R., 475 ...	440
<i>v.</i> Redley, 8 East, 378 ...	466
<i>v.</i> Howard, 3 Murphy, 74 ...	72-3
<i>v.</i> Jones, 36 W. R. (Eng.), 573 ...	439
<i>v.</i> New York C. R. Co., 16 N. Y., 97 ...	609
<i>v.</i> Scott, [1900] A. C., 499 ...	359
<i>v.</i> Spurr, 24 Mich., 335 ...	455
<i>v.</i> Walker, 9 Q. B. D., 581 ...	92
<i>v.</i> Williams, 3 Mer., 157 ...	161, 648
<i>v.</i> " 17 Beav., 213 ...	194
<i>v.</i> " [1897] 2 Ch., 12 ...	384, 20
<i>v.</i> " [1867] 2 Ch., 294 ...	405
<i>v.</i> " [1818] 2 Sw., 253 ...	596, 615
Williamson <i>v.</i> Dils, 24 Ky. L. R., ...	380
<i>v.</i> Railroad Co., 29 N. J. Eq., 311 ...	475
Willingham <i>v.</i> Joyce, 3 Ves., 168 ...	407
Willis <i>v.</i> U. F. P. L. Soc., 10 C. W. N., cclv. ...	144
Willmott <i>v.</i> Barber, [1880] 15 Ch. D., 96 ...	299, 336, 463, 475, 607, 658
Wilson <i>v.</i> Carpenter's Admr., 21 S. E. R., 243 ...	242
<i>v.</i> Furness Ry. Co., 1 Eq., 28 ...	110, 67
<i>v.</i> Northampton & B. J. Ry. Co., 9 Ch. Ap., 279 ...	83, 289, 291, 417
<i>v.</i> Ray, 10 A. & E., 82 ...	466
<i>v.</i> Short, 6 Hare, 366 ...	237
<i>v.</i> Townend, 1 Dr. & Sm., 324 ...	644
<i>v.</i> West Hartlepool Harbour Ry. Co., 34 Beav., 187, 2 DeG. J. & S., 475 ...	258, 355
<i>v.</i> Williams, 3 Jur., N. S., 810 ...	180
<i>v.</i> Wilson, 1 H. L. C., 538 ...	124, 597
<i>v.</i> Wilson, 1 Barb, Ch., 592 ...	562
Winch <i>v.</i> Winchester, 1 V. & B., 375 ...	177
Windbiel <i>v.</i> Carroll, 16 Hun., 101 ...	336
Winn <i>v.</i> Bull, 7 Ch. D., 29 ...	193
Wirt <i>v.</i> Hicks, 46 Fed., 71 ...	645
Wise <i>v.</i> Amcerunnissa Khatoon, 7 I. A., 73 ...	56, 32, 35
<i>v.</i> Sunduloonissa, 11 M. I. A., 177 ...	133
Wiseman <i>v.</i> Roper, 1 Ch. Rep., 158 ...	210
Wistar's Appeal, <i>re</i> , 80 Pa. St., 484 ...	100
Wiswall <i>v.</i> Hull, 3 Paige Ch., 313 ...	246
Withers <i>v.</i> Reynolds, 2 B. & Ad., 882 ...	458
Withy <i>v.</i> Cottle, 1 Sim. & St., 174 ...	101, 122
Woolmershansen <i>v.</i> Gullick, 2 Ch., 514 ...	114
Wolverhampton &c. Ry. Co. <i>v.</i> L. & N. W. Ry. Co., 16 Eq., 433 ...	21, 84,
112, 161, 162, 357, 382, 616, 622, 624, 626, 627, 169	
Wood <i>v.</i> Bernal, 19 Ves., 220 ...	175
<i>v.</i> Conway Corporation, 2 Ch., 47 ...	639, 159
<i>v.</i> Griffith, 1 Sw., 43 ...	103, 104, 203, 298, 381
<i>v.</i> Patterson, 4 Md. Ch., 335 ...	343
<i>v.</i> Rowcliffe, 2 Ph., 382 ...	71, 40
<i>v.</i> Sutcliffe, 2 Sim., N. S., 163 ...	631, 668

	PAGE
Woodburry <i>v.</i> Luddy, 14 Allen, 1	426
<i>v.</i> Woodbury, 141 Mass., 329	457
Woodhouse <i>v.</i> Walker, 5 Q. B. D., 404	637
Woodstock Iron Co. <i>v.</i> Fullenwider, 13 Am. St. R., 73	499
Woodward <i>v.</i> Gyles, 2 Vern., 119	117
Woollam <i>v.</i> Hearn, 7 Ves., 211	245
Woollums <i>v.</i> Horsley, 93 Ky., 582	230, 334
Woolsey <i>v.</i> Judd, 4 Duer, 379	158
Woopendra <i>v.</i> Aghore, 9 C. W. N., 498	505
Woorrall <i>v.</i> Jacob, 3 Mer., 256	439
Wotherspoon <i>v.</i> Currie, 5 H. L., 508	645
Wren <i>v.</i> Kiron, 11 Ves., 377	575
Wright <i>v.</i> Bell, 5 Price, 325	33, 124
<i>v.</i> Goff, 22 Beav., 207	443
<i>v.</i> Howard, 1 Sim. and St., 190	271
<i>v.</i> Pucket, 22 Gratt., 374	253
Wylson <i>v.</i> Dunn, 34 Ch. D., 569	350, 352
Wynne <i>v.</i> Lord Newborough, 1 Ves., 164	570
<i>v.</i> Price, 3 DeG. and Sm., 310	91, 101

Y

Yad Ram <i>v.</i> Umrao, 21 All., 380	406
Yamir-ud-doulah <i>v.</i> Ahmed Ali, 21 Cal., 561	583
Yard <i>v.</i> Ocean Beach Assn., 49 N. J., Eq., 306	511
Yaro <i>v.</i> Sanaullah, 19 All., 257	604, 652, 152, 160
Yashvantrav <i>v.</i> Dadabhai, 14 Bom., 353	46
Yates <i>v.</i> Jack, [1866] 1 Ch. Ap., 295	644
Yorks <i>v.</i> Richard, 34 Am. St., R., 721	352
Yeshwant <i>v.</i> Shankar, 17 Bom., 390	551
York <i>v.</i> Hinkle, 80 Wis., 624	212
Young, <i>in re</i> , 7 Fed., 855	563
<i>v.</i> Clerk, Prec. Ch., 538	320
<i>v.</i> Paul, 64 Am. Dec., 456	181
<i>v.</i> Wright, 4 Wis., 144	303
Yovatt <i>v.</i> Winyard, 1 J. and W., 394	648, 158
Yule <i>v.</i> Ardeshir, 16 Bom. L. R., 173	170

Z

Zackaraya <i>v.</i> Chunna, (1911) 9 M. L. T., 270	255, 26
Zafaryab Ali <i>v.</i> Bakhtawar Singh, 5 All., 497	498
Zemindar of Ramnad <i>v.</i> Zemindar of Yettiapooram, 10 M. I. A., 47	53
Zeringue <i>v.</i> Texas and P. R. R., 34 Fed. Rep., 239	292
Zetland <i>v.</i> Hislop., 7 A. C., 447	615
Zainullah <i>v.</i> Inu, 23 Cal., 693	66, 36
Zinnatunnessa <i>v.</i> Girindra, 30 Cal., 788	524, 121

LIST OF ABBREVIATIONS.

ACTS.

C. P. C.	... Civil Procedure Code (XIV of 1882).
Com. Law. Proc. Act	... Common Law Procedure Act.
Cr. P. C.	... Criminal Procedure Code.
I. C. A.	... Indian Contract Act.
I. E. A., I. Ev. A.	... Indian Evidence Act.
I. L. A., I. Lim. A.	... Indian Limitation Act.
I. P. C.	... Indian Penal Code.
I. R. A.	... Indian Registration Act.
I. Tr. A.	... Indian Trusts Act.
S. R. A.	... Specific Relief Act.
T. P. A.	... Transfer of Property Act.

CASE-BOOKS.

Ames	... Selection of Cases in Equity Jurisdiction, by J. B. Ames, Cambridge, Mass., Vol. I., 1904.
Bigelow, <i>L. C.</i>	... Leading Cases on the Law of Torts, by M. M. Bigelow, Boston, 1875.
Finch	... Selection of Cases on the English Law of Contract, by G. B. Finch, ed. 2, Cambridge, 1896.
Finch, <i>Cas. Prop.</i>	... Selected Cases on the Law of Property in Land, by W. A. Finch, ed. 2, New York, 1904.
H. & W. Huff, & Wood.	... American Cases on Contract, by E. W. Huffcutt and E. H. Woodruff, ed. 2, Albany, 1901.
Keener	... Selection of Cases on Equity Jurisdiction, by W. A. Keener, 3 Vols., New York, 1895-7.
Kenny	... Selection of Cases illustrative of the English Law of Tort, by C. S. Kenny, Cambridge, 1904.
R. C.	... Ruling Cases, by R. Campbell, 26 Vols., London, 1894-1902.
Rad. & Mil.	... Cases illustrating the Principles of the Law of Torts, by F. R. Y. Radcliffe and J. C. Miles, Oxford, 1904.
Scott	... Cases on Equity Jurisdiction, by J. B. Scott, 2 Vols., New York, 1906.
Smith, <i>L. C.</i> , Sm. L. C.	... Selection of Leading Cases, by J. W. Smith, 2 Vols., London, ed. 10, 1896; ed. 11, 1903.
Wh. & T.	... Selection of Leading Cases in Equity, by F. T. White and O. D. Tudor, 2 Vols., ed. 7, London, 1897.
Williston, <i>Cas. Bankruptcy.</i>	... Cases on the Law of Bankruptcy, by S. Williston, Cambridge, Mass., 1906.
<i>Cas. Con.</i>	... Selection of Cases on Contracts, by S. Williston, 2 Vols., Boston.
Woodruff, <i>Quasi-con.</i>	... Selected Cases on the Law of Quasi-Contracts, by E. H. Woodruff, Indianapolis, 1905.

PERIODICALS.

A. L. J.	... Allahabad Law Journal.
Amer. L. Reg.	... American Law Register.
Amer. L. Rev.	... American Law Review.
Bom. L. R.	... Bombay Law Reporter.
C. L. J.	... Calcutta Law Journal.
C. W. N.	... Calcutta Weekly Notes.
Columbia Law Rev.	... Columbia Law Review,

Harv. L. R. (or Rev.)	...	Harvard Law Review.
Journ. Comp. Legisl.	...	Journal of the Society of Comparative Legislation.
L. Q. R., Law Q. Rev.	...	Law Quarterly Review.
Law Journal (Eng.)	...	Law Journal, London.
Law Mag. & Rev.	...	Law Magazine and Review.
M. L. J.	...	Madras Law Journal.

REPORTS.

(a) *Indian.*

A. L. J. R.	...	Allahabad Law Journal Reports, 1904—
A. W. N.	...	Allahabad Weekly Notes, 1881-1908.
Agra H. C.	...	Agra High Court Reports, 1866-8.
All.	...	Indian Law Reports, Allahabad Series, 1876—
B. L. R.	...	Bengal Law Reports, 1868-75.
B. L. R., A. C.	...	Do. Appellate Civil.
B. L. R., Ap.	...	Do. Appendix.
B. L. R., F. B.	...	Do. Supplemental volume of Full Bench Rulings, 1862-8.
Bom.	...	Indian Law Reports, Bombay Series, 1876—
Bom. H. C., (H. C. R.)	...	Bombay High Court Reports, 1862-75.
Bom. H. C., A. C.	...	Do. Appellate Civil.
O. C.	...	Do. Original Civil Jurisdiction.
Bom. L. R.	...	Bombay Law Reporter, 1899—
Bom. P. J.	...	Printed Judgments, Bombay High Court, 1869-1900.
Boulnois	...	Boulnois' Reports, Calcutta, 1855.
Bourke	...	Bourke's Reports, Calcutta High Court, Original Side, 1865.
Burma L. R.	...	Burma Law Reporter.
Cal.	...	Indian Law Reports, Calcutta Series, 1876—
C. L. J.	...	Calcutta Law Journal Reports, 1905—
C. L. R.	...	Calcutta Law Reports, 1877-84.
C. P. L. R.	...	Central Provinces Law Reports, 1886-1904.
C. W. N.	...	Calcutta Weekly Notes, 1896—
Coryton	...	Coryton's Reports, Calcutta High Court, Original Side, 1862-3.
Hay	...	Hay's Reports, Calcutta High Court, 1863.
Hyde	...	Hyde's Reports, Calcutta High Court, 1863-4.
I. A.	...	Law Reports, Indian Appeals, 1868—
I. A. Sup.	...	Ditto, supplementary volume, 1872-3.
I. C.	...	Indian Cases, 1909—
I. L. R.	...	Indian Law Reports, 1876—
Ind. Jur., N. S.	...	Indian Jurist, Calcutta High Court, New Series, 1866-7.
O. S.	...	Do. do. Old „ 1862.
L. B. R.	...	Lower Burma Rulings, 1872—
Mad.	...	Indian Law Reports, Madras Series, 1876—
Mad. H. C., (H. C. R.)	...	Madras High Court Reports, 1862-75.
Mad. Jur.	...	Madras Jurist.
Marshall	...	Marshall's Reports, Calcutta High Court, 1862-3.
Morley, Dig.	...	Morley's Digest.
M. I. A., Moo. I. A.	...	Moore's Indian Appeals, 1836-72.
M. L. J. R.	...	Madras Law Journal Reports, 1881—
M. L. T.	...	Madras Law Times, 1906—
N. L. R.	...	Nagpur Law Reports, 1905—
N. W. P., H. C., (H. C. R.)	...	North Western Provinces High Court Reports, 1869-75.
O. C.	...	Oudh Cases, 1898—
P. L. R.	...	Punjab Law Reporter, 1900—
P. R.	...	Punjab Record, 1867—
P. W. R.	...	Punjab Weekly Reporter, 1907—

S. D. A.	...	Sudder Dewany Adawint Reports.
Sel. Ca.	...	Oudh Select Cases.
Sev.	...	Sevestre's Reports, Calcutta.
Sind. L. R.	...	Sind Law Reporter, 1908--
Tay. & Bell	...	taylor and Bell's Reports, Calcutta Supreme Court.
Travancore L. R.	...	Travancore Law Reports, 1885--
U. B. R.	...	Upper Burma Rulings, 1892--
W. R.	...	Sutherland's Weekly Reporter, 1864-76.
	(b)	<i>English, Scotch and Irish.</i>
A. C.	...	Law Reports, Appeal cases (House of Lords), since 1876.
Adol. & E.	}	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 Vols., 1831-1842.
A. & E.		...
Aleyn	}	Aleyn's Reports, King's Bench, 1 Vol., 1646-1649.
Amb.		...
Ambl.	}	Ambler's Reports, Chancery, 2 Vols., 1725-1783.
Ans.		Anstruther's Reports, Exchequer, 3 Vols., 1792-1797.
Atk.	...	Atkyn's Reports, Chancery, 3 Vols., 1736-1754.
B. & Ald.	...	Barnewall and Alderson's Reports, King's Bench, 5 Vols., 1830-34.
Ball & Beat.	}	Ball and Beatty's Reports, Chancery (Ireland), 2 Vols., 1807-14.
Ball & Be.		...
Ball & B.	}	Barnewall and Cresswell's Reports, King's Bench, 10 Vols., 1822-30.
Ba. & Be.		...
B. & C.	...	Beatty's Reports, Chancery (Ireland), 1 Vol., 1813-30.
Beat.	...	Beavan's Reports, Rolls Court, 36 Vols., 1838-66.
Beav.	...	Best and Smith's Queen's Bench Reports, 10 Vols., 1861-70.
Best. & Sm.	...	Bingham's Reports, Common Pleas, 10 Vols., 1822-34.
Bing.	...	Bingham's New Cases, Common Pleas, 6 Vols., 1834-40.
Bing., N. C.	...	Bligh's Reports, House of Lords, New Series, 11 Vols., 1827-37.
Bli. N. S.	}	...
Bligh, N. S.		...
Bos. & Pul.	}	Bosanquet and Puller's Reports, Common Pleas, 3 Vols., 1796-1804.
Bos. & P.		...
B. & P.	}	W. Brown's Chancery Reports, 4 Vols., 1778-94.
Bro. C. C.		...
Bro. Ch.	...	J. Brown's Cases in Parliament, 8 Vols., 1702-1800.
Bro. P. C.	...	Buck's Cases in Bankruptcy, 1 Vol., 1816-20.
Buck, Bankr. C.	...	Burrow's Reports, King's Bench, 5 Vols., 1756-72.
Burr.	...	Common Bench Reports, 18 Vols., 1845-56.
C. B.	...	Ditto, New Series, 20 Vols., 1856-65.
C. B. N. S.	...	Law Reports, Common Pleas, 10 Vols., 1865-75.
C. P.	...	Law Reports, Common Pleas Division, 5 Vols., 1875-80.
C. P. D.	...	C. P. Cooper's Reports, Chancery Practice, 1 Vol., 1837-38.
C. P. Coop.	...	Carrington and Payne's Reports, Nisi Prius, 9 Vol., 1823-41.
C. & P.	...	Calendar of Proceedings in Chancery.
Cal. Ch.	...	Campbell's Reports, Nisi Prius, 4 Vols., 1807-16.
Camp.	...	Cases in Equity. <i>tempore</i> Talbot, 1 Vol., 1730-37.
Cas. temp. Talbot	...	Law Reports, Chancery Division, since 1890.
Ch.	...	Law Reports, Chancery Appeals, 10 Vols., 1865-75.
Ch., Ch. A., Ch. Ap.	...	Cases in Chancery, 1660-1697.
Ch. Cas.	...	Law Reports, Chancery Division, 45 Vols., 1875-90.
Ch. D.	...	

Ch. Rep.	...	Reports in Chancery, 3 Vols., 1615-1710.
Cl. & F.	...	Clark and Finnelly's Reports, House of Lords, 12 Vols., 1831-46.
Co. Rep.	}	...
Coke		
		Coke's Reports, English, King's Bench, 13 parts, 1572-1616.
Coll.	}	...
Coll. C. C.		
Coop.	}	...
G. Coop.		
		G. Cooper's Reports, Chancery, 1 Vol., 1792-1815.
Cowp.	}	...
Cox		
Cox		Cox's English Equity Cases, 2 Vols., 1745-1797.
Cr. & Ph.		Craig and Phillip's Reports, Chancery, 1 Vol., 1840-41.
Cro, Jac.		Croke's Reports, <i>tempore</i> James I, King's Bench and Common Pleas, 1 Vol., 1603-25.
DeG., F. & J.		DeGex, Fisher and Jones' Reports, Chancery, 4 Vols., 1859-62.
DeG. & J.		DeGex and Jones' Reports, Chancery, 4 Vols., 1857-59.
DeG. J. & S.	}	...
D. J. S.		
		DeGex, Jones and Smith's Reports, Chancery, 4 Vols., 1862-65.
DeG., M. & G.	}	...
D. M. G.		
		DeGex, Macnaghten, and Gordon's Reports, Chancery, 8 Vols., 1851-57.
DeG. & Sm.	}	...
DeG. & S.		
		DeGex, and Smale's Reports, Chancery, 5 Vols., 1846-52.
Dick.		Dickens' Reports, Chancery, 2 Vols., 1559-1598.
Dow		Dow's Reports, House of Lords, 6 Vols., 1812-18.
Dow. & Ryl.		Dowling and Ryland's Reports, King's Bench, 9 Vols., 1822-27.
Drew.		Drewry's Reports, Chancery, 4 Vols., 1852-59.
Dr. & Sm.		Drewry and Smale's Reports, Chancery, 2 Vols., 1859-65.
Dr. & W.		Drury and Walsh's Reports, Chancery, (Ireland), 2 Vols., 1837-41.
Dr. & War.		Drury and Warren's Reports, Chancery, (Ireland), 4 Vols., 1841-45.
E. & B.	}	...
El. & B.		
El. & Bl.		
E., B. & E.		Ellis, Blackburn and Ellis's Reports, Queen's Bench, 1 Vol., 1858-60.
East		East's Reports, King's Bench, 16 Vols., 1800-12.
Eden		Eden's Reports, Chancery, 2 Vols., 1757-66.
Eq.		Law Reports, Equity Cases, 20 Vols., 1865-75.
Eq. Abr.		Abridgment of Cases in Equity, 2 Vols., 1667-1744.
Ex.		Law Reports, Exchequer, 10 Vols., 1865-75.
Ex. D.		Law Reports, Exchequer Division, 5 Vols., 1875-80.
F.		Fraser's Court of Session Cases, Scotland, 1898-1906.
Fl. & Kelly		Flanagan and Kelly's Reports, Rolls Court, (Ireland), 1840-2.
Freem.	}	...
Freem. C. C.		
Giff.		Giffard's Reports, Chancery, 5 Vols., 1857-1865.
Gould.		Gouldsbrough's Reports, Queen's Bench, 1 Vol., 1586-1601.
H. Bl.		Henry Blackstone's English Common Pleas Reports, 2 Vols., 1788-96.
H. & C.		Hurlstone and Coltman's Reports, Exchequer, 4 Vols., 1862-66.

H. & M.	...	Hemming and Miller's Reports, Chancery, 2 Vols., 1862-65.
H. & N.	...	Hurlstone and Norman's Reports, Exchequer, 7 Vols., 1856-62.
H. & W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 Vol., 1840-41.
H. L.	...	Law Reports, House of Lords, 7 Vols., 1866-75.
H. L. C.	...	Clark's Report, House of Lords, 11 Vols., 1847-66.
Ha.	}	Hare's Reports, Chancery, 11 Vols., 1841-53.
Hare		
I. R.	...	Irish Reports, 1893—
I. R. Eq.	...	Irish Reports, Equity, 11 Vols., 1866-77.
Ir. Ch. R.	...	Irish Chancery Reports, 17 Vols., 1850-67.
Ir. Eq. R.	}	Irish Equity Reports, 13 Vols., 1838-51.
Ir. Eq.		
J. P.	...	Justice of the Peace, 1837—
Jac.	...	Jacob's Reports, Chancery, 1 Vol., 1821-23.
J. & H.	...	Johnson and Hemming's Reports, Chancery, 2 Vols., 1866-62.
J. & W.	...	Jacob and Walker's Reports, Chancery, 2 Vols., 1819-21.
Jones & Lat.	}	Jones and La Touche's Reports, Chancery, (Ireland), 1 Vol., 1844-46.
Jon. & Lat.		
J. & Lat.		
J. & L.		
Johns.	...	Johnson's Reports, Chancery, 1 Vol., 1858-60.
Jur.	...	Jurist Reports, 18 Vols., 1837-54.
Jur., N. S.	...	Jurist Reports, New Series, 12 Vols., 1855-67.
K. B.	...	Law Reports, King's Bench Division, since 1900.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 Vols., 1853-58.
Kay	...	Kay's Reports, Chancery, 1 Vol., 1853-4.
Keen	}	Keen's Report, Rolls Court, 2 Vols., 1836-38.
Ke.		
Knapp	...	Knapp's Reports, Privy Council, 3 Vols., 1829-36.
L. J., Ch.	...	Law Journal, Chancery, 1822—
Ex.	...	Exchequer, 1830-75.
C. P.	...	Common Pleas, 1822-75.
P. C.	...	Privy Council, 1865—
Q. B. (or K. B.)	...	Queen's (or King's) Bench, 1822—
L. R. (Ir.)	...	Law Reports, (Ireland), Chancery and Common Law, 32 Vols., 1879-93.
Ch. D.	...	Chancery Division.
L. T.	...	Law Times Reports, 1859—
O. S.	...	Do., Old Series, 34 Vols., 1843-60.
Litt.	...	Littleton's Reports, Common Pleas, 1 Vol., 1627-31.
Lane	...	Lane's Reports, Exchequer, 1 Vol., 1605-11.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench, 3 Vols., 1694-1732.
Ll. & G.	...	Lloyd and Goold's Chancery Reports, (Ireland), 1834-9.
M. & W.	...	Messon and Welsby's Reports, Exchequer, 16 Vols., 1836-47.
Mac. & G.	}	Macnaghten and Gordon's Reports, Chancery, 3 Vols., 1849-47.
M. & G.		
Macq., MacQ.	...	Macqueen's Scotch Appeals, House of Lords, 4 Vols., 1874-65.
Madd.	...	Maddock's Reports, Chancery, 6 Vols., 1815-21.
Manson	...	Manson's Bankruptcy and Company Cases, 1893—
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 Vols., 1840-45.
Mer.	...	Merivale's Reports, Chancery, 3 Vols., 1815-17.
Mod.	...	Modern Reports, 12 Vols., 1669-1755.

Moll.	...	Molloy's Reports, Chancery, (Ireland), 3 Vols., 1808-31.
Moseley	...	Moseley's Reports, Chancery, 1 Vol., 1726-30.
Myl. & Cr.	}	...
My. & Cr.		Myne and Craig's Reports, Chancery, 5 Vols., 1835-41.
My. & K.	}	...
M. & K.		Myne and Keen's Reports, Chancery, 3 Vols., 1832-35.
M. & S.		Maule and Selwyn's Reports, King's Bench, 6 Vols., 1813-7.
Noy	...	Noy's Reports, King's Bench, 1 Vol., 1558-1649.
P.	...	Law Reports, Probate, Divorce and Admiralty Division, 1890—
P. C.	..	Privy Council, Parliamentary cases.
P. R.	...	Parliamentary Reports.
P. Wms.	}	Peere Williams' Reports, Chancery and Queen's Bench, 3 Vols., 1695-1735.
P. W.		...
Ph.	}	Phillips' Reports, Chancery, 2 Vols., 1841-49.
Phill., Ch.		...
Pr., Price	}	Price's Reports, Exchequer, 13 Vols., 1814-24.
Prec. in Ch.		...
Prec. Ch.		Precedents in Chancery, 1 Vol., 1689-1722.
Q. B.	...	Law Reports, Queen's Bench Division, 1891-1901.
Q. B. D.	...	Law Reports, Queen's Bench Division, 25 Vols., 1875-90.
R. R.	...	Revised Reports.
Rep.	...	Coke's Reports, King's Bench, 1572-1616.
Rep. Fin.	...	Cases <i>tempore</i> Finch, 1 Vol., 1730-7.
Ridg.	...	Ridgeway's Reports <i>tempore</i> Hardwicke, Chancery, 1 Vol., 1744-6.
Rus., Russ.	...	Russell's Reports, Chancery, 5 Vols., 1824-29.
Russ. & My.	}	...
Rus. & M.		Russell and Myne's Reports, Chancery, 2 Vols., 1829-33.
R. & My.		...
R. & M.		Sausse and Scully's Reports, Rolls Court, (Ireland), 1 Vol., 1837-40.
Sausse & Scully	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 Vols., 1866-75.
Sc. & D.	...	Schoales and Lefroy's Reports, Chancery, (Ireland), 2 Vols., 1802-06.
Schoales & L.	}	...
Sch. & Lefr.		Select Cases in Chancery, 1 Vol., 1685-98.
Sch. & Lof.	}	...
Sch. & L.		Court of Session Cases (Scotland), 1906—.
Sel. Cas. Ch.	}	Simons' Reports, Chancery, 17 Vols., 1826-52.
Sel. Ch. Cas.		Simon's Reports, Chancery, New Series, 2 Vols., 1850-52.
Ses. C.	...	Simon's and Stuart's Reports, Chancery, 2 Vols., 1822-26.
Sim.	...	Smale and Giffard's Reports, Chancery, 3 Vols., 1852-58.
Sim. N. S.	...	Solicitors' Journal, 1856—
Sim. & St.	}	...
S. & S.		Starkie's Reports, Nisi Prius, 3 Vols., 1814-23.
Sm. & Gif.	}	Swanston's Reports, Chancery, 3 Vols., 1818-21.
Sm. & G.		Times Law Reports, 1884—
Sol. Jour.	}	Term Reports, by Durnford & East, 8 Vols., 1785-1800.
Sol. J.		Turner and Russell's Reports, Chancery, 1 Vol., 1822-5.
Stark.	...	Tamlyn's Reports, Rolls Court, 1 Vol., 1829-30.
Sw.	...	Taunton's Reports, Common Pleas, 8 Vols., 1807-19.
Swanst.	...	
T. L. R.	...	
T. R.	...	
T. & R.	...	
Taml.	...	
Taunt.	...	

Tyr. & Gr.	...	Tyrwhitt and Grange's Reports, Exchequer, 1 Vol., 1835-6.
V. & B.	...	Vesey and Beames's Reports, Chancery, 3 Vols., 1812-14.
Vern.	...	Vernon's Reports, Chancery, 2 Vols., 1680-1719.
Ves.	...	Vesey Junior's Reports, Chancery, 19 Vols., 1789-1817.
Ves. Sr.	...	Vesey Senior's Reports, 2 Vols., 1747-56.
W. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, 2 Vols., 1746-79.
W. N.	...	Law Reports, Weekly Notes, 1866—
W. R. (Eng.)	...	Weekly Reporter, 54 Vols., 1852-1906
Willes	...	Willes' Reports, Common Pleas, 1 Vol., 1737-58.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 Vol., 1757-1770.
Wils.	...	J. Wilson's Reports, Chancery, 2 Vols., 1818-9.
Wms. Saund.	...	Williams' Notes to Saunder's Reports, 2 Vols.
Y. & C. Ch.	...	Younge and Collyer's Reports, Chancery Cases, 2 Vols., 1841-42.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 Vols., 1834-42.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 Vols., 1826-30.
Y. B.	...	Year Books. (c) <i>American</i> .
Ala. Alabama	...	Alabama State Reports, 1840—
Allen	...	Allen's Massachusetts Reports, 14 Vols., 1861-1867.
Am. Dec.	...	American Decisions, 100 Vols., 1769-1869.
Am. Rep.	...	American Reports, selected cases, 60 Vols., 1869-87.
Am. St. R.	}	American State Reports, 1887—
Am. St. Rep.		
Ark.	...	Arkansas State Reports, 1837—
Atl.	...	Atlantic Reporter, 1885—
B. Mon.	...	Benjamin Monroe's Kentucky Reports, 18 Vols., 1840-57.
Bailey	...	Bailey's South Carolina Reports, 2 Vols., 1828-32.
Barb.	...	Barbour's Supreme Court Reports, New York, 67 Vols., 1847-77.
Barb. Ch.	...	Barbour's Chancery Reports, New York, 3 Vols., 1845-8.
Blatchf.	...	Blatchfords U. S. Circuit Court Reports, 24 Vols., 1845-87.
Bush	...	Bush's Kentucky Reports, 14 Vols., 1866-79.
C. E. Gr.	...	C. E. Green's New Jersey Equity Reports, 12 Vols., 1862-76
Calif.	...	California State Reports, 1850—
Cold.	...	Coldwell's Tennessee Reports, 7 Vols., 1860-70.
Colo.	...	Colorado Supreme Court Reports, 1864—
Comst.	...	Comstock's New York Court of Appeals Reports, 4 Vols., 1847-51.
Conn.	...	Connecticut Reports, 1814—
Cowen	...	Cowen's New York Reports, 9 Vols., 1823-29.
Cranch	...	Cranch's U. S. Supreme Court Reports, 9 Vols., 1801-15.
Cush.	...	Cushing's Massachusetts Reports, 12 Vols., 1848-53.
D. C.	...	District of Columbia Reports.
Dak.	...	Dakota Reports, 6 Vols., 1867-99.
Dallas	...	Dallas' U. S. Supreme Court Reports, 4 Vols., 1790-1800.
Day	...	Day's Connecticut Reports, 5 Vols., 1802-13.
Del. Ch.	...	Delaware Chancery Reports, 7 Vols., 1814-99.
Denio	...	Denio's New York Law Reports, 5 Vols., 1845-8.

Desaus.	}	Desaussure's South Carolina Equity Reports, 4
Dess.		Vols., 1784-1816.
Dev.	...	Devereux's North Carolina Law Reports, 4 Vols., 1826-34.
Dev. Eq.	...	Devereux's North Carolina Equity Reports, 2 Vols., 1826-34.
Deur	...	Duer's New York Superior Court Reports, 6 Vols., 1852-57.
Fed., Fed. R.	...	Federal Reporter, 1880—
Fla.	...	Florida Reports, 1846—
Ge., Geor.	...	Georgia Reports, 1846—
Gratt.	...	Grattan's Virginia Reports, 33 Vols., 1844-80.
Gray	...	Gray's Massachusetts Reports, 16 Vols., 1854-60.
Green	...	Green's New Jersey Equity Reports, 3 Vols., 1832-45.
Green, C. E.	...	C. E. Green's New Jersey Equity Reports, 12 Vols., 1862-76.
Halst. Ch.	...	Halsted's New Jersey Equity Reports, 4 Vols., 1845-53.
Har.	...	Harrington's Chancery Reports, Michigan, 1 Vol., 1836-42.
Har. & Johns.	...	Harris and Johnson's Maryland Reports, 7 Vols., 1800-26.
Hill, Ch.	...	Hill's Chancery Reports, South Carolina, 2 Vols., 1833-7.
Holmes	...	Holmes' United States Circuit Court Reports, 1 Vol., 1870-75.
Houst. (Del.)	...	Houston's Delaware Reports, 7 Vols., 1855-1887.
How. Pr.	...	Howard's Practice Reports, New York, 67 Vols., 1844-85.
Howard	...	Howard's United States Supreme Court Reports, 24 Vols., 1843-60.
Humph.	...	Humphrey's Tennessee Reports, 11 Vols., 1839-51.
Hun	...	Hun's New York Supreme Court Reports, 92 Vols., 1874-95.
Idaho	...	Idaho Reports, 1866—
Ill.	...	Illinois Reports, 1819—
Indiana	...	Indiana Reports, 1848—
Iowa	...	Iowa Reports, 1855—
Ired. Eq.	...	Iredell's Equity Reports, North Carolina, 8 Vols., 1840-1852.
John. Ch., Johns. Ch.	...	Johnson's Chancery Reports, New York, 7 Vols., 1814-23.
Jones Eq.	...	Jones' Equity Reports, North Carolina, 6 Vols., 1853-63.
Kan.	...	Kansas Reports, 1862—
Ky.	...	Kentucky Reports, 1879—
Ky. L. R.	...	Kentucky Law Reporter.
L. R. A.	...	Lawyers' Reports Annotated, 70 Vols., 1888-1906.
L. R. A., N. S.	...	Lawyers' Reports Annotated, New Series, 1906—
La.	...	Louisiana Reports, 1830—
Lowell	...	Lowell's Reports, District Courts of Massachusetts, 2 Vols., 1865-76.
Mart. & Yerg.	...	Martin and Yerger's Tennessee Reports, 1 Vol., 1825-28.
Mason	...	Mason's United States Circuit Court Reports, 5 Vols., 1816-30.
Mass.	...	Massachusetts Reports, 1804—
Md.	...	Maryland Law Reports, 1851—
Md. Ch.	...	Maryland Chancery Reports, 4 Vols., 1847-54.
Me.	...	Maine Reports, 1820—
Meigs	...	Meigs' Tennessee Law Reports, 1 Vol., 1838-9.
Metc.	...	Metcalf's Kentucky Reports, 4 Vols., 1858-63.

Mich.	...	Michigan Reports, 1847.
Minn.	...	Minnesota Report, 1851—
Miss.	...	Mississippi Reports, 1851—
Missou.	}	Missouri Reports, 188 Vols., 1821-1902.
Mo.		
Mont.	...	Montana Reports, 1868—
Munf.	...	Munford's Virginia Reports, 6 Vols., 1810-20.
Murphy	...	Murphy's North Carolina Reports, 3 Vols., 1804-19
N. C.	...	North Carolina Reports, 1868—
N. E. Rep.	}	North-Eastern Reporter, 1885—
N. E. R.		
N. H.	...	New Hampshire Reports, 1816—
N. J. Eq.	...	New Jersey Equity Reports, 1830—
N. Y.	...	New York Reports, 1847—
N. Y. (Supp.)	...	New York Supplement Reports, 1888—
Neb.	...	Nebraska Reports, 1854—
Nev.	...	Nevada Reports, 1865—
Ohio	...	Ohio Reports, 20 Vols., 1821-51.
Ohio St.	...	Ohio State Reports, 1852—
Okla.	...	Oklahoma Reports, 1890—
Or., Oregon	...	Oregon Reports, 1853—
Pa.	}	Pennsylvania State Reports, 1844—
Pa. St.		
Pac.		
Paige, Ch.	...	Paige's New York Chancery Reports, 1 Vol., 1828-45
Pars. Eq.	...	Parsons' Select Equity Cases, Pennsylvania, 2 Vols., 1841-51.
Pet.	}	Peters' United States Supreme Court Reports, 16 Vols., 1828-42.
Peters.		
Phila.	...	Philadelphia Reports, 20 Vols., 1850-83.
Pick.	}	Pickering's Massachusetts Reports, 24 Vols., 1822-39.
Pickering		
Porter	...	Porter's Alabama Reports, 9 Vols., 1834-9.
R. I.	...	Rhode Island Reports, 1828—
Root	...	Root's Connecticut Reports, 2 Vols., 1789-98.
S. & R.	...	Sergeant and Rawle's Pennsylvania Reports, 17 Vols., 1814-28.
S. C.	...	South Carolina Reports, 1868—
S. E. R.	...	South-Eastern Reporter, 1886—
S. R.	...	Southern Reporter, 1886—
S. W.	...	South-Western Reporter, 1886—
Sandf. Ch.	...	Sandford's New York Chancery Reports, 4 Vols., 1843-7.
Saxton	...	Saxton's New Jersey Equity Reports, 1 Vol., 1830-2.
Sm. & Marsh.	...	Smedes and Marshall's Mississippi Reports, Chancery, 1 Vol., 1840-43
Stockt.	...	Stockton's New Jersey Equity Reports, 3 Vols., 1852-8.
Story	...	Story's U. S. Circuit Court Reports, 3 Vols., 1839-45.
Strob. Eq.	...	Strobbart's South Carolina Equity Reports, 4 Vols., 1846-50.
Sumn.	...	Sumner's U. S. Circuit Court Reports, 3 Vols., 1829-39.
Tenn. Ch.	...	Cooper's Tennessee Chancery Reports, 3 Vols., 1872-78.
Tex.	...	Texas Reports, 1846—
U. S.	...	United States Reports, 1790—
Va.	...	Virginia Reports, 1730—
Ver., Vt.	...	Vermont Reports, 1826—
W. Va.	...	West Virginia Reports, 1887—

Wall.	}	Wallace's United States Supreme Court Reports,
Wallace		23 Vols., 1863-74.
Wall. Jr.		Wallace Junior's U. S. Circuit Court Reports,
		3 Vols., 1842-62.
Wash.	...	Washington State Reports, 1889—
Wash. (Va)	...	Washington's Virginia Reports, 2 Vols., 1790-96.
Watts	...	Watt's Pennsylvania Reports, 10 Vols., 1832-40.
Watts & Serg.	...	Watts and Sergeant's Pennsylvania Reports,
		9 Vols., 1841-45.
Wheat.	...	Wheaton's United States Supreme Court Reports,
		12 Vols., 1816-27.
Wis.	...	Wisconsin Reports, 1853—
Woodb. & Min.	...	Woodbury and Minot's Reports, 3 Vols., 1845-7.
Woods	...	Woods' United States Circuit Court Reports,
		4 Vols., 1870-83.
Woolw.	...	Woolworth's United States Circuit Court Reports,
		1 Vol., 1863-9.
Wright	...	Wright's Ohio Supreme Court Reports, 1 Vol.,
		1831-34.
Yerg.	...	Yerger's Tennessee Reports, 10 Vols., 1828-37.

TEXT-BOOKS, ETC.

Agnew, <i>Trusts</i>.	...	<i>The Law of Trusts in British India</i> , by Sir W. F. Agnew, 1882.
Alderson, <i>Rec</i>.	...	<i>Practical Treatise on the Law of Receivers</i> , by W. A. Alderson, 1905.
Ameer Ali and Woodroffe, <i>Ev</i>.	...	<i>The Law of Evidence applicable to British India</i> , by Ameer Ali, S., and J. G. Woodroffe, ed. 4, 1907.
Anson, <i>Con</i>.	...	<i>Principles of the English Law of Contract</i> , by Sir W. R. Anson, ed. 11 (2nd American ed., by Hufcutt), 1906.
Arnold <i>Psych. Leg. Ev</i>.	...	<i>Psychology of Legal Evidence</i> , by G. F. Arnold, 1906.
Ashburner, <i>Eq</i>.	...	<i>Principles of Equity</i> , by W. Ashburner, 1902.
Austin, <i>Jur</i>.	...	<i>Lectures on Jurisprudence</i> , by J. Austin, 2 Vols., ed. 5, 1885.
Banerjee, <i>Arb</i>.	...	<i>Law of Arbitration in India</i> , by D. C. Banerjee, 1908.
Banning, <i>Lim.</i> ,	...	<i>Law of the Limitation of Actions</i> , by H. T. Banning, ed. 3, 1906.
Baudry-Lecantinerie, <i>Droit Civil</i>	...	<i>Traité Theorique et l'ratique de Droit Civil</i> , ed., by Baudry-Lecantinerie, 1895.
Beach, <i>Mod. Eq. Rec</i>.	...	<i>Modern Equity Jurisprudence</i> , by C. F. Beach, 1892.
	...	<i>Commentaries on the Law of Receivers</i> , by C. F. Beach, 1894.
Bell	...	<i>Commentaries on the Law of Scotland</i> , by W. Bell, 2 Vols., 1870.
Benjamin, <i>Sale</i>	...	<i>Treatise on the Law of Sale of Personal Property</i> , by J. P. Benjamin, ed. 5, 1906.
Bennet, <i>Rec</i>.	...	<i>Practical Treatise on the Appointment, Office and Duties of a Receiver</i> , by W. H. Bennet, 1849.
Bentham, <i>Theory Leg</i>.	...	<i>Theory of Legislation</i> , by J. Bentham, ed. 8, 1894.
Best, <i>Ev</i>.	...	<i>Principles of the Law of Evidence</i> , by W. M. Best, ed. 10, 1906.
Beven, <i>Neg</i>.	...	<i>Negligence in Law</i> , by T. Beven, ed. 3, 2 Vols., 1908.
Beverley, <i>Land Acq. Act</i>	...	<i>Land Acquisition Acts</i> , by H. Beverley, ed. 5, 1905.
Bhattacharjya, H. L.	...	<i>Commentaries on Hindu Law</i> , by J. N. Bhattacharjya, ed. 2, 1893.
Bhattacharyya, J. H. F.	...	<i>Law relating to Joint Hindu Family</i> , by K. K. Bhattacharyya, 1885.
Bigelow, <i>Est</i>.	...	<i>Treatise on the Law of Estoppel</i> , by M. M. Bigelow, ed. 5, 1890.

- Bigelow *Fraud* ... *Treatise on the Law of Fraud*, by M. M. Bigelow, 2 Vols., 1890.
Torts ... *The Law of Torts*, by M. M. Bigelow, ed. 8, 1907.
 Bishop, *Con.* ... *Commentaries on the Law of Contracts*, by J. P. Bishop, ed. 2, 1907.
 Black, *Judgments* ... *Treatise on the Law of Judgments*, by H. C. Black, ed. 2, 2 Vols., 1902.
 Blackstone, *Com.* ... *Commentaries on the Laws of England*, by Sir W. Blackstone, 4 Vols., ed. 21, 1844.
 Bower, *Act. Def.* ... *Code of the Law of Actionable Defamation*, by G. S. Bower, 1908.
 Bowstead, *Agency* ... *Digest of the Law of Agency*, by W. Bowstead, ed. 3, 1907.
 Bracton, *Lib.* ... *De Legibus et Consuetudinibus Angliæ*, by Bracton, 6 Vols., 1878.
 Brice, *Ultra Vires* ... *Treatise on the Doctrine of Ultra Vires*, by S. Brice, ed. 3, 1898.
 Brihaspati ... *Brihaspati Smṛiti*, translated by J. Jolly, 1889.
 Broom, *Leg. Max.*, ... *Selection of Legal Maxims*, by H. Broom, ed. 7, 1900.
 Broughton, *Decl. Dec.*, ... *Declaratory Decrees*, by L. F. D. Broughton, 1878.
 Brown, *Cov.* ... *Law relating to Covenants running with land*, by R. C. Brown, 1907.
 Bucknill and Tuke, *Psychological Medicine* ... *Dictionary of Psychological Medicine*, by Bucknill and Tuke, ed. 3.
 Bullen and Leake, *Pleadings* ... *Precedents of Pleadings*, by Bullen and Leake, ed. 6, 1905.
 Buswell, *Lim.* ... *Statute of Limitations and Adverse Possession*, by Buswell, 1889.
 Caspersz, *Est.* ... *Modern or Equitable Estoppel and Res Judicata*, by A. Caspersz, ed. 3, 1909.
 Clerk & Lindesell, *Torts.* ... *Law of Torts*, by J. F. Clerk and W. H. B. Lindesell, ed. 4, 1906.
Cod. ... *Codex Justiniani*.
 Code Nap. ... *Code Napoleon*, translated by R. S. Richards.
 Coke ... *Institutes of the Laws of England*, by Sir E. Coke, 4 Vols., 1797.
 Coke Litt ... *A Commentary on Littleton* (first part of above), by Sir E. Coke, ed. 18, 2 Vols., 1823.
 Cole, *Ejectment* ... *Law of Ejectment*, by Cole.
 Collett, *S. R.* ... *Law of Specific Relief in India*, by C. Collett, ed. 4, 1907.
 Cooley, *Torts* ... *Treatise on the Law of Torts*, by T. M. Cooley, ed. 3, 3 Vols., 1906.
Com. Dig., ... *Digest*, by Comyns.
 Copinger, *Copyright* ... *Law of Copyright*, by W. A. Copinger, ed. 4, 1904.
 Craies ... *Treatise on the Statute Law*, by W. F. Craies, 1907.
 Cripp, *Comp.* ... *Principles of the Law of Compensation*, by C. A. Cripps, ed. 5, 1905.
 Cunningham & Shepherd, *I. C. A.* ... *Indian Contract Act*, edited by Sir H. Cunningham and Sir H. H. Shepherd, ed. 10, 1908.
Cyc. ... *Cyclopedia of Law and Procedure*, edited by W. Mack and H. P. Nash, 1901—
 Daniell, *Ch. Pr.* ... *Practice of the Chancery Division of the High Court of Justice*, by Daniell, 2 Vols., ed. 7, 1901.
 Darby and Bosanquet, *Lim.* ... *Practical Treatise on the Statute of Limitation*, by J. G. N. Darby and F. A. Bosanquet, ed. 2, 1893.
 Dart, *V. & P.* ... *Treatise on the Law and Practice relating to Vendors and Purchasers*, by Dart, ed. 7, 1905.
 Davidson, *Prec. Conv.* ... *Concise Precedents in Conveyancing*, by M. G. Davidson, ed. 18, 1904.
 Dayabhaga ... *Daya Bhaga of Jimutavahana*, translated by H. T. Colebrooke, 1868.
 Desai ... *Law of Specific Relief*, by T. R. Desai, 1907.
 Dicey, *Conf. Law* ... *Digest of the Law of England with reference to the Conflict of Law*, by A. V. Dicey, ed. 2, 1908.

Dicey, <i>Parties</i>	... <i>Treatise on the Rule for the Selection of the Parties to an Action</i> , by A. V. Dicey, 1870.
Dig.	... <i>The Digest or Pandects of the Emperor Justinian</i> .
Digby, <i>Hist. R. P.</i> ,	... <i>History of the Law of Real Property</i> , by Sir K. Digby, ed. 4, 1892.
Domat, <i>Civil Law</i>	... <i>Civil Law</i> , by Domat, translated by Strahan, 2 Vols., ed. 2, 1737.
Eden, <i>Inj.</i>	... <i>Treatise on the Law of Injunctions</i> , by R. H. Eden, 1821.
<i>Encyc. L. E.</i>	... <i>Encyclopædia on the Laws of England</i> , by A. W. Renton, ed. 1, 13 Vols., 1897-1903 ; ed. 2, 15 Vols., 1906-9.
Everest & Strode, <i>Est.</i>	... <i>Law of Estoppel</i> , by L. F. Everest and E. Strode, ed. 2, 1907.
Eversley, <i>Dom. Rel.</i>	... <i>Law of Domestic Relations</i> , by W. P. Eversley, ed. 3, 1906.
Ewart, <i>Est.</i>	... <i>Exposition of the Principle of Estoppel by Misrepresentation</i> , by J. S. Ewart, 1900.
Fawcett, <i>L. & T.</i>	... <i>Law of Landlord and Tenant</i> , by W. M. Fawcett, ed. 3, 1905.
Fearne, <i>Con. Rem.</i>	... <i>Contingent Remainders</i> , by C. Fearne.
Foa, <i>L. & T.</i>	... <i>Relationship of Landlord and Tenant</i> , by E. Foa, ed. 4, 1907.
Fonblanque, <i>Eq.</i>	... <i>Treatise on Equity</i> , by J. Fonblanque, ed. 5, 1820.
Fry, (S. P.)	... <i>Treatise on the Specific Performance of Contracts</i> , by Sir E. Fry, ed. 4, 1903.
Gale, <i>Easements</i>	... <i>Treatise on the Law of Easements</i> , ed. 8, 1908.
Garrett	... <i>Law of Nuisances</i> , by E. W. Garrett, ed. 3, 1908.
Gharpure, <i>Adj. Law Smritis</i>	... <i>The Adjective Law of the Smritis</i> , by J. R. Gharpure, 1905.
Ghose	... <i>Interpretation of Indian Statutes</i> , by A. N. Ghose and S. C. Ghosh, 1904.
Ghose, <i>H. L.</i>	... <i>Principles of Hindu Law</i> , by J. C. Ghose, ed. 2, 1906.
<i>Mortgage</i>	... <i>Law of Mortgage in India</i> , by R. Ghose, ed. 3, 1902.
Gilbert	... <i>Lex Prætoria</i> by Gilbert.
Glanville	... <i>Glanville de Legibus</i> .
Goddard, <i>Easements</i>	... <i>Treatise on the Law of Easements</i> , by J. L. Goddard, ed. 6, 1904.
Godefroi, <i>Trusts</i>	... <i>Law relating to Trusts</i> , by H. Godefroi, ed. 3, 1907.
Gour, <i>Trans. Prop.</i>	... <i>Law of Transfer in British India</i> , by H. S. Gour, ed. 2, 3 Vols., 1905.
Gray, <i>Perpetuities</i>	... <i>Rule against Perpetuities</i> , by J. C. Gray, ed. 2, 1906.
Grotius	... <i>De Jure Belli ac Pacis</i> , by Grotius, translated by Whewell, 3 Vols., 1853.
Harriman, <i>Con.</i>	... <i>Law of Contracts</i> , by E. A. Harriman, ed. 2, 1901.
Hart, <i>Banking</i>	... <i>Law of Banking</i> , by H. Hart, ed. 2, 1906.
Haynes, <i>Eq.</i>	... <i>Outlines of Equity</i> , by F. O. Haynes, ed. 2, 1865.
Hedaya	... <i>The Hedaya</i> , translated by C. Hamilton, ed. 2, (Grady), 1870.
High, <i>Extr. Leg. Rem.</i>	... <i>Extraordinary Legal Remedies</i> , by J. L. High, ed. 3, 1896.
<i>Inj.</i>	... <i>Treatise on the Law of Injunctions</i> , by J. L. High, ed. 3, 1890, ed. 4, 1905.
<i>Rec.</i>	... <i>Treatise on the Law of Receivers</i> , by J. L. High, ed. 3, 1894.
Holland, <i>Jur.</i>	... <i>Elements of Jurisprudence</i> , by T. H. Holland, ed. 10, 1906.
Holmes, <i>Com. Law</i>	... <i>The Common Law</i> , by O. W. Holmes, Jr., 1887.
Ihering	... <i>Grund des Besitzesschutzes</i> , by Von Ihering, ed. 2, 1869.

- Ilbert, *Leg. Meth.* ... *Legislative Methods and Forms*, by Sir C. P. Ilbert, 1901.
- Ingpen, *Ex.* ... *Law relating to Executors and Administrators*, by A. R. Ingpen, 1908.
- Jenks, *Law and Pol.* ... *Law and Politics in the Middle Ages*, by E. Jenks, 1898.
- Jones, *Mortgages* ... *Treaties on the Law of Mortgages of Real Property*, by L. A. Jones, ed. 6, 2 Vols., 1904.
- Joyce, *Inj.* ... *Doctrines and Principles of the Law of Injunctions*, by W. Joyce, 1877.
- Justinian ... *Institutes of Justinian*, translated by J. B. Moyle, ed. 4, 1906.
- Kant, *Phil. Law* ... *Philosophy of Law*, by I. Kant, translated by W. Hastie, 1887.
- Keener, *Quasi-Contracts* ... *Treatise on Quasi-Contracts*, by W. A. Keener, 1893.
- Kelleher ... *Principles of Specific Performance and Mistake*, by J. Kelleher, 1888.
- Kent, *Com.* ... *Commentaries* by J. Kent, ed. 14, 4 Vols., 1896.
- Kerly, *Trade-Marks* ... *Law of Trade-Marks and Trade name*, by D. M. Kerly, ed. 3, 1908.
- Kerr, *Fraud* ... *Treatise on the Law of Fraud and Mistake*, by W. W. Kerr, ed. 3, 1902.
- Inj.* ... *Treatise on the Law and Practice of Injunctions*, by W. W. Kerr, ed. 4, 1903.
- Rec.* ... *Law of Receivers in the High Court*, by W. W. Kerr, ed. 5, 1905.
- Langdell, *Eq. J.* ... *Brief Survey of Equity Jurisdiction*, by C. C. Langdell, 1905.
- Laws of Eng.* ... *Laws of England*, by Earl of Halsbury, 1907—.
- Lawson, *Con.* ... *Principles of the American Law of Contracts*, by J. D. Lawson, ed. 2, 1905.
- Leage ... *Roman Private Law*, by R. W. Leage, 1906.
- Leake, *Con.* ... *Principles of the Law of Contracts*, by S. M. Leake, ed. 4, 1902.
- Leonhard, *Irrthum* ... *Der Irrthum bei nichtigen Verträgen*, by R. Leonard.
- Lewin, *Trusts* ... *Practical Treatise on the Law of Trusts*, by T. Lewin, ed. 11, 1904.
- Lightwood, *Pos.* ... *Treatise on Possession of Land*, by J. M. Lightwood, 1894.
- Time Limit*, ... *Time Limit on Actions*, by J. M. Lightwood, 1909.
- Lindley, *Com.* ... *Treatise on the Law of Companies*, by Lord Lindley, ed. 6, 2 Vols., 1902.
- Part.* ... *Treatise on the Law of Partnership*, by Lord Lindley, ed. 7, 1905.
- Lofft, *Maxims* ... *Collections of Maxims*, appended to Lofft's Reports, 1790.
- Macdonell, *M. & S.* ... *Law of Master and Servant*, by Sir J. Macdonell, ed. 2, 1908.
- Mackay, *Pract. Ct. Sess.* ... *Practise of the Court of Sessions*, by Mackay.
- Maine, *Anc. Law* ... *Ancient Law*, by Sir H. Maine, Pollock's ed., 1906.
- Maitland, *Eq.* ... *Equity*, by F. W. Maitland, 1909.
- Markby, *Com. I. Ev. A.* ... *The Indian Evidence Act*, with notes, by Sir W. Markby, 1897.
- Maxwell ... *On the Interpretation of Statutes*, by Sir P. B. Maxwell, ed. 4, 1905.
- Mayne, *Dam.* ... *Treatise on Damages*, by J. D. Mayne, ed. 7, 1903; ed. 8, 1909.
- Mayne, *H. L.* ... *Treatise on Hindu Law and Usage*, by J. D. Mayne, ed. 7, 1906.
- Mechem, *Pub. Off.* ... *Public Officers*, by F. R. Mechem, 1890.
- Miller, *Juris.* ... *Data of Jurisprudence*, by W. G. Miller, 1903.

Mitakshara	...	Mitakshara, Vyavahar Adhayaya, translated by Sir W. H. Macnaghten and H. T. Colebrooke, 1870.
Mitra, <i>Jt. Prop.</i>	...	<i>Law of Joint Property and Partition</i> , by R. C. Mitra, 1897.
<i>Lim.</i>	...	<i>Law of Limitation and Prescription</i> , by U. N. Mitra, ed. 4, 1904.
<i>S. R. A.</i>	...	<i>The Specific Relief Act</i> , by M. C. Mitra, ed. 3, 1907.
Moncrieff, <i>Fraud</i>	...	<i>Law relating to Fraud and Misrepresentation</i> , by F. Moncrieff, 1891.
Moore, <i>Act of State</i>	...	<i>Act of State in English Law</i> , by W. H. Moore, 1906.
Mukhopadhyaya, <i>S. R. A.</i> ...		<i>Commentaries on the Law of Specific Relief</i> , by A. Mukhopadhyaya, 1906.
Narada	...	Narada Smriti, translated by J. Jolly, 1889.
Nelson, <i>I. C. A.</i>	...	<i>Indian Contract Act</i> , with commentary, by R. A. Nelson, 1905.
<i>Inj.</i>	...	<i>Law of Injunctions in British India</i> , by R. A. Nelson, 1900.
<i>S. R. A.</i>	...	<i>Commentaries on the Specific Relief Act</i> , by R. A. Nelson, ed. 2, 1902.
Norton, <i>Deeds</i>	...	<i>Treatise on Deeds</i> , by R. F. Norton, 1906.
Odgers, <i>Libel</i>	...	<i>Digest of the Law of Libel and Slander</i> , by W. B. Odgers, ed. 4, 1905.
Page, (<i>Con.</i>)	...	<i>Law of Contracts</i> , by W. H. Page, 3 Vols., 1905.
Palmer, <i>Comp.</i>	...	<i>Company Law</i> , by Sir F. B. Palmer, ed. 6, 1909.
Pandekten	...	Pandekten, by Dernburg, 3 Vols., ed. 6, 1900.
Parsons, <i>Con.</i>	...	<i>Law of Contracts</i> , by T. Parsons, 3 Vols., ed. 9, 1903.
Pollock, <i>Con.</i> (W. W.)	...	<i>Principles of Contract</i> , by Sir F. Pollock, ed. 7, (3rd American ed., by Wald and Williston), 1906.
<i>Exp. Com. Law.</i>	...	<i>Expansion of the Common Law</i> , by Sir F. Pollock, 1904.
<i>F. M. M.</i>	...	<i>Law of Fraud, Misrepresentation and Mistake in British India</i> , by Sir F. Pollock, 1894.
<i>I. C. A.</i>	...	<i>Indian Contract Act</i> , with commentary, by Sir F. Pollock, assisted by D. F. Mulla, ed. 1, 1905; ed. 2, 1909.
<i>Torts.</i>	...	<i>Law of Torts</i> , by Sir F. Pollock, ed. 8, 1908.
Pollock & Maitland, <i>Hist. Eng. Law</i>	...	<i>History of English Law</i> , by Sir F. Pollock and F. W. Maitland, 2 Vols., ed. 2, 1898.
Pollock & Wright, <i>Pos.</i>	...	<i>Possession in the Common Law</i> , by Sir F. Pollock and R. S. Wright, 1888.
Pomeroy, <i>Eq. J.</i>	...	<i>Treatise on Equity Jurisprudence</i> , by J. N. Pomeroy, ed. 3, 4 Vols., 1905.
<i>Eq. R.</i>	...	<i>Treatise on Equitable Remedies</i> , by J. N. Pomeroy, Jr., 2 Vols., 1905.
Pomeroy, <i>S. P.</i>	...	<i>Treatise on the Specific Performance of Contracts</i> , by J. N. Pomeroy, ed. 2, 1897.
Poste, <i>Gaius</i>	...	<i>Gai Institutiones</i> , translated by E. Poste, ed. 4, 1904.
Pothier, <i>Obl.</i>	...	<i>Treatise on the Law of Obligations</i> , translated by W. D. Evans, 2 Vols., 1806.
Puchta, <i>Jur.</i>	...	<i>Juristic Encyclopædia</i> , by G. F. Puchta, translated by W. Hastie, 1887.
Rattigan, <i>Jur.</i>	...	<i>Science of Jurisprudence</i> , by Sir W. Rattigan, ed. 2, 1891.
Roscoe, <i>Nisi Prius.</i>	...	<i>Digest of the Law of Evidence on the trial of actions at Nisi Prius</i> , by Roscoe, ed. 17, 1900.
Russell, <i>Arb.</i>	...	<i>Power and Duty of an Arbitrator and the Law of Submissions and Awards</i> , by F. Russell, ed. 9, 1906.
Salmond, <i>Jur.</i>	...	<i>Jurisprudence</i> , by J. W. Salmond, ed. 1, 1902; ed. 2, 1907.

- Salmond, *Torts* ... *Law of Torts*, by J. W. Salmond, 1907.
- Sandars, *Inst.* ... *Institutes of Justinian*, translated by T. C. Sandars, ed. 2, 1859.
- Sarkar, H. L. ... *Treatise on Hindu Law*, by G. Sarkar Sastri, ed. 3, 1907.
- Savigny, *Pos.* ... *Treatise on Possession*, by Von Savigny, translated by Sir E. Perry, 1848.
- System* ... *System des heutigen romischen Rechts*, by Von Savigny, 1840-9, translated partially by Holloway, Guthrie and Rattigan.
- Schouler, *Dom. Rel.* ... *Domestic Relations*, by J. Schouler, ed. 5, 1895.
- Schuster ... *Principles of German Civil Law*, by E. J. Schuster, 1907.
- Sedgwick, *Dam.* ... *Elements of the Law of Damages*, by A. G. Sedgwick, 1896.
- Seton, *Judgments* ... *Forms of Judgments and Orders*, by H. W. Seton, 3 Vols., ed. 5, 1891 ; ed. 6, 1901.
- Shep. *Touch.* ... *Touchstone of Common Assurances*, by W. Sheppard, 2 Vols., ed. 8, 1826.
- Smith, *Prin. Eq.* ... *Practical Exposition of the Principles of Equity*, by H. A. Smith, ed. 3, 1902.
- Snell, *Eq.* ... *Principles of Equity*, by E. H. T. Snell, ed. 14, 1905.
- Sohm, *Inst.*, ... *Institutes of Roman Law*, by R. Sohm, trans. J. C. Ledlie, ed. 3, 1907.
- Spelling, *Inj.* ... *Treatise on Injunctions and Extraordinary Relief*, by T. C. Spelling, ed. 2, 1901.
- Starling, *Lim.* ... *Indian Limitation Act*, edited by M. A. Starling, ed. 4, 1900.
- Stephen, *Com.* ... *New Commentaries on the Laws of England*, by Sergeant Stephen, ed. 14, 4 Vols., 1903.
- Stokes, A.-I. *Codes* ... *Anglo-Indian Codes*, by W. Stokes, 2 Vols., 1887.
- Story, *Conf. Laws* ... *Conflict of Laws* by J. Story, ed. 8, 1833.
- Eq.* ... *Commentaries on Equity Jurisprudence*, by J. Story, ed. 13, (Bigelow), 2 Vols., 1886.
- Law of Con.* ... *Law of Contracts*, by W. W. Story, ed. 5, 2 Vols., 1874.
- Strahan & Kenrick, *Eq.* ... *Digest of Equity*, by J. A. Strahan and G. H. B. Kenrick, 1905.
- Street, *Leg. Liability* ... *Foundations of Legal Liability*, by T. A. Street, 3 Vols., 1906.
- Stroud, *Judl. Dict.* ... *Judicial Dictionary*, by F. Stroud, ed. 2, 3 Vols., 1903, Sup. 1907.
- Sugden, V. & P. ... *Law of Vendors and Purchasers of Estates* by E. Sugden (Lord St. Leonards), ed. 14, 1862.
- Taylor, *Ev.* ... *Treatise on the Law of Evidence*, by P. Taylor, ed. 10, 1906.
- Priv. Corp.* ... *Private Corporations*, by Taylor, ed. 5, 1902.
- Thayer, *Ev.* ... *Preliminary Treatise on Evidence at the Common Law*, by J. B. Thayer, 1898.
- Thibaut, *Jur.* ... *An Introduction to the Study of Jurisprudence*, by Thibaut, translated by Lord Lindley, Madras ed., 1879.
- Terrell, *Patents* ... *Law and Practice relating to Letters Patent for Inventions*, by T. Terrell, ed. 4, 1906.
- Trevelyan, H. F. L. ... *Hindu Family Law*, by Sir E. J. Trevelyan, 1908.
- Minors* ... *Law relating to Minors*, by Sir E. J. Trevelyan, ed. 3, 1906.
- Tudor, *Charities* ... *Law of Charities and Mortmain*, by O. Tudor, ed. 4, 1906.
- Underhill, *Trusts* ... *Law relating to Private Trusts and Trustees*, by A. Underhill, ed. 5, 1902.
- Underhill & Strahan ... *Principles of the Interpretation of Wills and Settlements*, by A. Underhill and J. A. Strahan, ed. 2, 1906.

- Vaizey, *Settlements* ... *Treatise on Settlements*, by J. S. Vaizey, 1887.
- Van Leeuwen, *Roman-Dutch Law* ... *Commentaries on Roman-Dutch Law*, by Van Leeuwen, 1881-97 (Decker).
- Vin., Ab.,
Viner } ... *Abridgment of Law and Equity*, by Viner, 22 Vols.
- Wace, *Bank.* ... *Law and Practice of Bankruptcy*, by H. Wace, 1904.
- Walker & Elgood, *Ex.* ... *Compendium of the Law relating to Executors and Administrators*, by W. G. Walker and E. J. Elgood, ed. 4, 1905.
- Wang ... *German Civil Code*, translated by C. H. Wang, 1907.
- Waterman ... *Practical Treatise on the Law relating to the Specific Performance of Contracts*, by T. W. Waterman, 1881.
- Westlake, *Pr. Int. L.* ... *Treatise on Private International Law*, by J. Westlake, ed. 4, 1905.
- Wharton ... *Law Lexicon*, by Wharton, ed. 10, 1902.
- Wharton & Stillé, *Med. Jur.* ... *Medical Jurisprudence*, by F. Wharton and Stillé, 3 Vols., ed. 5, 1905.
- Wigmore, *Ev.* ... *Treatise on the System of Evidence in Trials at Common Law*, by J. G. Wigmore, 4 vols., 1904.
- Williams, *Bank.* ... *Law and Practice of Bankruptcy*, by Sir R. L. V. Williams, ed. 8, 1904.
- Ex.* ... *Treatise on the Law of Executors and Administrators*, by Sir E. V. Williams, ed. 10, 1905.
- P. P.* ... *Principles of the Law of Personal Property*, by J. Williams, ed. 15, 1900.
- R. P.* ... *Principles of the Law of Real Property*, by J. Williams, ed. 20, 1906.
- V. & P.* ... *Treatise on the Law of Vendor and Purchaser*, by T. C. Williams, Vol. 1, 1904, Vol. 2, 1906.
- Wilson, A.-M. *Law* ... *Digest of Anglo-Muhammadan Law*, by Sir R. K. Wilson, ed. 2, 1903.
- Woodfall, *L. & T.* ... *Treatise on the Law of Landlord and Tenant*, by Woodfall, ed. 17, 1902.
- Woodroffe, *Inj.* ... *Law relating to Injunctions*, by J. G. Woodroffe, ed. 2, 1906.
- Rec.* ... *Law relating to Receivers*, by J. G. Woodroffe, 1903.
- Woodroffe and Ameer Ali, *C. P.* ... *Civil Procedure in British India*, by J. G. Woodroffe and Ameer Ali S., 1908.

SPECIFIC RELIEF.

LECTURE I..

INTRODUCTORY.

It is reported that when in the Imperial Legislative Council the Hon'ble Mr. (afterwards Lord) Hobhouse moved for leave to introduce the Specific Relief Bill, he apologised for the want of explicitness in the wording of the motion. He understood that some of his Hon'ble colleagues thought that he was going to propose a Poor-law, and others that it had reference to the Movement of troops. But that, the Hon'ble Law Member explained, was not the case. The Bill had nothing to do with the relief of taluqdars or other distressed members of the community, nor with the change of sentries, but was intended to deal with that which was well-known to lawyers under the technical term of "relief," namely, the remedy which was granted by courts of justice to suitors.¹ After that, the bill was passed without serious discussion, the case being apparently one of *ubi tu pulsas ego vapulo tantum*.² It is clear that a phrase which was not wholly intelligible to councillors, who were legislators by occupation, if not profession, stands in need of explanation.

"Specific Relief" explained.

"Specific relief" may, in brief, be explained as relief in *specie*. It is a remedy which aims at the exact fulfilment of an obligation. The meaning will become clear by a consideration of some illustrations. Suppose Tom Brown owns a garden and John Smith dispossesses Tom Brown and takes unlawful possession of it. Now, Tom Brown as owner of this garden, has

¹ Abstract of Proceedings of G. G.'s Council for making Laws (1875), Vol. XIV, p. 276.

² S. S. Thorburn, *The Panjab in Peace and War*, 246.

a right to hold this garden against everybody else in the world and do what he chooses with it. Since he has been deprived of the use and possession of this garden by John Smith, John Smith has interfered with Tom Brown's right and thus committed a wrong. Tom Brown is consequently entitled to redress, and this redress may take three forms. Either Tom Brown may ask a competent Court to punish John Smith for the invasion of his proprietary rights committed by the latter, or he may pray that the *status quo ante* may be restored and he may be put back into possession of his garden, or he may be satisfied with compensation for the loss he has suffered, and so he may allow John Smith to remain in possession of the garden, provided he pays to the owner the proper price of his property. If Tom Brown prays for the second relief, he will be deemed to be asking for "specific relief." He seeks to get back the very property he has lost; he therefore seeks relief in *specie*.

Again, consider a case where John Smith has agreed to sell a house to Tom Brown. Tom Brown pays the price agreed upon, but John Smith does not eventually execute the requisite deed and transfer the property. Here also Tom Brown may seek one or more of three possible remedies. He may prosecute John Smith for having cheated him with false promises, he may ask a competent Court to compel John Smith to perform his contract, or he may be satisfied with pecuniary compensation and not enforce the sale. If Tom Brown seeks for the second relief, he will be deemed to be asking for "specific relief." His prayer is that John Smith may perform the very thing that he undertook to do; he therefore seeks relief in *specie*.¹

Similar considerations will arise if John Smith's agreement is not to do a positive act, but to abstain from doing something which Tom Brown wants not to be done. Where the agreement is of a *negative* character, Tom Brown may ask for an order restraining John Smith from committing breach of faith. In this case also the relief sought is "specific," inasmuch as John Smith is compelled to carry out the very thing that he

¹ The performance here may be belated, but all the same it is specific.

has undertaken, that is, not to do what he has promised not to do.

Rights and obligations.

A consideration of these concrete instances will make it plain that "specific relief" is directed to the obtaining of the very thing that a party is under the law entitled to ask for. But before we proceed to discuss the different forms of "specific relief" that the Indian Legislature has thought fit to provide for, it is desirable to clear the ground by a brief consideration of the rights that may call for redress in this way, or, to put it from a different standpoint, the obligations that may be enforced by specific relief. For 'right' and 'obligation' (or 'duty')¹ are correlative terms. A person has a right only, so far as one or more other persons are bound to respect that right.² He has a legal power to do a certain thing or maintain a certain status, only if another will be restrained from preventing the exercise of this power. In a society which is an organic whole, made up of a number of component units, that are interrelated and interdependent, the weal and advancement of the whole can be brought about only by the highest self-realization of the components. But the self-realization of each must be consistent with and promotive of the self-realization of all, and that alone is right which, while allowing full scope for the plenary development of an individual member, leaves ample room for similar development on the part of all.³ The same thing, therefore, viewed from the standpoint of Professor Holland's "person of inherence," is a *right*, and, viewed from that of his "person of incidence" is a *duty* or an *obligation*. In a court of law a right becomes manifest when the corresponding obligation is enforced.

Now, obligations may be broadly divided as "paramount" and "consensual".⁴ They may result from a voluntary act on

Obligations paramount, consensual.

¹ Strictly speaking, 'obligation' and 'duty' are not synonymous. Langdell thus discriminates between them: "All duties originate in commands of the State; while all obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and to the loss of the other, and under such circumstances

as make it unjust for the one to retain the gain, or the other to suffer the loss." *Eq. Jur.*, 224. See also Salmond, *Jur.*, 422.

² Holland, *Jur.*, ch. vii; Salmond, *Jur.*, 184.

³ Kant, *Philosophy of Law*, 44-46. Cf. Puchta, *Jur.*, ch. i; Kohlar, *Phil. of Law*, 49 sq.

⁴ Bigelow, *Torts*, ed. 2 (Eng.), 8

the part of the person sought to be bound, or they may not. John Smith, as a member of society and a law-abiding citizen of His Majesty's empire, is bound to respect the rights of property vested in his fellow-citizens. This is a "paramount" obligation. Again, if John Smith has entered into a lawful agreement with some fellow-citizen, that agreement he is bound to carry out. This is a "consensual" obligation. The rights that correspond to these two classes of obligations are "antecedent," and may be rights *in rem* and rights *in personam*. The rights that come into existence upon the breach of these obligations may be termed "remedial" or "sanctioning."¹

Early forms
of liability.

Now, when a breach occurs, the party wronged has, as we have seen, three courses of redress open to him. Mr. Justice Holmes in his classical work on *The Common Law* has examined the early forms of liability and shown that vengeance, not compensation,—and vengeance on the offending thing,—was the original object in view. The law of civil and criminal wrongs has started from a moral basis, from the thought that some one was to blame, and it is retaliation which was sought for in the first instance by the aggrieved party.² In course of time, however, other principles came into operation and, as remedies recognised by the courts of law now stand, we may say the governing ideas are Retribution, Restoration and Compensation.³ The wrong-doer may expiate for the wrong he has committed by suffering in person or purse or by restoring things to their original condition and thus undoing the effects of his wrong-doing. The law of specific relief provides for this last form of expiation.

The Indian Legislature declares—

"Specific relief is given

"(a) by taking possession of certain property and delivering it to a claimant ;

Forms of
specific
relief.

Professor Wigmore suggests "irrecusable" and "recusable," 8 Harv. L. Rev. 200. Langdell points out that, strictly, every obligation is created by the law. *Eq. Jur.*, 2 n.

¹ Holland, *Jur.*, 141. Salmond, *Jur.*, 84. Langdell classifies rights as "absolute" and "relative," *op. cit.*, 219, 229 ;

Cf. Austin, *Jur.*, Lect. 17.

² Holmes, *Com. Law*, ch. i. Cf. Jenks, *Law and Politics*, ch. iv.

³ Bentham arranges legal remedies under the heads of preventive, suppressive, satisfactory and penal. *Theory of Legislation*, pt. II, ch. i.

- (b) by ordering a party to do the very act which he is under an obligation to do ;
- (c) by preventing a party from doing that which he is under an obligation not to do ;
- (d) by determining and declaring the rights of parties otherwise than by an award of compensation ; or
- (e) by appointing a Receiver.”¹

The same authority has further declared—

“Specific relief cannot be granted for the mere purpose of enforcing a penal law.”²

Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor will it interfere for the prevention of illegal acts, merely because they are illegal.³ It is clear, therefore, that the real object of the party seeking specific relief must be the protection of some civil right or the prevention of some civil wrong. It is in the case of civil injuries alone that a British Indian Court may be moved and this particular form of relief asked for. Civil injuries.

Now, civil injuries may result from the violation of obligations, either paramount or consensual. Readers of Sir Henry Maine's brilliant works cannot be unaware of the result of his investigations that the movement of the progress in societies has been from status to contract.⁴ It is only at a late stage of the evolution of human institutions that a man learnt to bring about an alteration of pre-existent rights or the creation of new rights by means of a voluntary act which placed him in fresh relations with those around him. And, as society became fuller and larger and human affairs more and more complex, the activity of man assumed protean forms, and consensual obligations came to occupy a much more important place in modern systems of law than paramount obligations did. We have got to consider wrongs of both kinds. These From status to contract.

¹ S. R. A., s. 5.

² *Ibid.*, s. 7. Cf. *Bank of Bengal v. Dinonath Roy* [1881], 8 Cal., 166.

³ *Spelling Inj.*, sec. 24, p. 36.

⁴ *Ancient Law*, 174. “Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up

in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreements of Individuals.” *Ib.*, 172. But see Pollock's Note I, 183 sqq. Cf. Jenks, *op. cit.*, ch. vii.

wrongs may be redressed either by compensation or by specific relief.

Torts :
Wrongs to
property :
(i) movable,
(ii) immov-
able.

Taking *torts* first, we find the legislature providing for the case of a claim to possession of property.¹ Property may be either movable or immovable, and any meddling with either sort of property would be wrongful. In England such wrongs were classified either as *Trespass* or *Conversion*. In the case of immovable property, a wrongful and unwarrantable entry thereupon was designated *trespass*, and the owner was allowed to maintain an *action of ejectment* against the trespasser, and, upon proof of title, oust him and recover possession. If there was no actual dispossession, the owner might bring an *action for trespass* and recover pecuniary compensation (*damages*) for the injury done to the property. In the case of movables or goods, the act of the wrong-doer might amount to an "unauthorised assumption of the powers of the true owner."² If it did, if there was a 'disseisin of chattels'³ and the goods were removed from the possession of the rightful holder, with the object of depriving him of them or of exercising some dominion or control over them, the wrong was designated *conversion*. If it did not, but there was only a wrongful intermeddling, the tort was a *trespass*.⁴ In the latter case the common law courts allowed damages for the injury done either directly⁵ or indirectly⁶ to the property. Where there was conversion, the party aggrieved had his choice of three actions, *viz.*, of *trover*, *detinue* and *replevin*.⁷ The first lay for the value of the goods, the second for the return of the goods wrongfully detained or for damages for such wrongful detention, and the third for restitution

¹ S.R.A., s. 5 (a). Torts to *person*, so far as they are relevant to the present discussion, will be treated of under 'injunctions.'

² Pollock, *Torts*, 350.

³ Ames, *Lectures*, 172.

⁴ *Trespass to goods* and *Trespass de bonis asportatis*. Ames, *Lectures*, 56. "The distinction between trespass and conversion is this: that trespass is an unlawful taking—as, for example, the unlawful removal of the property—while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership. A

mere seizure or unlawful handling may amount to a trespass, while conversion is usually characterized by a usurpation of ownership." *Montgomery & Co. v. Chapman & Co.* [1903] 126 Fed. 68. Bigelow, *Torts*, 233; *Fouldes v. Willoughby* [1841] 8 M. & W. 540, 551.

⁵ Action of trespass.

⁶ Action of trespass on the ease.

⁷ See Blackstone, *Com. bk. III, ch. ix, 144-153*. Ames, *op. cit.*, 64-87. See also J. W. Salmond, *Observations on Trover and Conversion*, 21 Law Q. Rev., 43-54; 27 *Laws of Eng.*, 888.

of a chattel unlawfully removed (generally by way of distress), with damages for the loss sustained by such removal. The law courts, therefore, had power in ordinary cases to require delivery or return of chattels capable of identification.¹ But there was no certainty of recovering anything but damages, as movable property is liable to destruction and decay and may be *eloigned* or removed out of the county where they were seized, in which case no further process could be issued against the goods themselves. Thus "it was early established that in an action for the recovery of movable things, such as cattle or clothes, the law would not enforce restitution by any means of execution against the things themselves, but the defendant might absolve himself by paying their value in money."² Sir William Blackstone, after discussing the special writs of execution issued to the sheriff according to the nature of the case, concludes, "So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrong-doer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election to deliver the goods, or their value: an imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate."³ Thus, in spite of the "excellent intentions" of the common law,⁴ the plaintiff had generally to satisfy himself with damages or pecuniary compensation. This, it is easy to see, is not always adequate. Tom Brown may have a valuable chattel which is unique of its kind and cannot be replaced. If John Smith makes away with this chattel, can Tom Brown be sufficiently recompensed by a decree for money? The article in question may have a *pretium*

Damages in common law courts.

Equitable doctrine of restitution.

¹ 2 Story, *Eq.*, Bigelow's note, 31-32. Cf. 2 Pollock and Maitland, *Hist. Eng. Law*, 523, 595.

² Williams, *Pers. Prop.* ed. 13, 5. Barbour, 33. As a matter of practice, the plaintiff had to specify the value of the goods sued for, on payment of which the defendant would be absolved. Bracton *Lib.*, cap. iii, par. iii, fol. 102a. The judgment was also framed

conditionally, entitling the plaintiff to recover either the property or its value. Com. Dig. Tit. Pleader, 2 W. 52, 2 X, 12. See also 2 Pollock and Maitland, *op. cit.*, 154.

³ 3 Blackstone, *Com.*, 413-4. Also cf. *Ib.* 146.

⁴ 2 Pollock and Maitland, *op. cit.*, 596.

affectionis, which it is absolutely impossible to value in sordid silver or gold. Again, John Smith may get possession of Tom Brown's goods as a trustee, and then abuse his position and appropriate the goods. Is it proper that a person, who stands in a fiduciary relationship, should be allowed to elect whether he should keep the goods of the beneficiary or compensate him in money? If such a thing were allowed, the beneficiary would be completely at the mercy of the fraudulent trustee. No wonder in such cases the Lord Chancellor, as the keeper of the King's conscience, assumed jurisdiction, and where the common law courts failed to carry out their intentions, the equitable doctrine of restitution found play.¹ The defendant was not allowed to defeat the plaintiff by paying damages: he was directed to return the very property he had wrongfully taken or detained.

Contracts.

Passing on to *contracts*, we find that they are the proper subjects of specific performance or, more correctly, specific reparation.² Not only may a party be ordered to do the very act which he is under an obligation to do, but he may be prevented from doing that which he is under an obligation not to do.³ Clearly, the affirmative obligation here contemplated is of the consensual type, more often than not it will be a matter of contract. But what is a "contract"? The Indian legislature defines it as "an agreement enforceable by law."⁴ An "agreement," in its turn, is defined as "every promise, and every set of promises, forming the consideration for each other."⁵ To understand this definition we must refer to the preceding clauses (a) and (b), which run thus:--

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining assent of that other to such act or abstinence, he is said to make a proposal.

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be

¹ Cf. Langdell, *Eq. Jur.*, 28. Barbour, 110-4.

² *Ibid.*, 40 sqq.

³ S.R.A., s. 5 (b) and (c).

⁴ I.C.A., s. 2 (h) Cf. "A contract

is an agreement upon sufficient consideration to do or not to do a particular thing." 2 Blackstone, *Com.* 442. Also Ashley, 1, 7.

⁵ I.C.A., s. 2 (e).

accepted. A proposal, when accepted, becomes a promise."

These definitions have been criticised,¹ and it must be admitted that they do not help us to arrive at a clear understanding of any definite theory of contract. A distinguished jurist has observed, "The doctrine of contract has been so thoroughly remodelled to meet the needs of modern times, that there is less necessity here than elsewhere for historical research. It has been so ably discussed that there is less room here than elsewhere for essentially new analysis."² It is, however, necessary to give a short account of modern doctrines with the object of making our own ideas clear upon the subject, and as the statute law in British India is practically the creation of English lawyers trained at home, it will be necessary to refer to some of the forms of procedure that obtained in England in past ages. "Whenever we trace a leading doctrine of substantive law far enough back," says the authority just cited, "we are very likely to find some forgotten circumstance of procedure at its source."³ "So great is the ascendancy of the Law of Actions in the Courts of Justice," remarked Sir Henry Maine, "that substantive law has at first the look of being gradually secreted in the interstices of procedure."⁴ The history of English law is therefore very largely the history of English procedure. Upon a consideration of the latter, Professor Harriman founds his conclusion that "the general idea of contractual obligation was unknown to our Anglo-Saxon ancestors, and that only in very recent times has that idea become fully developed;" and this seems fully justified by the data made available by the researches of historical students of law.⁵ Under the circumstances, it is idle to expect any common law theory of contracts. In India, however, we

History in
England.

¹ See, e.g., Salmond, *Jur.*, 303n; Holmes, *Com. Law*, 298; Markby, *Elem. of Law*, 301. But see Pollock, *Con.* 8-9.

² Holmes, *Com. Law*, 246.

³ *Ibid.*, 253.

⁴ *Early Law*, 389.

⁵ Harriman, *Con.*, 372. See also Jenks, *Law & Pol.*, 268 sqq.; Pollock and Maitland, *op. cit.*, bk. II, ch. v; Pollock, *Expansion of the Common Law*, 155. Prof. Harriman forcibly

points out that it is not easy to define "contract," because the term has been applied to so many things that are not promises or agreements at all. His conclusion is, "contractual obligation is that legal obligation which is the result of a voluntary act on the part of the person bound, and which is defined by that act." (*op. cit.* 1, see also 367).

Hindu and
Mahomme-
dan Law.

are not trammelled by considerations of the forms and rules of the common law of England or America. To both Hindu and Mahommedan laws the conception of a contract as an agreement has been familiar from early times. The Indian lawyer therefore need not bother himself with the incidents of specialties or of contracts of record. He never treats a judgment as a contract, he need not discuss if a seal imports consideration. To adopt the terms used by the ancient Muslim jurists, the "pillars" of every agreement which may be treated as an act in the law, and which contemplates the creation of legal relations, are two-fold, *viz.*, offer and acceptance.¹ Two persons must agree to create rights and liabilities as between themselves, to bring about a certain relation between them which has certain legal consequences attached to it. With this view, one must make an offer, and the other must accept that offer. It is only when two persons have thus agreed together, when the offer made has been thus accepted, that the legal relation contemplated is established as between them, that certain rights accrue in favour of one and certain liabilities become imposed upon the other. The Indian lawyer, therefore, may without hesitation start with Savigny's famous analysis of a contract.² It is an agreement, of which the constituent elements are—

Savigny's
analysis.

- (i) several parties,
- (ii) an agreement of their wills,
- (iii) a mutual communication of this agreement, and
- (iv) an intention to create a legal relation between the parties.

Consensus
of mind.

This luminous analysis has been accepted by the majority of subsequent writers,³ and may be said to have received the sanction of judicial decisions too. For instance, Kindersley, V.C., is reported to have said, "In order to constitute an agreement or contract, two things are requisite,—firstly, the will, and, secondly, some act, whether in word or deed, whereby that will is communicated to the other party. No man has entered into

¹ See, e.g., *Hedaya* (trans. Hamilton, ed. Grady), Bk. xvi, p. 241. j

² *System*, Vol. III, p. 308.

³ Pollock, *Con.*, 3-4. Anson, *Con.*,

2-9. 1 Page, 22. Salmond, *Jur.*, ch. xvi, s. 122. Markby, *Elem. Law*, ch. XV, 298-307. Lawson, *Con.*, 8.

an agreement or contract to do, or not to do, some particular thing, unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect; when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted."¹ So Lord Westbury remarked, "An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial."² In a similar strain, Lord Cairns, discussing the possibility of a contract arising between persons, who thought they were dealing with a party known to them, and a pretender, who induced them to believe him to be such party, said, "Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them, there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."³

The necessity, however, of the presence of a consensus of mind, a subjective union of wills, has been questioned with great ingenuity by Professor Holland. This learned author, relying upon what may strictly be termed the rule of estoppel,⁴ propounds what he calls the "objective" theory of contract.

Holland's
objective
theory
examined.

¹ *Haynes v. Haynes* [1861] 1 Dr. & Sm., 426, 433. Cf. *Marshall v. Berridge* [1881] 19 Ch. D., 233; *Preston v. Luck* [1884] 27 Ch. D. 502; *Wilding v. Sanderson* [1897] 2 Ch., 681; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B., 256, 268, Finch, 25.

² *Chinnock v. Marchioness of Ely* [1865] 4 De G. J. & S., 678.

³ *Cundy v. Lindsay* [1878] 3 A. C., 459, Finch, 445.

⁴ The authorities cited are *Pickard v. Sears* [1838] 6 A. & E. 475; *Freeman v. Cooke* [1848] 2 Ex. 654, Finch, 483; *Cornish v. Abington* [1859] 4 H. & N., 549; *Smith v. Hughes* [1871] 6 Q. B.,

607, Finch, 463. In the last case Blackburn, J., observed, "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that the other party on that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Upon this subject, Ewart's *Estoppel by Misrepresentation* may be consulted. See also Ashley, 60-3.

According to him, "the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' *i.e.*, a judge or jury, would put upon such acts."¹ He cites Professor Leonhard, "It may well be in contracts that a man may be bound to a meaning which demonstrably was not his,"² and he proceeds to show that the truth and practical importance of his theory are confirmed by the generally received rules as to contracts made by post and by the law of agency, and that the doctrine of mistake does not conflict with this theory. It is impossible to do justice to Professor Holland's weighty arguments here. There is no denying that the law has to content itself in the majority of cases with an examination of the *external* facts. For, as observed a learned Chief Justice several centuries back, "it is trite law that the thought of man is not triable, for even the devil himself does not know what the thought of man is."³ It is upon the thought as expressed, therefore, that the law fastens. And if the expression justifies the inference to the mind of a reasonable man, that the man responsible for the expression entertained a particular intention, he may not be allowed to turn round afterwards and allege that his words did not mean what they said. "Assent, in the sense of the law," says Holmes, J., "is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words."⁴ All this must be and is conceded, but we apprehend that all this does not affect the root of the controversy. Where the law requires an agreement, it means an *agreement*, a union of two or more minds upon the same thing in the same sense,⁵ though, of course, where there is every appearance of the parties having agreed, the law does not probe deeper and seek to discover within their hearts the *noumenon* or "thing-in-itself" of this

¹ *Jur.*, 256.

² *Irrthum*, Vol. I, p. 119.

³ *Per* Brian, C. J., 17 Ed. IV, 2, quoted by Lord Blackburn in *Brogden v. Metropolitan Railway Co.*, [1877]. 2 A. C., 666, 692. See also *Keighley Maxsted & Co. v. Durant* [1901] A. C., 240,

247, *per* Lord Macnaghten.

⁴ *O'Donnell v. Clinton*, 145 Mass., 461, 463. See also *Holmes, Com. Law*, 309; *Pollock, Con.*, 5., *Langdell, Con.*, § 180.

⁵ *Cf.* I.C. A., s. 13, *def. of consent*, 2 *Williams, V. & P.*, 667 *seq.*

agreement. As a matter of theory, there can be no contract without an agreement of two wills. As a matter of practice, the law has to satisfy itself with the *phenomenon* of a *consensu ad idem*. But the law does so satisfy itself, not because it does not require a consensus of wills, but because the *phenomenon* may as a rule be taken to represent the *noumenon*, because the *phenomenon* has any value simply as a symbol or index, and it pre-supposes the *noumenon*. Often it may not be even practicable to do without the physical manifestation; but, in reality, agreement, is the fundamental element¹. The distinction, therefore, that Professor Holland seeks to establish, is not of much theoretic importance, and does not really affect the truth and justice of Savigny's well-known analysis.² Dr. Holland's analysis, being even more detailed, deserves, however, to be here set forth. According to him, the constituent elements of a contract are—

Holland's
analysis.

- (i) several parties,
- (ii) a two-sided act by which they express their agreement,
- (iii) a matter agreed upon which is both possible and legal,
- (iv) is of a nature to produce a legally binding result,
- (v) and such a result as affects the relations of the parties one to another, and
- (vi) very generally, either a solemn form, or some fact which affords a motive for the agreement.³

Primary
remedy:
specific performance.

Having determined then the nature of a contract, we have now to see what the primary rights and liabilities of the contracting parties are. It seems hardly open to doubt that when parties enter into an agreement, their intention is to carry out that agreement. "When people make contracts, they usually

¹ Ashley, 52-3.

² Anson, *Con.*, 10 "After all, it is the intention of the parties which the Courts endeavour to ascertain; and it is their intention to agree which is regarded as a necessary inference from words or conduct of a certain sort." So Prof. Brooks Adams says, "I apprehend that the law is always primarily engaged with the state of

the parties' minds, and only secondarily with acts which are but the effects of volition, and therefore no more than evidence of the mind's action which is the matter in issue." 19 Green Bag, 13.

³ *Jur.*, 259. See Rattigan, *Jur.*, 186. Cf. Salmond, *Jur.*, 303n. 1 Stokes, *A. I. Codes*, 492.

contemplate the performance rather than the breach."¹ For instance, when Tom Brown agrees to sell a horse to John Smith, it is the intention of the former to part with the animal, and of the latter to purchase it. The original intention is or should be clear. But for some reason or other the agreement may not be fulfilled. Either Tom Brown may refuse to sell or John Smith may refuse to purchase. In such case, what is the primary remedy of the party aggrieved? John Smith is willing to buy, but Tom Brown does not sell,—is not, in this case, John Smith entitled to compel Tom Brown to carry out his part of the agreement and sell? This is common sense, and there is no reason to believe that this is not the law. The ancient Hindu law, it appears, recognised only two kinds of suits based on facts, *viz.*, those in which the relief prayed for was by way of injunction and those in which it was by way of specific performance.² The Mahomedan law knew not of actions in which aught but specific relief was sought in respect of contracts.³ And even the law in England does not seem to have been otherwise. "It is a consequence," says Glanville, "which naturally results from . . . undertaking to do any particular act that the party should be compelled to abide by it or perform it."⁴ The researches of Sir Frederick Pollock and Professor Maitland prove that the oldest actions of the common law aimed for the most part not at 'damages,' but at what we call 'specific relief,' and that an 'action for damages' was a novelty. "This may for a moment seem strange," say these learned authors. "In later days, we learn to look upon the action for

Common
Law in
England
originally
aimed at
specific
relief and
not damages.

¹Holmes, *Com. Law*, 302. As Austin shows, morally speaking, there is an obligation on each party to a contract to fulfil the terms thereof, *i. e.*, to keep his word. Among the rights which arise from civil delicts, therefore, the first are "rights of compelling judicially or extra-judicially, the specific performance of such obligations as arise from contracts and quasi-contracts, *e.g.*, a right of compelling performance by action or suit, a right to an *interdict* or *injunction*, for the purpose of preventing the obligor or debtor from evading the fulfilment of the obligation, a right of *retainer* or *detention*," etc., and the second are

"rights of obtaining *satisfaction*, in lieu of specific performance," and the third are "rights of obtaining specific performance in part, with satisfaction or compensation for the residue." 1 *Jur.*, 63-64 Cf. Salmond, *Jur.*, 84-7, 320-1.

²Gharpure, *Adjective Law of the Smritis*, 7. Cf. Narada, VI, 5; VIII, 4-5; V, 18; Brihaspati, XVII, 5 (Jolly's translation.)

³Cf. *e.g.*, the *Ma'allah*, pt. 151, p. 20; pt. 369, p. 49. (I am indebted for these references to Mr. S. Karamat Husain, ex-Judge, Allahabad High Court.)

⁴Bk. VIII, C. V. (Beames' translation); Page, 3 *Con.*, 2440-1.

damages as the common law's panacea, and we are told that the inability of the old Courts to give 'specific relief' was a chief cause for the evolution of an 'equitable jurisdiction' in the Chancery. But when we look back to the first age of royal justice, we see it doing little else than punishing crime and giving 'specific relief.' The plaintiff who goes to the King's Court and does not want vengeance, usually goes for something of which he is being 'deforced.' The thing may be land, or services, or an advowson, or a chattel, or a certain sum of money; but in any case it is a thing unjustly detained from him; or, may be, he demands that a 'final concord' or a covenant may be observed and performed, or that an account may be rendered, or that a nuisance may be abated, or that (for sometimes our King's Court will do curiously modern things) a forester may be appointed to prevent a doweress from committing waste. Even the feoffor, who fails in his duty of warranting his feoffee's title, is not condemned to pay damages in money; he has to give equivalent land. No one of the oldest group of actions is an action for damages."¹ Referring more particularly to the action of covenant, the same authors say at another place: "The history of covenant seems to show that the judgment for specific performance (*quod conventio teneator*) is at least as old as an award of damages for breach of contract. We may find a local court decreeing that a rudder is to be made in accordance with an agreement, and even that one man is to serve another. Nor can we say that what is in substance an injunction was as yet unknown. 'The prohibition' which forbids a man to continue his suit in an ecclesiastical Court on pain of going to prison, is not unlike that weapon which the Courts of common law will some day see turned against them by the hand of the Chancellor. But, further, a defendant in an action of waste could be bidden to commit no more waste upon pain of losing the land, and a forester or curator might be appointed to check his doings. The more we read of the thirteenth century, the fewer will seem to us the new ideas that were introduced by the Chancellors of the later

¹ 2 *Hist. Eng. Law*, 523.

middle age. What they did introduce was a stringent, flexible and summary method of dealing with law-breakers. The common law has excellent intentions; what impedes it is an old-fashioned dislike for extreme measures."¹

The above makes it clear that even the old common law courts of England recognised specific relief as the primary remedy, and if they in course of time practically ceased to enforce it as such, it was not because in theory they had abandoned that doctrine. As Dr. Bigelow puts it: "The duty to perform is, in the purpose of the parties, primary; but the law may not always deem it best to enforce such duty even when it might easily do so."² In many cases it may prefer to award compensation in lieu of performance. The current of ideas in modern times has made in favour of such preference. Take the ordinary case of a contract for sale of goods. "Wheat, corn, horses, and chattels generally are merchandise, to be bought and sold for money. Money is both the common measure of value and the thing sought; and payment of money is accordingly ordered in such cases wherever in law it answers the purposes of the chattel. Compensation is substituted as a legal equivalent for a thing which has never actually come under the ownership of the plaintiff. It is not his; it is a special object of barter for money; and money must be accepted if the will of the court is invoked."³ We find, therefore, as a matter of history in England, that actions for damages were more frequently resorted to than others, and, as the common law of contracts is based more on procedure than principle, the idea gained ground that compensation was the *primary* remedy, and specific fulfilment *secondary* or substitutational. After reviewing the history of the action of debt and and of assumpsit, even an acute thinker like Mr. Justice Holmes comes to the conclusion that "the only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for

Modern
spirit of
commerce :
importance
of money.

¹ Pollock and Maitland, *op. cit.*, 595-596; also 106. Cf. Holmes, *Early English Equity*, 1 *Law Q. Rev.*, 162.

² 2 Story, *Eq.*, ed. 13 (Amer.), 30n. Cf. Pomeroy, *S. P.*, 2.

³ Story, *op. cit.*, 32n. Cf. Fry, 4.

fulfilment has gone by, and therefore free to break his contract if he chooses."¹ This eminent writer therefore prefers to look upon a contract as "the taking of a risk." Theoretically, this position seems difficult to justify, and practically in a country like India where courts are not divided as of law and of equity, it is not of much help.² As Professor Harriman suggests, a distinction has to be made between a case where the fulfilment of the promise is within the power of the promisor and another where it is not. In the latter case, the promisee cannot insist upon specific performance; he can only ask the promisor to recompense him for any loss that he may have sustained by reason of non-performance. For instance, A may promise to sell a horse to B. Now, if this horse belongs to A, it is within the power of A to sell, and the intention of the parties will clearly be taken to be that of sale. But if the horse does not belong to A, but he undertakes to persuade the real owner to sell, here B knows that A may not be able to bring about the transaction; and B may be satisfied, in case A fails to effect the sale, if A makes adequate compensation for non-realisation of the expectation he has raised. In this latter case, it may be said that A in entering into the contract really takes a risk. The primary obligation is to compensate B for the non-occurrence of the promised event, and this coincides with the secondary or sanctioning obligation to pay damages for breach of contract.³ Equity holds a man bound to his agreement if he *can* perform it, and in countries where there is or was a conflict of jurisdiction between courts of law and of equity, the latter decreed specific performance of contracts to prevent (in the words of Chief Justice Fuller) "the intolerable travesty of justice involved in permitting parties to refuse performance of their contract at pleasure by electing to pay damages for the breach."⁴

Holmes' theory: contract taking of a risk,—discussed.

¹ *Com. Law*, 301. For some account of the common law actions of contract, see Harriman, *Con.*, App. II; Holmes, *op. cit.*, Lec. VII; Jenks, *op. cit.*, ch. VII; Ames, *History of Assumpsit*, 25. *Law Mag. and Rev.*, 129, 290, 2 *Harv. L. Rev.*, 1, 53, Woodroffe, *Quasi-Con-*

tracts, 653. See also Pollock and Maitland, *op. cit.*, bk. II, ch. v.

² For criticisms of Holmes' views, see Holland, *Jur.*, 250; Anson, *Con.*, 10; Harriman, *op. cit.*, 322-3.

³ Harriman, *Con.*, 322.

⁴ *Ibid.*, 330.

History of
growth of
equity juris-
diction in
England.

It is necessary to refer to the history of procedure in England, because the Indian Act purports to enact for British India the principles enforced by the equity courts in England, and these principles can never be fully appreciated if their history is forgotten. We have therefore even in India to take note of the fact that the common law courts in England could afford only such relief as had come to be associated with the various forms of contractual actions that they entertained. In the beginning only certain special obligations could be enforced by appropriate writs, and even later on the question that a common law lawyer put to himself was, "Will debt lie, or covenant, or account, or assumpsit?" The manorial courts and other inferior courts seem to have enforced agreements more liberally, and the ecclesiastical courts regarded the *læsio fidei* or breach of plighted faith as a sin demanding ecclesiastical penalties.¹ In olden times, Christians not unoften bound themselves by oath not to commit various crimes. Pliny mentions even an oath not to break one's word.² Gradually the pledge of faith came to give sanction to various engagements, and though the obligation thereby created was only a moral one, yet the spiritual courts enforced them by penance or excommunication. Sir Edward Fry traces the origin of the equitable jurisdiction in specific performance to ecclesiastical law. Chaucer in the *Friar's Tale* mentions contracts as a subject-matter of the jurisdiction of the archdeacon,³ and in the matter of a contract to marry, the Ecclesiastical Courts in olden times did exercise a jurisdiction very much in the nature of specific performance.⁴ But it is not necessary for our present purposes to pursue this interesting historical enquiry much further. Sir Edward Fry's conclusion, which seems to be justified by the evidence, is that it is "probable that from early times the Courts Christian enforced the execution of contracts in which there was an oath or *fidei interpositio*, that this jurisdiction was narrowed and perhaps almost extinguished

¹ Harriman. *op. cit.*, 378, 382.;
² Pollock and Maitland, *op. cit.*, 189,
197-98.

³ *Epistles*, bk. x, ep. 97.

⁴ *Canterbury Tales*, Group D. 1306,

Skeat's ed., Vol. IV., p. 359.

^{*} The heroine of Massinger's *Maid of Honour* sues for the specific performance of a written contract of marriage (V, ii).

by the pressure of the writ of prohibition from the King's Court, and that the ecclesiastical Chancellors found in the Chancery a means of reviving a like jurisdiction, the writ of *subpœna* taking the place of excommunication."¹ Scholars claim to have discovered traces of the jurisdiction in the records of the Court of Chancery even in the reign of Richard II.² But *Cokayn v. Hurst*³ seems to be the first clear case of specific performance of which we have record. In the Year Book of 8th Edw. IV, 4 (b) the jurisdiction is expressly recognised by the Chancellor as a clear one.⁴

It is curious to note that the Roman law does not recognise the doctrine of specific performance, and all systems derived from it apparently hold to the maxim, *Nemo potest præcise cogi ad factum*.⁵ The remedy, however, seems to be familiar to German law, both ancient and modern.⁶ "A perfect system of jurisprudence," says Sir Edward Fry, "ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is specifically enforceable until the contrary be shown."⁷ So Bentham thought 'restitution in nature' was due in every case. "The law ought to assure me everything which is mine without forcing me to accept equivalents, even though I have no particular objection to them."⁸

Roman Law

Limitation of doctrine of specific performance in England.

¹ *Sp. Perf.* 7-15. Cf. Holmes, 2 Sel. Essays, 719-21.

² *Ibid.*, Additional Note C. See also Selden Society's "Select Cases in Chancery," Vol. X., esp. pp. xxxv-xxxvi. Dean Ames, however, gives good reasons for holding that specific performance is not one of the most ancient heads of equity jurisdiction, 1 Cases, 37n.

³ [1458] 10 Sel. Ca. Ch. Selden Soc., no. 142, 1 Ames, 36

⁴ 2 Story, *Eq.*, s. 716, p. 28. Cf. *Halsey v. Grant*, [1806] 13 Ves., 76; 33 E. R. 228.

⁵ 1 Pothier, *Obligations*, p. 89, pt. I, ch. ii, art. 2, s. 2. As to Roman-Dutch Law, Fry refers to Van Leeuwen's *Commentaries*, trans. by Kotze, Vol. II, pp. 27, 33, 118-9, etc. As to French Law, see article by M. Sheldon Amos, 17 Law Rev., 372; Fry, Addl. Note B,

680-682; Holland, *Jur.*, 317; Proudfoot's article, Canadian Law Times, Oct., 1894.

⁶ See article by "E.S.," 8 Law Q. Rev., 252.

⁷ Fry, *op. cit.*, s. 47, p. 18. See also Salmond, *Jur.*, ch. xvii, s. 126:

"It may be laid down as a general principle that wherever the law creates a duty, it should enforce the specific fulfilment of it. The sole condition of the existence of remedial liability is the existence of a legal duty binding upon the defendant and unfulfilled by him. What a man ought to do by a rule of law, he ought to be made to do by the force of law. In law ought is normally equivalent to must, and obligation and remedial liability are in general co-existent."

⁸ *Theory of Leg.*, 288.

In Scotland, specific performance or ('inplement') is the normal legal remedy for breach of a contract for the sale of a specific object.¹ But the conditions under which the jurisdiction has grown in England have prevented the establishment of any such general rule. As Lord Redesdale observed in *Harnett v. Yielding*,² "Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground, the court in a variety of cases has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained." Specific performance, being "a remedy intended by Courts of Equity to supply what are supposed to be the defects in the remedy given by the Courts of Law," his Lordship ruled, "considerable caution is to be used in decreeing specific performance of agreements; and the Court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction." In India, where the courts of justice are courts both of law and equity, it would probably have been more satisfactory to frankly recognise specific performance as the primary remedy in cases of breach of contract, and not to fetter the discretion of the judge by any consideration as to the adequacy or otherwise of a decree for damages. But the traditions of the Courts of Chancery in England have moulded the provisions of our Specific Relief Act, and the limitations of the English doctrine have continually to be borne in mind even here. The rule, however, is well established that, if the contract has been entered into by a competent party and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages.³

Practically
same in
India.

¹ *Stewart v. Kennedy* [1890] 15 A.C. 75, 102, 105.

² [1805] 2 Sch. & Lefr. 552, 553.

³ *Per Grant, M. R., Hall v. Warren*

[1804] 9 Ves, 605, 608, 22 E. R. 739. Cf. *Haywood v. Cope* [1858] 25 Beav., 140, 53, E. R. 589; *Leech v. Schweder* [1894] 9 Ch., 463, 467.

But it is not every contract that will be specifically enforced. A contract may be regarding a past, present or future event. When the promise or assurance (which is a better word to use)¹ relates to something that has already happened or is happening at the time, the promisor really incurs a liability only to pay compensation, if the assurance which he has given turns out to be untrue. For "in such a case the contract is broken, if at all, as soon as it is made, and the primary obligation necessarily coincides with the secondary or sanctioning obligation to pay damages." But where the assurance is in respect of something which is to happen in the future, the value of the liability, as we have seen, will be determined by the nature of the subject-matter of the promise, whether it is or it is not within the power and control of the promisor.²

Only executory contracts specifically enforced.

It follows, therefore, that specific performance, strictly speaking, can be claimed only in respect of what are technically called *executory contracts*.³ An executory contract, according to Lord Selborne, is one which is "not intended between the parties to be the final instrument regulating their mutual relations;" while an executed contract is one which is intended to be thus final.⁴ Where, for instance, goods are bargained for and sold, the price being paid down and the delivery made on the spot, nothing more remains to be done by either party, the contract may be said to have been *performed*, as distinguished from one *executed*. If, on the other hand, only the bargain is struck and payment of price or delivery or both are postponed to a future date, the contract is an *executory* one. But where, under an agreement, one party has done all he has to do, while the other has not, the contract is an *executed* one. In Sir William Anson's words, "executory contracts of sale are, in truth, contracts as opposed to conveyances, and create rights *in personam* to a fulfilment of their terms, instead of rights *in rem* to an enjoyment of the property passed."⁵ Only *promises* as to the

¹ Harriman, *Con.* 370.

² *Ibid.* 321-322.

³ Snell therefore defines specific performance as "turning an executory contract into an executed one, by decreeing the execution of the document (or other thing), which in and

by the executory contract is provided for." *Equity*, ed. 9, 639; ed., 14, 551.

⁴ *Wolverhampton & Walsall Ry. Co. v. L. & N. W. Ry. Co.* [1873] 16 Eq. 433, 439. Cf. *Tailby v. Official Receiver*, [1888] 13 A. C., 523, 547.

⁵ *Con.*, 22. "Executed contract

'Specific relief' wider than 'specific performance.'

future can be fulfilled, the past cannot be altered. But 'specific relief' need not be limited, as 'specific performance' has been, by English lawyers. Such relief may be granted in respect of executed contracts too, *e.g.*, settlements or conveyances which contain covenants. Where, after a sale-deed has been executed and completed, the purchaser fails to pay the stipulated price, the Court by enforcing against the property sold what is called the unpaid vendor's lien really grants specific relief.¹

Three aspects of specific performance.

Now, specific performance of contracts has three aspects. First of all, a party may be compelled to carry out his promise. This promise may be of either a positive or a negative type. For instance, A may contract with B to sell a village to him. This is a positive agreement, and may be enforced by compelling A to sell. On the other hand, A may contract with B not to build anything upon his land to the detriment of B's property. This is a negative agreement and may be enforced by an order enjoining A from making any such construction. An order of this description is generally styled an *Injunction*. And here it is necessary to emphasise that the remedy by way of prevention is the true specific performance, for the object of that remedy is to prevent a violation by the defendant of the plaintiff's right, and whenever the remedy is successful, that object is completely accomplished. On the other hand, in the case of affirmative duties there can be, strictly speaking, no specific performance. The assistance of the Court is sought after there has been a breach and the Court can only enforce a belated performance, which is very different from the performance promised. Even where the thing agreed to be done can be substantially done at the order of the Court, yet it is not done at the time when it was agreed to be done. In the case of affirmative contracts therefore the relief granted is accurately described by Professor Langdell as 'specific reparation for breach.'²

Prevention true specific performance.

Consent.

Again an, agreement may be such as the law does not

means a contract performed wholly on one side, while an executory contract is one which is either wholly unperformed or in which there remains something to be done on both sides."

¹ See 19 Harv. L. Rev., 481-2, where it is suggested that in the class of equitable liens the jurisdiction of equity is founded upon specific performance.

² Langdell, *Eq. Jur.*, 41 sqq.

countenance the enforcement of. "No agreement is a contract unless its effect is to bind the parties to each other by the *vinculum juris* of a newly created personal right."¹ 'The law therefore pre-supposes consent, and this consent must be "true, full and free."² If there is not such consent, the agreement is not valid. For "a valid agreement is one which is fully operative in accordance with the intent of the parties."³ Now, various causes may stand in the way of a free and full consent. The Indian Contract Act enumerates five such causes, *viz.*, coercion, undue influence, fraud, misrepresentation, and mistake.⁴ Where consent would not have been given but for the existence of one or more of these causes, it cannot be said to be true or free. As Sir Frederick Pollock has shown, these five causes may be reduced to two, *viz.*, Ignorance and Fear, and these may be thus analysed in respect of their legal consequences:—

A.—Ignorance—

- (a) Not caused by act (or omission) of the other party is referred in law to the head of ... *Mistake.*
Caused by act of the other party
- (b) Without wrongful intention ... *Misrepresentation.*
- (c) With wrongful intention ... *Fraud.*

B.—Fear, or dependence, excluding freedom of action—

- Not caused by acts of the other party or } (Immaterial.)
relation between the parties.
- (d) Caused by such acts ... *Coercion.*
- (e) Caused by such relation ... *Undue influence.*⁵

Where consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.⁶ This means that the latter party may enforce the agreement if he chooses, but the other party (guilty of coercion, etc.,) has no option in the matter, and cannot enforce the agreement by law.⁷ On the other hand, where both the parties to an

Voidable
agreements.

¹ Salmond, *Jur.*, 312.

² Pollock, *Con.*, 439. Cf. I. C. A., s. 10; I Williams, *V. & P.*, 2.

³ Salmond, *op. cit.*, 313.

⁴ I. C. A., s. 14. See also ss. 15-18, 20.

⁵ Pollock, *Con.*, 439.

⁶ I. C. A., s. 19.
I. C. A., s. 2 (i).

Void
agreements

agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.¹ This means that it is not at all enforceable by law,² that there is no *contract*. For the minds do not really meet. Now, an agreement that is voidable or even void, it is obviously not in the interest of the party wronged to enforce specifically. It is, on the other hand, as a general rule, in his interest to free himself from any obligation that it purports to impose upon him. And this he may do by getting the agreement rescinded. Rescission of contracts therefore is a form of specific relief in respect of a class of agreements where the relief appropriate is not specific enforcement, but the contrary. Chapter IV of the Specific Relief Act deals with this topic. It is worthy of note that, though an agreement founded on mistake is void, and an act that is a nullity in law cannot strictly speaking be solemnly cancelled, yet, as a matter of fact, Equity Courts have allowed a victim of mistake to avail himself of their peculiar relief of rescission.³ The object of this relief is to put parties in *statu quo*, if practicable, and therefore a plaintiff, who fails to get specific performance of a contract in writing, may get it rescinded and delivered up to be cancelled.⁴

Rescission
of contracts.

Cancellation
of instru-
ments.

If a written instrument is void or voidable against any person and he has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, he may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.⁵ As Mr. Justice Story points out, Equity is not merely remedial, it is also preventive of injustice. "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose."⁶ But where the illegality of an instrument is apparent on the face of it, even an Equity Court will take no notice of such a document.⁷ And in ordering the cancellation of a document it may put the plaintiff upon terms. For he who seeks equity must do equity, and if the plaintiff has taken any

¹ I. C. A., s. 20.

² *Ibid.*, s. 2 (j).

³ S. R. A., s. 36.

⁴ *Ibid.*, s. 37.

⁵ *Ibid.*, s. 39.

⁶ 2 *Eq.*, s. 700, p. 10.

⁷ Story, *op. cit.*, s. 700a, p. 14. Cf. *Bromley v. Holland* [1802] 7 Ves. 3, 16, 32 E. R. 2.

benefit under the instrument, the defendant, while not entitled to hold to it, may yet be deemed entitled to such compensation as justice may require.¹

There is yet another form of specific relief in respect of contracts which deals exclusively with agreements in writing. If language was given to man to conceal his thought, there is no question that writing assists the process. At any rate, the actual expression of a thought very often fails to express the whole thought, sometimes more may be expressed, sometimes less, sometimes something totally different may be expressed. Now, when parties have come to a contract, but have failed to express themselves correctly, if the mistake is a real one and mutual, and can be established by satisfactory proofs, a court of equity will reform the written instrument so as to make it conformable to the precise intent of the parties. The real intention may have been misrepresented in writing, either by mutual mistake or by fraud. Equity affords relief in either case, in accordance with its general policy to suppress frauds and to promote general good faith and confidence in the formation of contracts.² If an instrument that does not give effect to the real agreement between the parties be enforced, one party is bound to suffer. If it be cancelled as a whole, both parties suffer, because a real agreement by such cancellation falls through. If, on the other hand, the instrument be set right, the genuine contract becomes capable of enforcement, and neither party can suffer by being held to his actual agreement. But no Court will be justified in making a new contract for the parties. Whenever an application is made for reforming an instrument, "the question to be considered is not what the parties would have done, had they been able to anticipate subsequent developments, but what was their intention at the time the contract was executed."³ If parties have deliberately left out something from the written instrument that cannot be put in.⁴ If they have deliberately chosen one

Rectifica-
tion of
instruments

¹ Story, *op. cit.* s. 696, p. 8, S. R. A, s. 41.

² 1 Story, *Eq.*, s. 154.

³ *Ibid.* s. 164 (b). 2 Pomeroy, *Eq., Jur.*, § 843, p. 1487. Cf. *Townshend v. Stang-*

room [1801] 6 Ves. 328, 332, 31 E. R., 1076.

⁴ Cf. *Lord Irnham v. Child* [1781] 1 Bro. Ch., 92, 28 E. R., 1006.

form of security in preference to another, the Court cannot direct a new security.¹ Similarly, where doubtful rights have been deliberately renounced and family settlements have been effected.² But where third parties in good-faith and for value have acquired rights, the court in its discretion will refuse to rectify an instrument to the prejudice of such rights.³

Declaratory
decree.

A relief allied to cancellation of instruments is what Scotch lawyers call a "declarator." Bell defines a *declarator* as "an action whereby it is sought to have some right of property or of status or other right judicially ascertained and declared." A cloud may be cast upon the plaintiff's title, somebody may deny his right or may execute a document which, if left outstanding, may militate against such right. If some step is not taken at once to have all doubt and difficulty removed, it may at a later time be difficult for the plaintiff to prove his title. For the evidence that is forthcoming now, may not be forthcoming hereafter. A declaratory action is designed for the purpose of making that clear which is at present doubtful, and which it is necessary to make clear. A declaratory decree confers no new right upon the plaintiff, and does not compel the defendant to pay or perform anything.⁴ The party is relieved upon the principle, as it is technically called, *quia timet*, and the jurisdiction exercised is founded upon the administration of a protective or preventive justice.⁵ The present existing interest of the plaintiff is affirmed, and the cloud upon his title removed, if the Court is satisfied that there is some present danger or detriment which may be averted by a declaration. Such a declaration is a substantive relief granted by the Courts, and it is not necessary to show a right to consequential relief.⁶ In fact, under the law as it now

¹ Cf. *Hunt v. Rousmaniere*, [1828] 8 Wheat., 174, 1 Peters, 1, 3 Keener, 6.

² Cf. *Stewart v. Stewart*, [1839] 6 Cl. & F., 912, 7 E. R., 940; Pollock, *Con.*, 455.

³ S. R. A., s. 31. Cf. 2 Pomeroy, *Eq. Jur.*, § 776.

⁴ Cf. Collett, 293.

⁵ Cf. 2 Story, *Eq.*, s. 694, p. 5. Cf. also bills of peace, bills to perpetuate testimony, or to take it *de bene esse*, etc. H. A. Smith, *Prin. Eq.*, pt. II, ch. VIII.

⁶ English Courts at one time would make no declaratory decree, where there was no right to consequential relief. The result was that people were left uncertain as to their rights and serious difficulties were experienced in, e.g., making testamentary dispositions of property or settling family disputes. At Mr. Pitt Kennedy's suggestion, the Indian law was assimilated to the Scotch. 1 Stokes, *A. I. Codes*, 934-5.

stands in British India, a person who is at the time entitled to an executory decree cannot seek only a declaratory decree.¹ For instance, a plaintiff who is not in possession of some property, cannot ask merely for a declaration of his title to such property.

Injunction.

The most ordinary form of preventive relief, however, is that known as an *injunction*. Spelling truly observes, "Without the power to prevent as well as to undo wrongs, to restrain as well as to compel action, to preserve as well as to reinstate the status of persons and things, courts of equity would possess but little power, and command but little respect as dispensers of justice and arbiters between man and man. The important restraining function is given effect by the great extraordinary remedy of injunction, which may be appropriately termed the strong arm of courts of equity."² An injunction, Burney defines, as "a judicial process by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful act."³ A writ of injunction may either take a positive or a negative form. It may require a party to do a particular thing, or it may require him to refrain from doing a particular thing.⁴ In the former case, the injunction may be described as 'mandatory.'⁵ The second class of injunctions is more common, and is known as 'restrictive,' and may be either perpetual or temporary. Suppose, for instance, Brown is about to build a house on Smith's land. Smith may sue for an injunction restraining Brown from making any constructions. If Smith succeeds in establishing his title and gets a decree, the decretal order will be one of perpetual injunction. But Smith may be anxious that the mischief should be nipped in the very bud, and he may, immediately after instituting his suit, move the Court for an interlocutory order, enjoining Brown from making any constructions during the pendency of the action. If the Court makes the order, it will be an order granting

¹ S. R. A., s. 42, prov.

² *Inj.*, 3.

³ 6. *Encyclopædia of the Laws of England*, 464.

⁴ Eden calls the first 'judicial writ' and the second a 'remedial writ' of injunction. *Injunctions*, Ch. 1, pp. 1, 2.

⁵ S. R. A., s. 55. Kerr, *Inj.* 31.

Primary
remedy.

a temporary injunction.¹ That an injunction is a primary remedy seems clear. There are some duties, of a peremptory nature, in regard to which an election, as an equivalent, to violate the same upon the terms of making compensation, cannot be permitted. The only difference in this respect between the two remedies of specific performance and injunction, Professor Bigelow points out, is that the former is directed to compelling performance of an active duty, while the latter (though sometimes in a subsidiary way requiring an act to be done) is generally directed to preventing the violation of a negative one. An injunction has accordingly been sometimes described as a "negative specific performance."² The difference, however, has important results. "The remedy of specific performance, relating as it does to active duties, deals in the main only with contracts; while the remedy of injunction, having to do with negative duties, deals not only with contracts, but also with torts, and with many other subjects, among them subjects of a purely equitable nature."³

Substitu-
tional
remedy of
damages.

A learned Judge has declared, "the very first principle of injunction law is that you do not obtain injunctions for actionable wrongs, for which damages are the proper remedy."⁴ The reason why the substitutional remedy is here put before the primary remedy, is again historical. The Common Law of England, following the analogy, possibly of the *Jus Civile* of Rome, did not favour a jurisdiction to prevent the infliction of injuries. An injury actually inflicted might be compensated for, but the repetition of that injury or any other threatened wrong, would not be prohibited.⁵ With the object, therefore, of affording preventive relief, the Prætors in ancient Rome issued interdicts, and the Chancellors in more recent times in England had recourse to writs of injunction.⁶ The English Judges, however, left themselves a free hand in the matter, and even the Judicature Act of 1873 purports to leave their discretion.

¹ Kerr, *Inj.*, 2, 12.

² *Dills v. Doeblér* (Conn.) 20 L. R. A. 452; *Muncie Natural Gas Co. v. Muncie* (Indiana) 60 L. R. A. 822.

³ Bigelow's note in 2 Story, *Eq.*, 178 et seq. H. A. Smith, *Prin. Eq.*, 744.

⁴ Per Lindley, L. J., *London and Blackwall Ry. Co., v. Cross* [1888]. 31 Ch. D., 354, 360.

⁵ Langdell, *Eq. Jur.*, 24, 28.

⁶ 2 Story, *Eq.*, s. 865, p. 184; Nelson, *Inj.*, 7 sqq.

unfettered, except by reference to considerations of justice and convenience.¹ In British India, the requisite conditions of the jurisdiction in Injunction are to a large extent laid down by the Legislature. "This has been done by selecting the leading principles upon which the English Courts are in the habit of acting in the exercise of their *discretion*, and converting them into legislative rules of *jurisdiction*."² The general doctrine may, however, be thus stated: wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy, or compensatory damages will afford complete and adequate relief.³

Receivers.

It is also in the exercise of the equity jurisdiction which consists in the administration of a protective or preventive justice, that the Court may appoint a receiver. Daniell defines a *receiver* as "an indifferent person between the parties appointed by the Court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things in question pending the suit, where it does not seem reasonable to the Court that either party should do so, or where a party is incompetent to do so, as in the case of an infant."⁴ The object of the jurisdiction, said Lord Redesdale, is to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests. Relief in this matter, too, is given upon the principle *quia timet*. Bills in equity *quia timet*, says Story, "are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of

¹ 36 and 37 Vic., cap. 66, s. 25, sub-s. 8. *Per* Jessel, M. R.: "There is unlimited power to grant an injunction in any case where it would be right or just to do so, and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons, or on settled legal principles." *Beddow v.*

Beddow [1878] 9 Ch. D., 89. *Cf. Harris v. Beauchamp* [1894] 1 Q. B. 801; *Cowper v. Laidler* [1903] 2 Ch. 337.

² Nelson, *op. cit.*, 27, also *Com. S. R.* A. 71.

³ 4 Pomeroy, *Eq. Jur.*, s. 1338.

⁴ *Chancery Practice*, 1664. See also *Kerr, Rec.*, 3.

a Court of Equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief.”¹ A receiver is an officer of the Court, appointed at the discretion of the Court, pending a suit,² for the benefit and on behalf of all the parties in interest,³ provided it is shown that either actual damage has occurred, or there is imminent danger thereof, and the apprehended damage, if it comes, will be very substantial, if not irreparable.⁴ As Lord Hardwicke observed, “If the power of appointment is a discretionary power, exercised by the Court with as great utility to the subject as any authority which belongs to it; and it is provisional only for the more speedy letting in of a party’s estate and securing it for the benefit of such person who shall appear to be entitled; and it does not at all affect the right.”⁵

Other forms
of specific
relief.

There are some specific remedies which Indian Courts, in common with English Courts, grant, but which are to be found described in statutes other than the Specific Relief Act.⁶ For instance, where there is a contract of mortgage, the mortgagee may sue either for foreclosure or sale, and the mortgagor may sue for redemption of the mortgaged property. The Transfer of Property Act provides for such a contract and the remedies which are appropriate to it.⁷ Again, there may be a partnership which has been dissolved or is to be wound up. The accounts of the partnership have to be taken, the assets realised, and each partner may be compelled to pay the balance due from him and discharge the debts of the partnership. Now, the substantive law regarding partnership is to be found codified in the Indian Contract Act⁸ and the remedies appropriate are to be worked out according to the Code of Civil Procedure.⁹ This Code also provides for the taking of an account of the property of a deceased person and for the administration of

¹ 2 Eq., s. 826, p. 157. Cf. Woodroffe *Rec.*, 9. 14.

² S.R.A., s. 44. Cf. C.P.C., Sch. 1, Or. 40, r. 1; Collett, 325.

³ *Davis v. Duke of Marlborough* [1818] 1 Sw. 74, 83; s. c., 2 Sw. 108, 125, 36 E. R., 307, 562.

⁴ *Per Pearson, J., Fletcher v. Bealey*

[1885] 28 Ch. D. 688, 698.

⁵ *Skip v. Harwood* [1747] 3 Atk., 564, 26 E. R., 1125.

⁶ 1 Stokes, A. I. Codes, 928-9.

⁷ Ch. IV; C. P. C., Sch. 1, Or. 34; App. A(3), nos. 45-6; App. D, nos. 3-10.

⁸ Ch. XI.

⁹ C. P. C., App. D, nos. 21-2.

the same.¹ A trust estate may, similarly, have to be administered and accounts of the trust taken. The Indian Trusts Act provides for this.²

In several places I have spoken of the discretion of the Court. It is an undoubted rule that "giving a specific performance is matter of discretion." But this does not mean that it is open to a Court to do just what it pleases in an individual case, without regard to authority or principle. *Chambre, J.*, said in an old case, "Granting a specific performance is not to be claimed as matter of right. It is in the discretion of the Court; and will not be done, unless complete justice can be done by the party seeking it."³ Lord Eldon explained next year that the discretion was not arbitrary or capricious, but it must be regulated upon grounds that would make it judicial.⁴ No hard and fast rules, it has been said, can be laid down.⁵ In exercising its discretionary power, a Court will act with more freedom than when exercising its ordinary powers, and will grant or withhold relief according to the case presented. An American Judge has observed, "In every case the question must be whether the exercise of the power of the Court is demanded to subserve the ends of justice; and unless the Court is satisfied that it is right in every respect, it refuses to interfere."⁶ In an old English case it was said, "discretion is a science not to act arbitrarily, according to men's wills and private affections."⁷ The rules contemplate an exercise of the *arbitrium*, not the arbitrariness, of judges.⁸ Consequently, the use of an ambiguous term, like 'discretion,' is unfortunate and calculated to mislead. To take the case of contracts for an instance. The law always enforces the contracts of men where they are unobjectionable.⁹

Discretion.

¹ C.P.C.Sch.I, 20, r.13; App.D., nos. 17-20.

² S. 59. See also C. P. C., App. A(3), no. 44.

³ *Omerod v. Hardman* [1801] 5 Ves. 722, 734, 31 E. R. 825, 830.

⁴ *White v. Damon* [1802] 7 Ves., 30, 35, 32 E. R. 13, 15. Cf. S. R. A., s. 22; 1 Stroud, 542.

⁵ 2 Story, Eq., s. 742, p. 59. But see Bigelow's note.

⁶ *Per Stewart, J., O'Brien v. Pentz*, 48 Md., 562. *Waterman*, 7-8. *Willard*

v. Tayloe [1869] 8 Wall. 557, 567, 1 Ames, 406. Cf. *Leech v. Schweder* [1874] 9 Ch. 467.

⁷ *Rooke's Case*, 5 Rep. 996, cited and explained in *Cowper v. Cowper* [1734] 2 P. Wms., 720, 753, 24 E.R. 942, *Burgess v. Wheate* [1759] 1 Eden, 177, 214, 28 E. R. 666, and *Hoywood v. Cope* [1858] 25 Beav., 140, 151, 53 E. R. 589.

⁸ 40 Law Journal (Eng.), 277.

⁹ *Per Moncre, P. J., Hale v. Wilkinson*, 21 Gratt. 75, 80.

In the words of Rolt, L. J., "Contracts ought to be performed ; to break them, and to propose compensation for the breach, by damages, is not complete justice."¹ "Within the domain of equity jurisdiction remedies are not, in any true sense, discretionary," says Pomeroy, "but are governed by the established principles and rules which constitute the body of equity jurisprudence."² All that we mean by saying that the right to an equitable remedy is 'discretionary,' is that the mere existence of a legal right is not sufficient to attract the equitable remedy. In addition to the facts, events, and relations which give rise to the certain and absolute *legal* right, there may be *other* facts, circumstances, and incidents which determine the existence of the equitable right, which modify its application, or, perhaps, entirely prevent its exercise.² The plaintiff who seeks the assistance of a court of equity may not be himself prepared to do equity, or his hands may not be clean. Either circumstance will determine the so-called discretion of the court against the plaintiff. Where neither circumstance is present, the court will exercise its jurisdiction in favour of the plaintiff. A careful analysis, therefore, discloses that what has been so frequently and so vaguely described as the discretionary power of a court of equity, consists really in the application of two fundamental maxims of equity.³ As has been well said, Equity walks arm-in-arm with Precedent,⁴ and, after all, the question to what extent a court of equity will go is very largely one of authority as to what has been done before.⁵

Codes in
India.

We have now reviewed the broad features of the several forms of specific relief that the Indian statute-book recognises. As is well known, a large portion of the law which is administered by courts in this country is codified. Codification has some obvious advantages in a country where law is not always administered by lawyers. Rules may be stated in a precise and definite form, and a study and consideration of the ultimate principles may thus be rendered to some extent unnecessary.

¹ *Tilley v. Thomas* [1867] 3 Ch. 61, 72, 2 Keener 1099.

² *S. P.*, s. 37, p. 60.

³ ⁴ Pomeroy, *Eq. Jur.*, s. 1404, p. 2768. See the matter further dis-

cussed, Lect V. *infra*.

⁴ 11 *Encyc. Laws of Eng.*, 655 (Rawlins).

⁵ *Per Rigby, L. J., Re Scott and Alvarez' contract* [1895] 2 Ch. at 615.

But this very fact of the judiciary being only a partially trained body may make it doubtful if codification on a large scale is an unmixed blessing. A civilian critic has sharply criticised "measures introduced by a lawyer ignorant of India and passed by a Council ignorant of the measures."¹ The Calcutta High Court has severely commented upon the tremendous power of granting an injunction having been a little lavishly bestowed upon our mofussil Courts. "A jurisdiction originally, and perhaps properly, belonging only to superior Courts possessed of legal knowledge and experience, is imposed on Courts in the mofussil, which sometimes share, with the victims of its exercise, the inconvenience of its being so imposed on them."² Besides, by codification legal principles run the risk of losing their elasticity and life, as the letter not unoften eats up the spirit. It is important to remember that "the law is not a series of arbitrary distinctions to be retained by memorizing." The law, viewed aright, says Professor Brooks Adams, "presents a series of phenomena, evolved by the conflict of social forces," and "for every change in the ways of daily life which has been wrought by science, there must be a corresponding change in law."³ "Whatever disadvantages attach to a system of unwritten law," observed Cockburn, C. J., "and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."⁴ But in India neither courts nor parties are always able to appreciate the proper nature of the rights and obligations in issue where the same have not been made the subject-matter of legislation. Under the circumstances, the Government probably pursued a wise policy when they determined to formulate in the form of codes the general law of the land.

¹ S. S. Thorburn, *Punjab in Peace and War*, ch. on "Machine Rule."

² *Baddam v. Dhunput Sing* [1889] 1

C. W. N., 429, 431.

³ *Centralisation and the Law*, 45, 47.

⁴ *Wason v. Walter* [1867] 4 Q. B. 73.

The British Indian law of specific relief is contained mostly in Act No. I of 1877. This Act was originally drafted by Dr. Whitley Stokes upon the lines generally of the draft New York Civil Code, 1862, and after mature consideration it was placed upon the statute-book, at the instance of that eminent equity lawyer, now unhappily deceased, Lord (then Sir Arthur) Hobhouse, Law Member of the Imperial Legislative Council of India.¹ It came into force on the first day of May, 1877, and extended to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874, to some of which it has since been extended. The Act in its main provisions follows the doctrines of the English Equity Courts, and deliberate departures therefrom were intended to be few, though some of the English doctrines have since been modified and cannot now be said to be in entire harmony with the words of the Act. But the Act, on the whole, has worked well and has not required much amendment, though there is room for improvement both in the expression² and the substance.³

¹ 1 Stokes, *A. I. Codes*, 938-939, where the author acknowledges his obligations also to the well-known treatises of Fry and Dart. See also *Abstract of Proceedings of G. G.'s Council for making laws* (1877), Vol. XVI, pp. 22

et seq.

² See, e.g., S.R.A., s. 23 (e), (f); s. 27 (d).

³ Stokes, *op. cit.*, 939-940; Pollock, *F.M.M.*, 121 sqq. It is not exhaustive, e.g., *Janardan v. Bhairab* (1915) 39 I. C. 365.

LECTURE II.

POSSESSION.

The first form of specific relief that the Indian Legislature has recognised¹ is "by taking possession of certain property and delivering it to a claimant." I propose to deal with this in the present lecture, and the first concept I propose to consider is that of *possession*.

Now, there is hardly another concept known to the student of jurisprudence which is more difficult or more important. But I do not propose to-day to enquire into the history of the idea of possession, or to discuss the various philosophic theories that have been advanced to account for it. Let us recognise once for all that "the first lesson to be learnt from the study of legal history is that the fundamental conceptions of modern Law are the result of a slow growth which has been going on for ages."² Let us further recognise that all legal ideas are sociological phenomena, which have their history, as also their metaphysic,³ and when a philosopher says, "possession is the objective realization of free will,"⁴ he throws a light upon some vexing questions that really illuminates. All historical and philosophical questions apart, however, what is necessary to make clear to our minds is the meaning of possession, both as a physical fact and as a legal concept, as it is now understood. "In common speech," says Sir F. Pollock, "a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others."⁵ The subject possessing is brought in a certain relation with the object possessed, and thereupon the fact of possession follows. This relation may, in the first instance, be viewed as physical. I am in possession, *e g.*, of

Possession.

¹ S. R. A., s. 5 (a).

² Jenks, *Laws and Politics*, 190.

³ Miller, *Data of Juris.*, 2.

⁴ Kant, *Phil. of Law*, 68 *et seq.*

⁵ Pollock & Wright, *Possession*, 1.

Relation,
physical.

the pen I hold or the chair I occupy. But it is not necessary that there should be actual physical contact, some "corporal touch."¹ If I am in possession of the pen I actually hold in my hand, I am also in possession of the other pens on the pen-rack before me; so, if I am in possession of the chair I am actually sitting in, I am also in possession of the other chairs in the room. And the reason is that I may take any other pen at any moment, I may even now sit in any of those other chairs, if I feel so inclined. And to go further afield, I am in possession of the horse in my stable or the fruits in my garden and also of my country-house several miles away, and I am so in possession, not because I stand in a physical relation to them at the present moment, but because it is open and competent to me to resume such relationship with them whenever I choose. But physical contact, either actual or possible, is not enough to constitute possession. Juxtaposition is not possession. There are your books lying in front of me, but I cannot be said to possess them, unless I am in a position not only to handle them, but to bring them to my use, to do what I like with them. The physical relation should therefore be such as to enable me to control the use of the material object in question.²

Relation,
mental.

This consideration brings us to the second or mental aspect of the relation. In order to constitute possession, not only must I be placed in a position to exercise some control or power over the object, but I must intend or will to exercise this control or power.³ Suppose you hand up one of your books to me, and I hold it for a time; there is a physical relationship brought about no doubt, but no possession strictly speaking. The physical relationship must be accompanied by a certain intent. If I hold the book, say, with the intention of keeping it and using it for my own purposes, then I have possession of it. Upon analysis, therefore, the idea of possession resolves

¹ *Ellis v. Hunt* [1789] 3 T. R. 464, per Kenyon, C. J.

² *Jenks, op. cit.*, 188. Cf. *Pollock & Wright*, 119, "Every case of possession is founded on the state of consciousness of unlimited physical power. To create this feeling, the desire to have the subject as one's own must exist; and, at the same time,

the physical requisites of power which are capable of giving rise to this consciousness," *Savigny, Possession* (Perry), 170; *Markby*, 182-5. Other authorities seem to be satisfied with the mere appearance of power; cf. *Holmes, Com. Law*, 234; *Pollock and Wright*, (1)

³ *Holmes, Com. Law*, 216.

itself into two elements, physical and mental, *corpus* and *animus* (to adopt the terms of Roman lawyers).¹ The mind must accompany the act, the will must realise or embody itself in an external fact or group of facts. I, as distinct from other human beings, from other possible possessors, must elect to deal with or subject to my control a certain physical object. To gain a complete idea, therefore, of possession, we have to consider (1) the person possessing, (2) the thing possessed, and (3) the persons excluded from possession. If there is a general scramble for a thing, and none of the scramblers can keep it for himself and exclude the others, there is no possession. As soon as one of them puts himself in such relation with the object as to be able to hold it against the others and keep them out, he has taken possession of it. It is important to note here that, though possession in its fullest sense must be exclusive and absolute, yet a physical power to exclude others is by no means essential even to corporeal possession. I may be owner, say, of a large estate and I am in possession. This does not mean that I have the physical power to put down by brute force all acts of trespass and wrong-doing in different parts of this estate, but that I exercise such control over it as the nature of the *zamindari* admits of, and outsiders respect my possession and do not interfere with the exercise of such control on my part. This they may do, because they are law-abiding people, because they do not feel inclined to quarrel with established facts, because they have a wholesome dread of the civil and criminal courts, or because they think I am too strong for them. If the physical power to prevent interference were essential, then a helpless infant or imbecile could not be in possession of what he could not guard. Possession is a continuing relation. Prof. Salmond defines *possession* of a material object as "the continuing exercise of a claim to the exclusive use of it."² The intention to hold or occupy has to be realised or embodied in certain external facts, and the

*Corpus,
animus.*

Physical
power to
exclude.

Continuing
relation.

¹ Cf. Holland, *Jur.* 185: "A moment's reflection must show that 'possession,' in any sense of the term, must imply, first, some actual power

over the object possessed, and, secondly, some amount of will to avail oneself of that power."

² Salmond, *Jur.* 243.

holding or occupation cannot be effective without some reasonably sufficient security that it will continue. The test therefore is the improbability of any interference, and this, as we have seen, may arise from a variety of causes.¹ "Absolute security for the future," however, "is not requisite," says Dernburg,² "for it cannot be had.....All that is necessary is that, according to the ordinary course of affairs, one is able to count on the continuing enjoyment of the thing." And, as Sir F. Pollock has neatly put it, "the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition."³

So far for the physical element. The mental element may now be considered. Three different degrees may here be distinguished. A person may hold an object without claiming any interest therein for himself. I may, *e.g.*, have given my watch to my servant to keep. Here the watch is actually with him, but he holds it for me. He has therefore only custody of the watch, not possession. Again, a person may hold an object and intend to use it for the time, but not claim it absolutely for himself. *E.g.*, I may lend my watch to a friend. Here my friend does not disclaim my outstanding title, but he keeps the watch for use and may be said to be in possession of it in a qualified sense. A person may, lastly, hold the object for his own exclusive use and recognise the title of no one else to it. He is then truly in possession of the object. Such possession may be of the owner or of a wrong-doer, say, a thief who has stolen the thing from the owner. The mental

Three
degrees
of *animus*.

¹ *Ibid*, 262 : "The chances of hostile interference are determined by other considerations than that of the amount of physical force at the disposal of the claimant. We have to take account of the customs and opinions of the community, the spirit of law-abidingness and of respect for rightful claims, and the habits of acquiescence in established facts. We have to consider the nature of the uses of which the thing admits, the nature of the precautions which are possibly or usually taken in respect of it, the opinion of the community as to the rightfulness of the claim seeking to realise itself, the extent of lawless

violence that is common in the society, the opportunities for interference and the temptations to it, and, lastly, but not exclusively, the physical power of the possessor to defend himself against aggression. If, having regard to these circumstances and to such as these, it appears that the *animus possidendi* has so prospered as to have acquired a reasonable security for its due fulfilment, there is true possession; and if not, not."

² Pandekten, I, s. 169 (cited by Salmond, *op. cit.*, 247). Cf. Pollock and Wright, *Pos.*, 12-13.

³ Pollock and Wright, *op. cit.*, 14.

element, the intention to exercise control, is in this last case to be seen in its fullest form. What, then, is the nature of this mental element? One feature is common to all the three cases,—the intention is to retain the thing and exclude others. In the first case, of custody (or, as Roman lawyers prefer to call it, *detention*), however, the servant means to hold the thing against all but the master, to keep off every other claimant, but there is no intention to retain the thing independently of the master. The master, therefore, is in possession, the servant is only his hand wherewith to hold the thing.

In the second case, of derivative possession, as it is called, there is an intention to exclude everybody but the owner, and to exclude the owner also to such extent and for such period as may be necessary to enable the holder to get such use out of the object as he holds it for. The intent here differs from that in the third case only in degree. Viewed from the standpoint of the holder, it is self-regarding; viewed from that of the outsider, it is exclusionary; but in both aspects it is not of that absolute character which it reaches in a case of true possession. An owner, for instance, holds the object for himself with intent not to let anybody else have anything to do with it. The intent is to appropriate, to bring the object, as has been said, under the personality of the possessor. Savigny holds that without such intent (*animus domini*) there can be no true possession. Holmes prefers to think that all that the law requires is an intent to exclude others.¹ This view would bring the second class (of borrowers, pledge-holders, bailees, *etc.*) within the category of possessors. There is not much difference in the nature of the intent, however, by reason of the view-point from which we regard it. Von Ihering, to achieve practically the same result as Holmes, reduces to its minimum the intent admittedly required to distinguish accidental physical contact from possession. The intention, according to this jurist, need be one only of retention. But the controversy between Savigny and Ihering turns upon certain peculiar rules of the Roman law,² and we need not pursue it further.

Intention to
exclude or
retain.

¹ *Com. Law*, 220.

² Markby, *Elem. Law*, 196-7.

Physical and
legal posses-
sion.

We may take it, then, that possession is a physical relation which gets its legal meaning from the intent with which it is accompanied, and which is established as a fact and a right when the intent is respected by others.¹ There is dominion on the possessor's part and submission to this dominion on the part of those excluded from possession.² Lawyers distinguish between physical and legal possession.³ In the former case, the physical relation, the actuality or possibility or corporeal contact, is the dominant consideration. In the latter case, what we principally contemplate is the legal relation of the possessor to the object possessed with respect to other persons. It may exist without physical possession, as, for instance, by reason of my absence from Allahabad I do not cease to be in possession of the goods in my house there.

Mediate and
immediate
possession.

Lawyers also distinguish between mediate and immediate possession.⁴ What is directly held by me is in my immediate possession, what somebody else holds for me is in my mediate possession. An object in my servant's custody may therefore be said to be in my mediate possession, so also is what is in the 'derivative' possession (to adopt Savigny's expression) of some borrower or hirer from me, a tenant-at-will, or even a termor or pledge-holder. In the case of the last two, no doubt, they have the *corpus* and also the *animus* to hold even as against me for a certain period or till some claims of theirs are satisfied. But, as against third parties, I retain possession; for, though temporarily I have placed somebody else in occupation, he occupies on my behalf and in my interest and not adversely to me, and my *animus* to claim exclusive use for myself remains intact.⁵ Mediate possession is also sometimes spoken of as constructive possession, which, however, is often taken simply to mean the right to possess as distinct from possession.⁶

¹ The question whether possession is a matter of fact or of right was raised by Bentham. See Pollock & Wright, *Pos.*, 10; also Holmes, *op. cit.*, 213-214.

² A. S. Thayer, 18 Harv. L. Rev. 212.

³ Pollock & Wright, *op. cit.*, 118-119.

⁴ Salmond, *op. cit.*, 254-8.

⁵ "In each case, the possession of the bailee is the possession of the bailor; it would be dangerous to distinguish between such cases." *Marvin v. Wallare* [1856] 6 E. & B., 726, 735, per Crompton, J.

⁶ Pollock & Wright, *op. cit.*, 25, 145.

Actual and
formal
possession.

A third distinction worth noticing is that drawn between actual and symbolical or formal possession. The idea of symbolical possession is that where the usual physical relation cannot be readily effected there may be a delivery of something by way of symbol. For instance, where goods in a warehouse are transferred, the key of the warehouse may be handed over to the transferee, and he will thereafter be deemed to have taken possession, though he had never gone near the warehouse or touched the goods. Similarly, where immovable property is sold by auction in execution of a decree, the possession that is delivered to the auction-purchaser by, say, beat of drum on the spot by an officer of the Court, is generally spoken of as symbolical. The judgment-debtor whose property has been sold is at the time in actual possession and may not be ousted by the auction-purchaser for years afterwards. But the formalities carried out by the officer of the Court are taken to amount to a 'livery of seisin,' and, as between the judgment-debtor and the auction-purchaser, the legal possession is deemed to be with the latter.¹ The expression 'symbolical possession,' however, is a misnomer. In determining whether possession has been taken of a particular thing, the nature of possession that that thing is capable of has to be borne in mind.² Now in the cases we have been considering, there is in fact such a transfer of control as the nature of the case admits of.³ As Lord Hardwicke pointed out in the classic case of *Ward v. Turner*,⁴ "delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and therefore, the key is not a symbol, which would not do." So, with regard to delivery of possession, under Order 21, rules 35, 36, 95, or 96 of the Code of Civil Procedure, it has been

Symbolical
possession.

C. P. C., Or.
21 rr. 35-6,
95-6.

¹ *Juggobundhu Mukerjee v. Ramchunder Bysack* [1880] 5 Cal., 584, F. B.; *Hari Mohan v. Baburahi* [1897] 24 Cal., 715; *Mangli Prasad v. Debi Din* [1897] 19 All., 499; *Norain Dos v. Lalta Prasad* [1899] 21 All. 269. Cf. *Gunga v. Bhoopal* [1872] 19 W. R. 101, P. C.

² "By possession is meant possession of that character of which the thing is capable." *Lord Advocate v. Young* [1887] 12 A. C. 556, per Lord Fitzgerald.

³ Pollock & Wright, *op. cit.*, 61.

⁴ [1752] 2 Ves. Sr., 431, 443, 1 Wh. & T., 7th ed., 390, 8th ed., 413.

pointed out by two learned judges of the Madras Court that such delivery cannot legally be characterised as 'symbolical' or 'formal,' either as against the judgment-debtor in possession or a third party in possession. "If the judgment-debtor is in possession, such delivery operates as a delivery of actual possession. If a third party is in possession, it is no delivery of possession at all, as against him, if made in his absence and without his knowledge, but it is operative as an ouster or dispossession of him and placing of the decree-holder or purchaser in actual possession, if such delivery takes place in the presence of and adversely to the claim of such third party."¹

Joint
possession.

Another concept which it is worth while to examine here is that of 'joint possession.' As a physical fact, possession does not easily admit either of division or participation. For instance, two or more persons cannot be in physical occupation of the same point of space at the same time. Possession has therefore been said to be by its nature exclusive.² But from this it does not follow that two or more persons cannot own or exercise dominion over the same property at the same time. To an Indian lawyer, acquainted with the personal law of the Hindus, no juristic phenomenon is more familiar than that of coparcenary property, that is, an estate which is owned and held and enjoyed in common by a number of persons. It may be that the actual management is vested in a single member of the family, the *svami*, *prabhu* or *karta*, as he is called,³ but his possession as such manager is on behalf of the whole family, none of the members of which he can exclude. If it is a family governed by the *Mitákshará*, before partition, it cannot be

¹ *Kocherlakota v. Vadrevu Venkappa* [1903] 27 Mad., 262, 269-270: "In all cases of delivery of possession of immovable property, whether to the decree-holder or to an execution-purchaser, the officer entrusted with the warrant of delivery proceeds to the spot near enough to command a view of the land with its boundaries (see Savigny on 'Possession,' p. 150), in the presence of the decree-holder or purchaser or their agent, and generally in the presence also of several others, including village officers; and, after the delivery is thus effected,

a receipt acknowledging delivery of possession and attested by witnesses is obtained and forwarded to the Court along with the return to the warrant. If the judgment-debtor be the party in possession, it is difficult to see what else has to be done to put the decree-holder or purchaser in actual possession." *Per* S. Ayyar, O.C.J. and B. Ayyangar, J. Cf. also *Ramchandra Subrao v. Ravji*, [1895] 20 Bom. 351.

² *Mohanlal v. Amratlal* [1878] 3 Bom. 174, 177.

³ Ghose, *Hindu Law*, 369.

predicated in respect of any individual coparcener that his interest is limited to a specific share.¹ In a Dáyabhága family, too, which affords points of analogy to a body of English tenants in common,² the shares of individual members may be ascertained before partition, but the possession of no member can be limited to a specific portion of the property.³ Co-owners, consequently, are said to be seized *per my et per tout*,⁴ an expression which Blackstone understood to mean, "by the *half* or *moiety* and by *all*: that is, they each of them have the entire possession, as well of every parcel as of the whole."⁵ In actual life, therefore, joint possession is not only an easily intelligible concept, but it is a reality, a fact which no practical lawyer can afford to ignore. The legislature has expressly recognised it in the Transfer of Property Act,⁶ and the law reports contain numerous cases in which decrees have been made for joint possession of property.⁷

In recent years, however, a doubt has been raised by some Hon'ble judges of the Allahabad High Court and the current of decisions in that Court during the last two or three years has in consequence been disturbed, and there is now a perplexing

Conflict at
Allahabad.

¹ *Appovier v. Rama Subba Ayyan* [1866] 11 M.I.A. 75, 89. Cf. *Katama v. Rajah of Shivagunga* [1863] 9. M.I.A. 543.

² *Mitra, Joint Prop.*, 174-6.

³ *Dayabhaga*, ch. I, § 8 Cf. *Ram Chandar Dutt v. Chunder Coomar Mundul* [1869] 3 M.I.A. 181; *Bhattacharyya, Joint Hindu Family*, 171-3.

⁴ *Litt.*, 323. Cf. *Markby, Elem. Law*, s. 399; *Buswell, Lim.*, 408; *Mitra, Lim.*, 150.

⁵ 2 *Blackstone, Com.*, 181; 4 *Kent, Com.*, 405. But the correct meaning of the French expression seems to be that the party is seized wholly, or not at all. 7 C. B. 455; *Bigelow, L. C.*, 360.

⁶ S. 44: "Where one of two or more co-owners of immovable property legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the condi-

tions and liabilities affecting, at the date of the transfer, the share or interest so transferred."

⁷ "In the case of land, it is possible for the co-owners to enjoy it concurrently," says Prof. Kenny, "and therefore any attempt by one of them to exercise an exclusive enjoyment may easily constitute trespass against the other" *Cases on Torts*, 338; *Murray v. Hall* [1849], 7 C. B. 441, Kenny, 387. Decrees have been made for joint possession, even where plaintiff had asked for exclusive possession: *Wahid Alam v. Safat Alam* [1890] 10 A. W. N. 130; *Rambhawan v. Rambaran*, *ibid*; 166; *Ram Chandar v. Madho Rao* [1891] 11 A. W. N. 45; *Bhiku Ravlu v. Puttu Timappa* [1905], 8 Bom. L. R. 99, 105 (large number of authorities collected). Cf. also *Antu Singh v. Mandil Singh* [1893], 15 All. 412. Decree made for partial ejectment and joint possession: *Hulodhur v. Gooroo Dass* [1873], 20 W. R. 126; *Rudha Prosad v. Esuf* [1881], 7 Cal. 414; *Kamal Kumari v. Kiran Chandra* [1898] 2 C. W. N. 220.

conflict of authority. The exact meaning "to be attributed to the words "a decree for joint possession" has been said to be not intelligible,¹ it has been doubted if such a decree could be executed,² and it has been ruled that a Civil Court can declare rights, but cannot go on to partially eject one co-sharer for the benefit of another. "Where co-sharers in an undivided mahal," said Stanley, C. J., "come into court complaining that other co-sharers having a like interest with themselves have taken possession of part of the joint property, the only relief which a Civil Court can give is a decree declaring the plaintiffs to be entitled to possession jointly with the other co-sharers."³ It appears to me that if co-sharers desire to sue a co-sharer who is in occupation of joint property, and who has not obtained possession illegally, the only course open to them is to apply for and obtain partition."⁴ Now, there is no doubt that the courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners,⁵ but they will do so in proper cases. Where one co-sharer makes use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession, and does not exclude any other co-sharer, the fact that he spends money in a certain use of the joint property and thereby reaps a profit for himself does not give a cause of action to another co-sharer.⁶ So, where one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with justice, equity and good conscience to restrain him from proceeding with his work, or to

¹ *Rahman Chaukhri v. Salamat Chaukhri* [1901] 21 A. W. N. 48.

² "There is no machinery, so far as we are aware, whereby this court can put a joint owner into joint possession of property under a decree for joint possession," *Ram Sarup v. Gulzar Banu*, [1905] 25 A. W. N., 160, 161. But see sch. I, Or. 21, r. 35 (2) C. P. C. The latter would apparently apply where the decree is for joint, and not exclusive, possession.

³ This passage seems to imply that where the property is of such character (e.g., house property) as may be partitioned by a Civil Court, that Court may be competent to grant

relief more substantial than a declaration. Precedents like *Rajanikant v. Ram Nath* [1883] 10 Cal. 244, and *Ram Chandra v. Damodhar* [1895], 20 Bom., 467, show that a decree for joint possession can be made.

⁴ *Jagannath Singh v. Jainath Singh* [1904], 27 All. 88, 90; *Phani Singh v. Nawab Singh* [1905], 28 All. 161, 166.

⁵ *Lachmeswar Singh v. anowar Hossein* [1891], 19 Cal. 253, 265, P. C.

⁶ *Lachmeswar Singh v. Manowar Hossein*, supra. In *Ram Sarup v. Gulzar Banu*, supra, a grove had been planted on waste land with the consent of co-sharers.

allow any other share-holder to appropriate to himself the fruits of the other's labour or capital. This is what happened in the leading case of *Watson & Co. v. Ramchund Dutt*,¹ Messrs. Watson & Co. were co-owners of a joint estate. They had procured leases of a plot of land from the others, had built a factory and had produced indigo. After the expiry of their leases, they went on in the same way. But the other co-owners wished to grow oil-seeds, and they sued for an injunction to restrain the Watsons from growing indigo on *ijmali* land. The Judicial Committee observed: "If their be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation, as if it were his separate property and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there, inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists or prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession.."² Their lordships, accordingly, refused such a decree, as also an injunction, but declared the plaintiffs' title and gave them compensation for the exclusive use of the joint land by the Watsons.

*Watson Co.,
v. Ramchand
Dutt.*

Where there is an actual ouster of a co-sharer, his right to a decree restoring him to joint possession cannot be denied.³ Nor can it be disputed that, where a co-sharer takes exclusive physical possession of a parcel of joint property, he must account for its profits to the other co-sharers.⁴ But *Watson & Co. v. Ramchund Dutt* does not⁵ lay down that there can be no decree for

Decree for
joint possession.

¹ [1890] 18 Cal., 10, P. C.

² 18 Cal., 21.

³ *Bhairon Rai v. Saran Rai* [1904] 26 All. 588 F. B.; *Dilbar Sardar v. Hossein Ali* [1899] 26 Cal. 553; *Wasudeo v. Sakharam*, 13 C. P. L., R. 158. As to what amounts to an ouster, see *Wilkinson v. Haygarth* [1847] 12 Q. B. 837; *Jacobs v. Seward* [1872] 5 H. L., 464; *Ittappan v. Manvikrama* [1897] 21 Mad. 153, 165-6.

⁴ *Jagarnath Singh v. Jainath Singh* [1904] 27 All. 88, 90.

⁵ *Ram Charan Rai v. Kauleshar Rai* [1904] 27 All. 153, 155. *Bholanath v. Buskin* [1894] 14 A. W. N. 127 seems to have been decided on this supposition; see as to this case *Namhi Devi v. Daulat Singh* [1905] 2 A. L. J. R., 256, 259, *Phani Singh v. Nawab Singh* [1905] 28 All. 161, 166. Cf. *Madanmohan Shaha v. Ra'ab Ali* [1900] 28 Cal. 223.

joint possession as between co-sharers, except in the case of an illegal ouster. If that were so, then the result would be (in the words of Banerji, J.) "that any co-sharer in a co-parcenary body, however small the extent of his share may be, may, if he is more powerful than his co-sharers, take exclusive possession of the bulk of the land jointly belonging to him and to his co-sharers, and thereby drive the latter to the necessity of suing for partition, which, as is well known, entails delay and expense."¹ Where a co-sharer has taken exclusive possession of derelict land, the court may well refuse to disturb such possession at the instance of other co-sharers, and in two recent cases the Allahabad High Court accordingly held that the proper decree to make was one declaring the parties to be joint owners of the land in dispute, and the plaintiffs as such entitled to an account of the profits of the land, so long as it remained in the possession of the defendant.² But the Calcutta High Court has refused to hold "that whenever new lands are formed by accretion to an old estate, it is open to any co-sharer of the estate, who appears first on the field, to grab possession of the land and hold it, either as his *kamat* or by settling tenants thereon, to the permanent exclusion of all the other co-sharers. "Such a principle," said Brett and Gupta, JJ., "would be subversive of the rights of joint owners and would, in the large alluvial tracts of Bengal, lead to frequent disturbances of the peace."³ Amongst co-sharers *inter se* there is a right to joint possession, and, as a merely declaratory decree can serve no purpose beyond that of establishing the right, they may, in a proper case, sue to enforce the right, without being forced to a suit for partition. If the plaintiff establishes a subsisting right as a co-parcener to the joint property, the proper decree to pass, says the Bombay High Court, is one placing him in joint possession with the defendants.⁴ If a decree can be passed to put back a plaintiff into

¹ *Nannhi Devi v. Daulat Singh*, *supra*.

² *Jagarnath Singh v. Jainath Singh*, *supra*, expld. in *Raja Ram v. Lalji* [1905] 2 A. L. J. R. 481; *Phani Singh v. Nawab Singh*, *supra*.

³ *Surendranarain Singha v. Hari Mohan Misser* [1906] 33 Cal. 1201, 1207.

⁴ *Narainbhai v. Ranchod* [1901] 26 Bom. 141, 145. 1 Gour, *Trans. Prop.*, 4th ed. 458.

joint possession in any case, and apparently it can be, even at Allahabad,¹ in the event of an illegal ouster,² there is no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff, who has never been in possession. Whether such a decree ought to be passed in any particular case is, as remarked by Aikman, J., "another matter."³ In one case, Edge, C. J., and Banerji, J., issued an injunction instead, restraining the defendant from dealing with the land by cultivating, letting it to a tenant and recovering the rents and profits of it in any way, to the exclusion of the plaintiff without the previous consent of the plaintiff.⁴ An injunction, as we shall see later on,⁵ will not always be the proper remedy,⁶ but in every case the plaintiff is entitled to a decree which will thoroughly protect his rights and interests.⁷

Injunction.

Possession
and
Ownership.

I will now consider the relation between possession and property or ownership. "Possession," says Ihering, "is the actuality or objective realisation of ownership; it is to ownership what an outwork is to a fortress."⁸ Similarly, says Sir Henry Maine: "The distinction between property and possession is the distinction between the legal right to act upon a thing and the physical power to do so."⁹ Possession, therefore, is in *fact* what ownership is in *right*.¹⁰ "Possession," to quote Professor Salmond, "is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me, when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership

¹ *Bhairon Rai v. Saran Rai*, *supra*.

² Ouster defined, *Basanta Kumari v. Mohesh* [1914] 18 C. W. N., 328.

³ *Ramcharan Rai v. Kauleshar Rai*, *supra*.

⁴ *Ram Jatan v. Jaisar* [1894] 14 A. W. N. 166, *fold*, in *Nannhi Devi v. Daulat Singh*, *supra*.

⁵ Lecture XII.

⁶ *Watson & Co. v. Ramchand Dutt* [1890] 18 Cal. 10, 22, P. C.; *Brahma-moyee v. Gopi* [1910] 15 C. W. N., 188.

⁷ A declaratory decree will generally but lead to circuity of action, as the plaintiff, if he desires to reap the benefit of such decree, must follow it

up with one or more, possibly successive, suits.

The distinction between a common law action in ejectment and an equity suit for injunction should not be introduced into India, but both should be decided according to the same principles of justice, equity and good conscience, *Basanta v. Mohesh*, *supra*.

⁸ May it not rather be compared to an outwork, worth defending, whether or not the fortress of ownership lies behind it? Holland, *Jur.*, 192 n.

⁹ *Ancient Law*, 298.

¹⁰ *Jenks, Law & Pol.*, 188-190.

is the guarantee of the law; possession is the guarantee of the facts. ... Possession without ownership is the body of fact, uninformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things tend mutually to coincidence. Ownership strives to realise itself in possession, and possession endeavours to justify itself as ownership."¹ Historically, the fact of possession comes first, and the idea of ownership is subsequently developed. Where no prior proprietorship has been asserted, the occupant of a thing naturally becomes its owner, because everything of value may be the subject of exclusive enjoyment, and here nobody else can be shown to have a better right to such enjoyment.² There is no ground for surprise therefore if, as Sir Frederick Pollock says, the Common Law of England regularly protects ownership only through possessory rights and remedies.³

Possession
evidence of
title.

I have tried to examine the import of the notion of possession at some length, because, without clear ideas upon this subject, it will be difficult to follow the nature of the specific relief dealt with in the first chapter of the second part of Act I of 1877. There is no difficulty about a suit on title, where the plaintiff seeks to eject the defendant, say, from certain land, because the said land belongs to, is the property of, the plaintiff, and the defendant is in wrongful possession of it. The question is one of title or ownership in this case, and if the plaintiff can establish that he is the owner, and the defendant cannot show a better title, the latter must go out. Such title is proved by evidence. There may, for instance, be a conveyance, or the plaintiff may be able to prove possession, acts of user extending over such a long period of time that all adverse claims are barred by the statute of limitations. Possession is *prima facie* evidence of ownership. For, as we have seen, possession in fact is the visible exercise of ownership, and, so long as it is not otherwise explained, it tends to show that the possessor is also the

¹ Salmond, *Jur.*, 267.

² Maine, *op. cit.*, 269. See art. 'Possession and ownership' (Thayer), 23 L.

Q. R. 175, 314.

³ *Torts*, 326.

owner.¹ The presumption raised is rebuttable, but the strength of it is shown by the popular saying, *possession is nine points of the law*.

It may not be out of place to note here that ejectment is not restricted to ousters from the surface estate. From early time up to the present, ejectment has lain for the wrongful occupation of a mine² or of the upper story of a house.³ The same principle would seem to apply to the case of projecting eaves, walls, bay-windows, and foundation stones. The dispossession of the owner from a part of his land may be small, but it is actual and permanent in its nature. The disseisor may not be personally present, but he has subjected the land to a purpose of his own, to the exclusion of the owner. It has accordingly been held in New York that ejectment will lie for a telephone wire strung without right over the plaintiff's premises.⁴ Ejectment.

Since possession implies a right to possess, physical possession itself becomes a title or a root of title.⁵ Possession matures into title in course of time by prescription, and possession itself may be a title in the eye of the law which requires to be superseded by a better one.⁶ "Actual possession," says Bentham, "is a title to property which precedes all others, and may hold the place of them. It will always be good against every man who has no other to oppose it."⁷ A finder of a lost jewel consequently, may keep it against all but the rightful owner; by finding it, he does not become the absolute proprietor, but he acquires such property therein as will be protected against a mere wrongdoer.⁸ Possession has a two-fold value, according to Jenkins, C. J.,—it is evidence of ownership, and is itself the foundation of a right to possession.⁹ Seisin may not be Possession, root of title.

¹ Pollock & Wright, *Pos.*, 25. Evidence Act, s. 110. *Ramchandra Apaji v. Balaji* [1884] 9 Bom. 137. *Ameer Ali & Woodroffe, Ex.*, 575.

² *Comyn v. Kyueto*, Cro. Jac. 508.

³ *Ford v. Lerke*, Noy 109, 74 E. R. 1074.

⁴ *Butler v. Frontier Telephone Co.*, 186, N. Y., 486. Cf. 19 Harv. L. R. 369.

⁵ *Miller, Jur.*, 85; Pollock & Wright, *op. cit.*, 22. "Long enjoyment is itself a title," *Sumbhoolal v. Collector of*

Surat [1859] 8 M. I. A. 40. Cf. *Wajid v. Dargahi* [1906] 9 O. C. 161.

⁶ *Enaetoolloh v. Kishen Soondur* [1867] 8 W. R. 386, 390, per D. Mitter, J.

⁷ *Theory of Legis.*, 158.

⁸ *Armory v. Delamirie* [1722] 1 Sm. L. C. 12th. ed., 397; Pollock, *Torts*, 355. Per Campbell, C. J.: "Against a wrongdoer possession is a title." *Jefferies v. G. W. Ry. Co* [1856] 5 El. & B. 802.

⁹ *Hari Khardu v. Dhondi Natha* [1905] 8 Bom. L. R., 96.

heritable, but the man who dies seised as of fee, transmits a heritable right to his heir, and thus seisin generates a heritable right.¹ A possessory right has, therefore, been held to be both heritable and alienable.²

Possessory
title in ac-
tion of eject-
ment.

But it seems necessary to emphasise, in view of some recent judicial *dicta*, that possession alone is not sufficient in ejectment (as it is in trespass) to maintain the action.³ When a plaintiff sues to recover possession of some property and not merely damages for some interference with his possession, he has to prove his title to the property, to show, in fact, that he has a better right to be in possession of that property than the defendant. For the defendant holds the property, his possession raises in his favour a presumption of ownership, and he cannot be disturbed till somebody else shows that he has a better title to the possession.⁴ So Patteson, J., said, "Possession is *primâ facie* evidence of title, and no other interest appearing in proof, evidence of seisin in fee."⁵ Similarly, Mellor, J.: "The fact of possession is *primâ facie* evidence of seisin in fee. The law gives credit to possession, unless explained."⁶ The principle is well explained by Messrs. Radcliffe and Miles: "An action of ejectment is *ex hypothesi* brought against a person who is in possession of the land, and therefore *primâ facie* seised of it. This of course is merely a legal presumption liable to be rebutted. But if the plaintiff comes into court and only proves that he once was also in possession of the land before the defendant, and *nothing more*, he only sets up a presumption against a presumption, and

¹ 2 Pollock and Maitland, *Hist.* 61.

² *Asher v. Whitlock* [1865] 1 Q. B. 1.
Perry v. Clissold [1907.] A. C. 73.

³ "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question," *Lambert v. Stroother*, Willes, 221. *Cf.*, *Graham v. Peat* [1801] 1 East, 244, Kenny, 389.

⁴ "The plaintiff cannot recover but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a good title against every man who cannot show a good title." *Per Mans-*

field, C. J., *Roe d. Haldane v. Harvey* [1769] 4 Burr. 2487. *Cf.* *Arumugam v. Perriyannan* [1875] 25 W. R. 81, P. C.; 10 Cal. 511, 519, P. C. *Hari Khardu v. Dhondi Natha* [1905] 8 Bom. L. R. 96; *Basant v. Mahabir* [1913] 35 All., 273. P. C. Where plaintiff has never been in possession, he can succeed only if he proves his title, *Gadsden v. Barrow* [1854] 9 Ex., 514; Clerk & Lindsell, *Torts*, 269.

⁵ *Doe d. Carter v. Barnard* [1849] 13 Q. B., 945, 953; 78 R. R., 569.

⁶ *Asher v. Whitlock*, [1865] 1 Q. B., 1, 6, Rad & Mil., 281.

as the *onus* is upon him to prove his case, he must fail. If, on the other hand, he goes further than mere proof of prior possession, and establishes that, while he was peaceably in possession, the defendant came and ousted him, upon proof of that additional fact he is entitled to succeed, if the defendant does not show title. For the defendant's possession in that case is a possession obtained *vi*, and it could never be permitted that a person by merely doing a tortious act and forcibly ejecting another, who is peaceably in possession, should be allowed to improve his position at the expense of the person whom he has wronged, and shift the *onus* of proof from himself to the previous possessor."¹

The proposition, therefore, that possession is good against all the world, except the person who can show a good title,² is to be applied with some qualifications in an action for ejectment. The authorities seem to establish that prior possession avails a party only in three cases: (i) when he is in possession and seeks as a defendant to resist a claimant, who cannot show a better title;³ (ii) when he is in possession, and upon the ground of such possession, seeks some relief, *e.g.*, an injunction⁴ or a decree for partition;⁵ and (iii) when, while in possession, he has been wrongfully ousted by a trespasser, and seeks to recover possession from the wrong-doer.⁶ The title conferred by possession is (apart from the statute of limitation) a title only against wrong-doers.⁷ "When the statute converts twenty years' wrongful possession into a right," said Romilly, M. R., "it requires that that full length of time should have elapsed, as a condition, before such conversion. If I could allow

Possessory title in other cases.

¹ *Cases on Torts*, 283, citing *Cole on Ejectment*, 212-3, and *Browne v. Dawson*, [1840] 12 A. & E. 6, 24. Cf. *Dadabhai v. Sub-Collector of Broach* [1870] 7 Bom. H. C., A. C., 82, 84; *Shi Gopal v. Aisha*, [1903] 3 A. L. J. R. 775 (Knox, J.) *Lachman v. Shambhu* [1910] 33 All. 174.

² *Asher v. Whitlock*, *supra*, per Cockburn, C. J.

³ 'Possessio contra omnes valet prae-ter eum cui jussit possessionis'. Lofft, *Maxims*, no. 265.

⁴ *Ismail Ariff v. Muhomed Ghous* [1893] 20 Cal. 834. P. C.

⁵ *Sundar v. Parbati* [1889] 12 All. 51, P. C.

⁶ *Doe d Hughes v. Dyeball*, [1828] 3 C. & P., 610; *Davison v. Gent* [1857] 26 L. J. Ex., 122, Rad. & M. 285; *Wali Ahmed v. Ajudhia* [1891] 13 All. 537; *Narayana v. Dharmachar* [1902] 26 Mad. 514; *Ali v. Pachubibi* [1903] 5 Bom. L. R., 264; *Gobind Prasad v. Mohan Lal* [1901] 24 All. 157; *Pahlwan Singh v. Ram Bharose* [1904] 27 All. 182, 15 Cyc. 22, 30. *Sawanji v. Chinki* [1909] 5 N. L. R. 83.

⁷ *Pollock & Wright, op. cit.*, 99.

eighteen years and a half to constitute such a right, why could I not allow a shorter space of time to perform the same office? And if I did so, I should in effect repeal the statute.”¹ But “any possession,” remarked Kenyon, C. J., “is a legal possession against a wrong-doer.”² Where, of two claimants, neither appears to be in actual possession, the person who has the title will be held to be in possession, for possession follows the title.³ But if neither has title, it would seem, says Bigelow, that the one who first entered, if his possession were continuous, would be entitled to the possession as against the other.⁴ Possession relied on as evidence of title must be continuous in itself; a claimant cannot tack together successive occupations, however, peaceable, which are not connected as of right.⁵

*Enaetoollah
v. Kishen
Soondur.*

The law upon this point was very well explained in the Indian case of *Khajah Enaetoollah Chowdhry v. Kishen Soondur Surma*.⁶ D. Mitter, J., in a luminous judgment, pointed out that throughout the whole system of our laws a constant solicitude to widen the distinction between legal and illegal dispossession, and to discourage the latter as much as possible, was to be found. He also showed that to permit a mere wrong-doer to take any advantage of his possession as a defendant in the cause, when that possession had been acquired by illegal means, would be tantamount to holding out a premium in favour of wrong and violence. Proof of prior possession in actions of ejectment raised a presumption of title, and adverse possession for any period sufficient under the Limitation Act would be itself a title, even against the rightful owner himself. As against a mere wrong-doer, prior possession, however short, is itself a title. The illegal dispossession of the plaintiff being established, the wrong-doer defendant should be called upon to prove his title. “If he fails to do it, the plaintiff is entitled to a decree; if, on the other hand, he succeeds, the plaintiff

¹ *Dixon v. Gayfere* [1893] 17 Beav. 429, 51 E. R. 1100.

² *Graham v. Peat* [1801] 1 East. 244. Cf. *Cutts v. Spring* [1818] 15 Mass. 135, Bigelow, L. C., 341.

³ *Jones v. Chapman* [1848] 2 Ex. 803.

⁴ Bigelow, L. C., 352.

⁵ Pollock & Wright, *Pos.* 67, Cf. *Frost v. Courtis* 52 N. E. Rep. 515; 9 Harv. L. R., 279; 13 *ibid.*, 52.

⁶ [1867] 8 W. R., 386. See also *Jadubnath v. Ram Soonder Surmah*, [1867] 7 W. R., 174; *Kumul Dutt v. Mohun Malla*, [1871] 15 W. R., 278.

should then, and *not till then*, be called upon to prove a better title."

Upon principle and authority, therefore, in the case of a wrongful ouster, a plaintiff is entitled to succeed, upon the strength merely of previous possession, if the defendant fails to prove a better title. And this would be so, where neither party can prove a title but the plaintiff proves anterior possession.¹ It has, however, been sometimes thought that the law in British India has been made different by the legislature. Section 15 of the Indian Limitation Act of 1859² provided as follows:—

"If any person shall, without his consent, have been dispossessed of any immovable property otherwise than by due course of law, such person or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit is brought within six months from the date of such dispossession."

Act XIV of
1859, s. 15.

This has now been replaced by section 9 of the Specific Relief Act, which runs thus:—

S. R. A., s. 9.

"If any person is dispossessed, without his consent, of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit,³ recover possession thereof, notwithstanding any other title that may be set up in such suit.

"Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."⁴

Now, learned judges have thought that, since the law in India has fixed a period of limitation within which a party may recover possession without proof of title, if he allow that period

¹ *Zemindar of Ramnad v. Zemindar of Yettiapooram* [1865] 10 M. I. A. 47; *Tukroonissa v. Mogul Jan* [1867] 8 W. R., 370.

² Act XIV of 1859.

³ The words "instituted within six months from the date of the dispossession" were repealed by Act XII of

1891, sch. I., pt. i. But see Limitation Act (IX of 1908), sch. I., art. 3, where the same provision is reproduced.

⁴ There are two other provisos, with which we are not concerned at this stage.

to elapse, he must prove his title, and mere anterior possession would not avail him.¹ But, as D. Mitter J., pointed out, the section² “does not say that a person illegally dispossessed shall not be entitled to recover, notwithstanding that the defendant has failed to prove any other title, if the suit has not been brought within six months from the date of dispossession.”³ Possession in law, as we have seen, is a substantive right or interest which exists, and has legal incidents and advantages apart from the true owner’s title.⁴

Suit on basis of prior possession after six months of dispossession.

Does section 9 of Act I of 1877, then, or its predecessor, section 15 of Act XIV of 1859, take away any remedy available to a person previously in peaceable possession? In order to answer this question, upon which there has been no little conflict of authority,⁵ it is necessary to examine the nature of the relief which the above statutory enactment provides for. A person who has been dispossessed may recover possession if he institutes his suit within a certain period, *notwithstanding any other title that may be set up in such suit*. Here we have then the very apotheosis of possession. No matter how good the title of the dispossessor, the person previously in possession is entitled to be restored to possession, if he is prompt in coming into Court. The Court

¹ *Lakshmibai v. Vithal Ramchandra*, [1872] 9 Bom. H. C. R. 53 (Westropp, C. J.). See also *Dadabhai Narsidus v. Sub-Collector of Broach*, [1870] 7 Bom. H. C. R., A. C., 82, 86 (Melville, J.); *Kawa Manji v. Khowaz Nussio* [1879] 5 C. L. R., 278, 282 (Prinsep, J.); *Wali Ahmad Khan v. Ajudhia Kandu* [1891] 13 All., 537, 540 (Mahmood, J.).

² Act XIV of 1859, s. 15.

³ *Enaetoollah v. Kishen Soondur* [1867] 8 W. R., 386, 389.

⁴ *Pollock & Wright, Pos.*, 19. *Mustapha Saheb v. Santha Pillai* [1899] 23 Mad. 179.

⁵ The question has been answered in the affirmative, in the following cases (besides those cited in n. 1 above): *Rassonada v. Sitharama* [1864] 2 Mad. H. C. R., 171; *Kunhi Komapen v. Changara*, *ibid*, 313; *Ertaza Hossein v. Bany Mistry* [1882] 9 Cal., 130; *Debi Churn Boido v. Issur Chunder Manjee*, *ibid*, 39; *Purmeshur Chowdhry v. Brijo Lal Chowdhry* [1889] 17 Cal. 256; *Shama Churn Roy v. Abdul Kabeer* [1898] 3 C. W. N., 158; *Nisa*

Chand Gaita v. Kanchiram Bagani, [1899] 26 Cal. 579; *Fazlar Rahman v. Raj Chander* [1900] 5 C. W. N., 234. The following cases (besides those cited in n. 2, p. 66) give or support a negative answer: *Dabjee Sahoo v. Tumeerzooddeen* [1888] 10 W. R. 162; *Mohabeer Pershad Singh v. Mohabeer Singh* [1881] 7 Cal. 591; *Pemraj v. Narayan* [1882] 6 Bom., 215, F. B.; *Krishnarav v. Vasudeb Apaji* [1884] 8 Bom., 371; *Wali Ahmad Khan v. Ajudhia Kandu* [1891] 13 All. 537; *Ismail Ariff v. Mahomed Ghous* [1893] 20 Cal. 834, P. C.; *Krishnacharya v. Lingava*, [1895] 20 Bom., 270; *Gongaram v. Secretary of State*, *ibid*, 798; *Hanmant-rav v. Secretary of State* [1900] 25 Bom. 287; *Mustapha Saheb v. Santha Pillai*, [1899] 23 Mad., 179; *Narayan v. Dhur-machar* [1901] 26 Mad. 514; *Rajaram v. Nanchand*, [1903] 5 Bom. L. R., 225; *Abdul Hamid v. Sarbuland* [1902] P. R., no. 78; *Wa Tha v. Pe Hlaw* [1905] 3 L. B. R. 27. Cf. also *Tamizuddin v. Ashrub Ali* [1904] 31 Cal. 647. 15 C. W. N. 163.

will try no question of title, it will simply determine two questions of fact, *viz.*, first, who was formerly in possession, and, secondly, whether he was dispossessed within six months from the date of the institution of the suit. If the Court finds these facts in favour of the plaintiff, it must decree his claim for ejectment of the defendant, even though it be patent to the Court that the defendant is the owner of the immovable property in dispute and the plaintiff has no title thereto. We will presently examine the nature and scope of this form of specific relief further; but our analysis so far has made one thing plain, *viz.*, that this is a very different sort of action from that we were previously considering. Where a plaintiff sues for ejectment and only proves anterior possession, ordinarily it is open to the defendant to prove a good title in himself or another, and, if he succeeds in doing so, the presumption in favour of the plaintiff (embodied in the rule that possession is *prima facie* evidence of title) is displaced, and the plaintiff's suit fails. But if he brings his suit within six months of the date of his dispossession and proves that he was previously in peaceable possession, the defendant is not allowed to prove any title, but must go out. Section 9 of the Specific Relief Act therefore is a piece of special legislation designed to confer a unique advantage upon possessors who sue promptly. They are protected from all defences based on title.¹ The section therefore was intended, in the words of Holloway and Innes, JJ., "not to abridge any rights possessed by a plaintiff, but to give him the right, if dispossessed otherwise than by due course of law, to have his possession restored, without reference to the title on which he holds, and that which the dispossessioner asserts."² There is no reason therefore to think that the remedy provided by section 9 has the effect of doing away with the English rule above referred to, *viz.*, that possession is *prima facie* evidence of title.³

Object of
S.R.A., s. 9.

¹ The section gives a special remedy to the party illegally dispossessed, by depriving the dispossessioner of the privilege of proving a better title to the land in dispute, *Khajah Enactoolah v. Kishen Soondur* [1867] 8 W. R., 386, 389.

² *Kunhi Komapen v. Changarachan*

[1865] 2 Mad. H. C. R., 313, 314. *Narayana v. Dharmachar* [1902] 26 Mad. 514.

³ *Per Garth, C. J., Mohabeer Pershad v. Mohabeer Singh* [1881] 7 Cal. 591, 593. *Cf. Lachho v. Har Sahai* [1887] 12 All. 46.

*Wise v.
Ameerun-
nissa.*

In fact, the rule has been embodied in a way in section 110, Evidence Act, and the first proviso to section 9 shows clearly that it provides for a summary process which does not debar any person from suing to establish his title to the property in dispute. Such title may also be possessory, which is good against all who cannot prove a better title. This probably explains the *dictum* of the Calcutta High Court, of which the Judicial Committee approved in *Wise v. Ameerunnissa Khatoon*:¹ "But lands to which he (the plaintiff) is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under section 15 of Act XIV of 1859, which must be brought within six months from the time of dispossession." For their lordships said in a previous passage² "If the plaintiffs had wished to contend that the defendants had been wrongfully put in possession, and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months, under section 15 of Act XIV of 1859." This only means that if a plaintiff seeks to take advantage of this special provision, he must strictly comply with the requirements of the section. The validity of what has been loosely termed a possessory title, and which has been affirmed in England in cases like *Asher v. Whitlock*,³ was distinctly recognised by the Privy Council in the later cases of *Sundar v. Parbati*⁴ and *Ismail Ariff v. Mahomed Ghous*.⁵

Writ of
novel dis-
seisin.

Section 9 of the Specific Relief Act is a special provision, which is based upon the old English writ of novel disseisin, which in its turn seems to have been founded on the interdiction *de vi* of the civil lawyers of Rome.⁶ The policy of the law has always been to discourage people from taking the law into their own hands. If, therefore, A wrongfully dispossessed B, B could

¹ [1879] 7 I. A. 73, 81.

² *Ibid.*, 80. Cf. *Grant v. Bangsi Deo* [1871] 6 B. L. R. 652, 656.

³ [1865] 1 Q. B. 1, Rad. & M. 277.

⁴ [1889] 12 All. 51.

⁵ [1893] 20 Cal., 834. See the question discussed in 3 C. W. N., cclxxii, cccxii; 6 C. W. N. ix; also Collett, 81-92; Nelson, 95-98; Mukhopadhyay, 12-19. Cf. *Lep Singh v. Nimar Khasia*

[1893] 21 Cal. 244.

⁶ Sandars' Institutes, lib. iv. tit. xv. 6. Poste, *Gaius*, 586, 600 sqq. *Dadabhai Narsidus v. Sub-Collector of Broach* [1870] 7 Bom. H. C. R., A. C., 82; *Virjivandas Madhavdas v. Mahomed Ali Khan* [1880] 5 Bom. 208; *Kunhi v. Changarachan* [1865] 2 Mad. H. C. R., 313.

recover the property on the ground of previous possession alone by an interdict *unde vi*, provided he put forward his claim within one year from the date of dispossession. If he failed to avail himself of this special summary remedy, however, he had to bring an action for the property and make out his title. It appears that English lawyers, notably Glanvill, C. J., finding that the old English writ of right was cumbrous and involved delay, if not risk, and having the precedent of Roman lawyers before them, invented the writ of assize.¹ This was a real action, which proved the title of the demandant merely by showing his or his ancestor's possession.² There were two varieties of the writ of assize, (1) *mort d' ancestor*, applicable where the rightful heir was kept out of possession owing to some stranger having entered, and (2) *novel disseisin*, applicable where the claimant or demandant himself had been turned out of possession. These actions were merely possessory, they decided nothing with respect to the right to the property, but only restored the claimant to that state or situation in which he was (or by law ought to have been) before the dispossession was committed. There was no prejudice to the right of ownership, for, if the dispossessor had any legal claim, he might afterwards exert it, notwithstanding a recovery against him in these possessory actions. "Only the law," says Blackstone, "will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means."³

Interdict
unde vi.

This gives one reason why the law respects possession, even if without title. Self-help is prohibited in the interest of public order.⁴

Self-help.

"The plain object is to discourage proceedings calculated to lead to serious breaches of the peace and to provide against

¹ This, suggests Bigelow, was a provision for trial by jury designed to protect the economic man against the military man, 41 Amer. L. Rev. 30. Lightwood, *Possession of Land*, ch. v, viii.

² Pollock & Maitland, *Hist. Eng. Law*, 49; 4 Law Q. Rev. 24; Blackstone, *Com.*, bk. III, 185.

³ *Ibid*, 180. "Its object was to drive persons who wanted to eject a person into the proper court and prevent them from going with a high hand and ejecting such person." Per Edge, C. J., *Wali Ahmed Khan v. Ajudhia Kandu* [1891] 13 All. 537, 558.

⁴ 2 Pollock & Maitland, *op. cit.* 41.

the person who has taken the law into his own hands deriving any benefit from the process."¹

Special and speedy remedy against wrongful dispossession.

We will not go into the philosophical question here, whether the protection of possession is protection of the person,² or of property,³ or whether possession as such deserves protection, the theory of law being that he who possesses has by the mere fact of his possession more right in the thing than the non-possessor has.⁴ It is enough for our present purposes to recognise that the possessory action was invented with the object of providing a special and speedy remedy to a person who has been forcibly dispossessed of immoveable property against his will and consent.⁵ It places even a rightful owner "in the same predicament as a mere wrong-doer, when the act of illegal dispossession has emanated from him."⁶

Inversion of onus probandi.

Another object why the Legislature enacted this special provision has been thus stated by Phear, J. : "A person turned out of possession by a stranger, and in invoking the assistance of a Court of law, would come into court seeking to eject one who has possession, and, therefore, by the general rules of procedure, the burden would be placed upon him to prove a *prima facie* title, before the defendant would be called upon :⁷ whereas, had it not been for the high-handed act of violence, which had turned the plaintiff out of possession, the defendant could not have obtained the land in question, except, upon the same condition, *viz.*, of discharging the onus of showing a *prima facie* title ; and we imagine that the Legislature considered it

¹ *Kunhi v. Changarachan* [1865] 2 Mad. H. C. R., 313, 314. *Krishnarav v. Vasudev* [1884] 8 Bom., 371.

² *Per Denman, C. J.*, "These rights of action are given in respect of the immediate and present violation of possession, independently of rights of property. They are an extension of that protection which the law throws around the person." *Rogers v. Spence* [1844] 13 M. & W., 581. This is Savigny's view ; 2 Pollock & Maitland, *Hist.*, 42. Cf. also Holmes, *Com. Law*, 212.

³ 2 Pollock & Maitland, *op. cit.*, 42 (Ihering's view) ; see also 45-6, where it is shown that English law, both medieval and modern, seems to accept

to the full the theory that every title to land has its root in seisin, and the title which has its root in the oldest seisin is the best title.

⁴ *Ibid.*, 42-3.

⁵ *Tarini Mohun Mozumdar v. Gunga Prosad Chuckerbutty* [1887] 14 Cal., 649. Cf. *Kalee Chunder Sein v. Adoo Shaikh* [1868] 9 W. R., 602, 603 ; *Wali Ahmed Khan v. Ajudhia Kandu* [1891] 13 All., 537, F. B.

⁶ *Khajah Enaetoollah v. Kishen Soandur* [1867] 8 W. R., 386, 390. *Bandu v. Naba* [1890] 15 Bom., 238, 241.

⁷ And this would be so, even where the suit is only for a declaration of title, *Rassonada v. Sitharama* [1864] 2 Mad. H. C. R., 171.

advisable to do away with the opportunity, thus lying open to powerful persons, of shifting by wrongful act the burden of proof from their shoulders to those of persons less able to support it."¹

By reason of the introduction of improved forms of procedure and less rigid rules of evidence in England, the necessity for writs of assize has probably disappeared.² They were finally abolished by 3 and 4 Will. IV, c. 27, sec. 36, and the law is now well settled that so long as the rightful owner makes his entry "in a peaceable and easy manner," he cannot be treated as a trespasser, and the person previously in possession without title must vacate.³

English law.

I will now proceed to consider the nature of the possessory action recognised by the statute law of India.

This is an action to recover possession of immovable property which may be maintained by any person who has been dispossessed of the same (i) without his consent and (ii) otherwise than in due course of law. The plaintiff therefore may be any person who was in possession and has been dispossessed. There is no question of ownership, but there must have been such possession as the law recognises. A wrong-doer by committing an act of trespass to-day cannot to-morrow maintain a possessory action, if he is in the meantime turned out.⁴ The reason is that the wrong-doer never acquires juridical or juristic possession of the property. His possession is not acquiesced in by the real possessor, any acts of dominion on his part therefore cannot be regarded as exclusive.⁵ As Bramwell, L. J., pointed out in *Leigh v. Jack*,⁶ "Acts of user are not enough to take the soil out of the plaintiff and vest it in the defendant; in order to defeat a title by dispossessing the

Possessory action in India.

Plaintiff in juridical possession.

¹ *Kalee Chunder Sein v. Adoo Shaikh* [1888] 9 W. R., 603. *Kunhi v. Chingara-chan* [1885] 2 Mad. H. C. R., 313. Cf. 2 Pollock & Maitland, *Hist.*, 47; Salmond, *Jur.*, 271.

² Salmond, *Jur.*, 270-2.

³ *Taylor v. Cole* [1789] 3 T. R., 292, 1 Sm. L. C., 133.

⁴ *Per Denman, C.J.*: "A mere trespasser cannot by the very act of trespass, immediately and without acquiescence, give himself what the

law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." *Browne v. Dawson* [1840] 12 A. & E., 624.

⁵ *Amirudin v. Mahamad Jamal* [1891] 15 Bom., 685.

⁶ [1879] 5 Ex. D., 264, 273. Cf. *Radhamoni v. Collector of Khulna* [1900] 27 Cal., 943, P. C.; *Vithaldas v. Secretary of State* [1901] 26 Bom., 416.

Juridical
possession
explained.

former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it." Dispossession therefore is constituted by "positive acts which can be referred only to the intention of acquiring exclusive control."¹ Under the Civil Law of Rome, a plaintiff could not obtain the interdict *unde vi*, unless he had a juridical possession, *i.e.*, one founded in right and obtained without force, stealth or license. And it was held, with reference to section 15, Act XIV of 1859, that the law in India was not different.² The plaintiff therefore must prove possession, *i.e.*, a certain relation to the thing of which the use or enjoyment is in question,³ and this must be a juridical or legal possession against the defendant.⁴ But "legal possession," as Sir F. Pollock points out, "does not necessarily coincide either with actual physical control or the present power thereof (the 'detention' of Continental terminology), or with the right to possess (constantly called 'property' in our books), and it need not have a rightful origin."⁵ But "physical control or occupation is *prima facie* evidence that the holder is in exercise (on his own behalf or on that of another) of an actual legal possession, and then, if the contrary does not appear, the incidents of legal possession follow."⁶ Juristic possession (*jus possessionis*) has been said not to depend on a legal title to possess (*jus possidendi*) like ownership, but simply on the fact of a man's having actual control of a thing with the intention of maintaining it.⁷ The only question of title, if it is one, that comes in issue, therefore, in a possessory action, is as to the nature of the plaintiff's anterior possession.⁸ Mere custody will not do, as in the case of a son occupying a room in his father's house.⁹ But if there was possession, which

Custody.

¹ Pollock & Wright, *Pos.*, 85.

² *Dadabhai Narsidas v. Sub-Collector of Broach* [1870] 7 Bom., H. C. R., A. C., 82, 87; also *Virjivandas v. Mahomed Ali* [1880] 5 Bom., 208, 221; *Amirudin v. Mahamad Jamal* [1891] 15 Bom., 685; *Raj Krishnu v. Muktaran*, [1910] 12 C. L. J., 605. Cf. Coke, Lit., 368A; *Jonardon Acharjee v. Haradhun* [1868] 9 W. R., F. B. 513; *Sofuoll Khan v. Woosean Khan* [1868] *ibid.* 123, in which it was held that the possession of a tenant of land holding on after the expiry of his

term was a juridical possession, which would entitle him to claim this summary remedy, in the event of forcible dispossession by the landlord.

³ Pollock & Wright, *Pos.* 29.

⁴ *Rajaram v. Nanchand* [1903] 5 Bom. L. R., 225.

⁵ *Torts*, 328.

⁶ *Ibid.* 354.

⁷ *Poste, Gaius*, 610.

⁸ *Euaetoolloh v. Kishen Soondur* [1867] 8 W. R., 386, 390; *Bassa Chatagir v. Matandmul* [1910] 8 L. C., 215.

⁹ *Nritto Lal v. Rajendro* [1895]

Constructive possession.

the law regards as such, that is sufficient, and, as we have seen, possession may be either physical or constructive, direct or mediate. Upon principle, therefore, there is no reason to limit the section to those cases only where "physical possession" has been disturbed by force. "If any one possesses a thing as usufructuary, pledgee, tenant, borrower, or deposit, or in any similar capacity by virtue of which he is entitled or bound with respect to some other person to keep possession of the thing for a limited time, then that other person has possession of it also."¹ The Calcutta High Court, however, held in *Tarini Mohun Mozumdar v. Gunga Prosad*² that where A's tenants were persuaded by B to attorn to C and discontinue paying their rents to A, the latter could not proceed under section 9; and reaffirmed the same view in a later case.³ A similar doctrine seems to have found favour in the Central Provinces⁴ and Oudh.⁵ But in the eye of the law the possession of the landlord is the possession of the tenant, and *vice versa*;⁶ so also the possession of a mortgagee is the possession of his mortgagor.⁷ One possesses for the other, who possesses through him.⁸ Where, therefore, there is no conflict of interest between, say, a landlord and a tenant, either may sue, the tenant on his possessory right, the landlord for an injury to the reversion.⁹ Where, therefore, a tenant in possession was dispossessed, immediately before his tenancy terminated, by the wrongful act of a third party, the Madras High Court held that the landlord could maintain a suit under section 9.¹⁰ Where tenants are in actual possession, the right to collect rents from them may be restored to the landlord by directing the tenants to pay rent as heretofore to the landlord and not to his rival claimant, until the latter dispossesses the

22 Cal., 562. In such a case, the father must sue.

¹ German Civil Code, ss. 868-871, cited Salmond, *Jur.*, ed. i. 308; Wang 193.

² [1887] 14 Cal., 649 Cf. *Fadu Jhala v. Gour Mohun Jhala* [1892] 19 Cal., 544 571.

³ *Nobin v. Kailash* [1910] 15 C.W. N. 294

Sonaton v. Helim [1902] 6 C.W.N., 616.

⁴ *Dinkarshaw v. Anantsha*, [1903] 16 C. P. L. R., 154.

⁵ *Abbas Ali v. Mohammad Khan*, Sel. Ca. 243.

⁶ *Grish Chunder v. Bhugwan Chunder* [1870] 13 W. R. 191.

⁷ *Inayat Husen v. Ali Husen* [1897] 20 All., 182, 184.

⁸ Salmond, *Jur.*, 256.

⁹ *Virjivandas v. Mahomed Ali Khan* [1880] 5 Bom., 208, 220. Collett, 79. Cf. Bigelow. L. C., 355-8. But see Mukhopadhyay, 23.

¹⁰ *Jaganuatha v. Rama Rayer* [1904] 28 Mad., 288. Fold. in Sind, *Sahibrakhio v. Jumromal* [1911] 12 I. C., 190.

former in due course of law.¹ The Calcutta High Court subscribes to this view now.²

Partial possession of immoveable property.

Possession of immoveable property must necessarily consist of a more or less discontinuous but exclusive series of acts of dominion,³ and acts of ownership exercised over part of the property may be evidence of possession over the whole.⁴ "What amounts to a sufficient occupation must depend upon the nature of the soil, and the uses to which it is to be applied."⁵ For instance, "if there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common."⁶ The dispossession therefore against which redress is sought under section 9 need not in every case be *total*. Where, consequently, the plaintiff had been only partially disturbed, and the trespasser acquired a joint possession with him, the latter was held competent to sue.⁷

"Due course of law."

The dispossession next must be contrary to the wishes of the person dispossessed⁸ and otherwise than in "due course of law." This last expression means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication.⁹ Where, therefore,

¹ *Imasi v. Sivagnana* [1894] 5 M. L. J. R., 95 (M. Aiyar, J.); *Rathnasavapathi v. Ramasami* [1910] 33 Mad., 452 455; *Rangaswamy v. Krishna* [1911] 8 L. C. 844.

² *Nobin v. Kailash* [1910] 12 C. L. J. 483; *Akhil v. Akhil* [1911] 15 C. W. N., 715.

³ *Pollock & Wright, Pos.*, 30. Cf. *Lord Advocate v. Lord Blantyre* [1879] 4 A. C., 770; *Ishan Chunder v. Ram Lochun* [1868] 9 W. R., 79; *Jagabandhu v. Dinabandhu* [1868] 2 B. L. R., Ap., 30; *Sivasubramanya v. Secretary of State* [1885] 9 Mad., 285.

⁴ *Jones v. Williams*, [1837] 2 M. & W. 326; *Lord Advocate v. Young* [1887] 12 A. C., 544; *Raj Krishna v. Muktarlam* [1910] 12 C. L. J. 605; Cf. *Pudar Bindoo v. Mohesh Chunder Sen* [1873] 20 W. R. 183; *Sivasubramanya*

v. Secretary of State [1884-5] 9 Mad., 285; *Iqbal Husen v. Naud Kishore* [1902] 24 All., 294 (possession of appendages).

⁵ *Cook v. Rider*, 16 Pick., 186, 187 (Mass.)

⁶ *Per Bramwell, L. J., Coverdale v. Charlton* [1878] 4 Q. B. D., 118. Cf. *Dartmouth v. Spittle* [1871] 19 W. R. (Eng.) 444.

⁷ *Sabapathi Chetti v. Subraya Chetti* [1881] 3 Mad., 250; *Omar Chand v. Nawab Nazim* [1869] 11 W. R. 229.

⁸ *Baldeo Das v. Mangui Ram* [1899] 20 A. W. N. 7 (plaintiff had himself let defendant into possession, but latter had subsequently done acts indicating intention to interfere with plaintiff's ownership).

⁹ *Rudruppa v. Narasingrao*, [1904] 29 Bom. 213.

a landlord ejects a ryot of his own authority, without the intervention of a Court of law or of the Collector, the ryot, even if he is a tenant on sufferance, holding over after expiry of the term of his lease, can recover possession by a summary action without reference to the title of the landlord or his representative to eject him.¹ But it is not necessary that the ejectment should have been effected by the exercise of actual physical force. Where tenants are dispossessed in execution of a decree for *khas* possession against their landlord, the dispossession cannot be said to be otherwise than in due course of law².

The dispossession complained of must be from "immoveable property." There is no definition of this expression in either the Specific Relief Act or the Contract Act; consequently, unless there be something repugnant in the subject or the context, the definition in the General Clauses Act may be referred to. This runs thus: "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."³ This definition clearly includes property both tangible or corporeal and intangible or incorporeal. The question has been debated whether the possessory action contemplated by section 9 may be maintained in respect of incorporeal or intangible property, *i.e.*, rights which arise out of corporeal or tangible property, "benefits to arise out of land" (to adopt the words of the legislature). Such a right or benefit cannot, strictly speaking, be the subject of possession. A right is conferred by law and removed by law. The exercise of such a right may be obstructed, but that entails no divestiture of the right, and there is no dispossession properly so called. The right remains in the person in whose favour it has been created by the law, and when the obstruction has been removed or enjoined, he becomes free to exercise the right again. If there has been an injury to an incorporeal right, therefore, the proper remedy seems to be

"Immoveable property."

Incorporeal rights.

¹ *Ibid.* Cf. *Sofaoll v. Wopean* [1868] 9 W. R. 123; *Jonardun v. Haradhuu* [1868] *ibid.* 513, F. B.; *Bhagabati v. Luton* [1902] 7 C. W. N., 218 (which is apparently not touched upon this point by *Tamizuddin v. Ashrub Ali* [1904] 31 Cal., 647, F. B.); *Kuldip Singh*

v. Gillanders Arbuthnot & Co. [1899] 26 Cal., 615.

² *Kamini v. Subed* [1910] 14 C. W. N., 405; *Haran v. Madan* [1911] 15 C. W. N., 956.

³ Act X of 1897, s. 3, subs. 25.

an injunction, as also damages for trespass, and not delivery of possession. The specific relief contemplated by section 5 (a) of Act I of 1877 is "by taking possession of certain property and delivering it to a claimant." These words are wholly inapplicable to the case of an incorporeal right. There seems therefore great force in the following observations of Petheram, C. J. : "The whole of section 9 is repugnant to the idea that immoveable property in that section includes an incorporeal right, such as a right of fishing in waters belonging to another. It is, I think, apparent from the section itself read as a whole, that the immoveable property, intended to be dealt with by it, is something of which actual physical possession can be given and taken, in other words, some piece of land or something permanently attached to the land, and that the words as they appear in the section cannot include an incorporeal right, which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it."¹

Fadu Jhala
v. Gour
Mohan Jhala.

In the case, from one of the judgments in which the above quotation is taken, the dispute related to a right of fishing in a *khāl*, the soil of which did not belong to the plaintiff. In a previous case,² it had been held that since the plaintiff had no right in the land nor possession of the land, section 9 did not apply to such a right. The matter was thereupon referred to the Full Bench, and the majority, consisting of Petheram, C. J., Ghose and O'Kinealy, JJ., confirmed this view. Pigot and Prinsep, JJ., dissented. The question is exhaustively discussed in the several judgments. The minority seems to have been much impressed by the fact that the qualification "tangible" of "immoveable property" was not to be found in section 9, though it was to be found in section 145 of the Code of Criminal Procedure, 1882. Taking this to be a deliberate omission on the part of the Legislature, the Bombay High Court also held a right of fishing to be "immoveable

¹ *Fadu Jhala v. Gour Mohan Jhala* [1892] 19 Cal., 544, 547. Cf. *Fuzlur Rahman v. Krishna Prasad* [1902] 29 Cal., 614 (*hāt*, possession of which was

held by collecting tolls or rents, held not to be immoveable property).

² *Natabar Parue v. Kubir Parue* [1890] 18 Cal., 80.

property" within the meaning of section 9,¹ and the Madras High Court came to a similar conclusion in respect of a right of ferry.² Sargent, C. J., observed in the former case, "A man is said to be in possession of a right, when he can exercise it, and he recovers possession of an incorporeal right, when the obstruction which interfered with it, is removed."³ But in a later case the Bombay High Court has held that mere easements are not "immoveable property" within the meaning of section 9⁴.

A common right, I may note in passing, cannot be the exclusive property of any individual member of the community to which the right belongs, and so no question in respect thereof can arise under section 9.⁵

Common
right.

The result then is that, where a plaintiff proves that he had juridical possession of immoveable property capable of possession, and was wrongfully dispossessed of the same within six months of the date of the institution of the suit, he is entitled to recover possession of the land, with crops growing thereon, if any,⁶ and also costs of the suit.⁷ This right of suit can be claimed by every plaintiff, unless there is some special law which deprives him of the benefit of the general provisions of the Specific Relief Act.⁸ If he dies within the six months, his

Possessory
suit.

¹ *Ehndal Panda v. Pandol Pos Patil* [1887] 12 Bom., 221. Some jurists have favoured this view. See Salmond, *Jur.*, 266, where Baudry-Lecantinerie is cited to the following effect: "Possession is merely the exercise of a right; in reality, it is not the thing which we possess, but the right which we have or claim to have over the thing. This is as true of the right of ownership as of the right of servitude or usufruct; and consequently the distinction between the possession of a thing and the quasi-possession of a right is destitute of a foundation." *Droit Civil*, Prescription, s. 199.

² *Krishna v. Akilanda* [1889] 13 Mad., 54. Cf. *Imasi v. Sivagnana* [1894] 5 M. L. J. R. 95, *Rangaswamy v. Krishna* [1911] 8 I. C. 844 (right to collect rents from tenants in actual possession).

³ 12 Bom. at 225.

⁴ *Mangaldas v. Jewanram* [1899] 23 Bom., 678. Cf. *Haro Dyal v. Krishna Govind* [1872] 17 W. L., 70 (right

of way). The question is well discussed by Nelson, S. R. A., 102-6. Under the Common Law of England, the convenient remedy of the assize of novel disseisin was allowed in the case of several incorporeal rights over real estate, where they admitted of exclusive enjoyment. But this was only an artificial extension of the idea of possession upon grounds of analogy. Pollock & Wright, *Pos.*, 35, 86, 87-90.

⁵ *Bahan Mayacha v. Nagn Shrivacha* [1874] 2 Bom., 19. Justinian, lib. 11, tit. 1, 1-2.

⁶ *Shiradjee Pramanick v. Emam Buksh* [1874] 13 W. R., 104.

⁷ *Radhakristo Chakranvis v. Kulee Prosunno Roy* [1871] 15 W. R., 268. *Tilak Chandra Dass v. Fatik* [1890] 25 Cal., 803.

⁸ *Khelra v. Piru* [1911] 13 C. L. J. 250 (tenant's suit against unlawfully ejecting landlord, not barred by s. 139, Act VI of 1908, B. C.) *Distinguish Fateh v. Bhaurani* [1911] 146 C., 60 (s. 108, Act XXII of 1886).

Inadmissible defences. heir or representative may bring the suit.¹ It will not avail the defendant to plead that he was acting as merely the agent of a third person,² or that the plaintiff's anterior possession had been obtained by fraud,³ or that the property in dispute formed part of a larger area which belonged to him,⁴ or that a Magistrate had made an award in his favour under section 145, Criminal Procedure Code,⁵ or that a Mamlatdar in the Bombay Presidency had given him a decree.⁶ Even in a claim case under section 331 of the Code of Civil Procedure, which arises in execution of a decree under section 9 of the Specific Relief Act, no question of title can apparently be raised or enquired into,⁷ though the proceedings are in the nature of a fresh suit.⁸

Injunction. The plaintiff is not, however, entitled to an injunction in a summary action like this; nor can the decree direct that the defendant should, *e.g.*, pay damages⁹ or the costs of removing huts and filling up excavations.¹⁰ Even *mesne profits* must be separately sued for, though, no doubt, in such separate suit the plaintiff may rely upon the decree in the possessory suit as *prima facie* evidence of his title. But the defendant will not be precluded in this suit from proving a better title in himself.¹¹ A decree in a possessory suit has thus the effect of shifting the *onus* of proof,¹² and if the defendant brings a regular suit to establish his title, he has to allege and prove possession on his own part and dispossession by the plaintiff.¹³

Mesne profits.

Burden of proof.

¹ *Nritto versus Rajendro* [1895] 22 Cal., 562.

² *Virjivandas v. Mahomed Ali* [1880] 5 Bom., 208.

³ *Sayaji v. Ramji*, [1881] 5 Bom., 446.

⁴ *Omar Chand v. Nawab Nazim* [1869] 11 W. R. 229.

⁵ *In re Chytun Chunder Roy* [1872] 20 W. R., 12. Distinguish *Moore v. Monoranjan* [1908] 7 C. L. J., 547. The object of s. 9 is to restore possession, that of s. 145 to maintain in possession. *Nagappa v. Badrudin* [1901] 26 Bom., 353, 358. A magistrate is competent to proceed under s. 145, though a suit under s. 9 is pending. *Kishori v. Srinath* [1908] 36 Cal., 370. As to these two sections see also *Lalit v. Surja* [1901] 28 Cal., 709, 715. An order for possession under s. 145, Cr. P. C., confers no title. *Dinomoni v. Brojo Mohini* [1901] 29 Cal., 187, P. C.

⁶ *Ramchandra v. Narsinhacharya* [1899] 24 Bom., 251, F. B., where *Ramchandra v. Bhikibai* [1882] 6 Bom., 477, is considered.

⁷ *Mohamed Isub v. Bashotappa* [1903] 27 Bom., 202.

⁸ *Nasir Ali v. Meher Ali* [1895] 22 Cal., 830.

⁹ *Tilak v. Fatik*, *supra*.

¹⁰ *Nazir v. Abid* [1911] 8 A.L.J.R., 910.

¹¹ *Radha Churn v. Zumuroonissa* [1868] 11 W. R., 83. Cf. *Ziaullah Sheikh v. Inu Khan* [1896] 23 Cal., 693; *Sheo Kumar v. Narain Das* [1902] 24 All., 501.

¹² *Ziaullah v. Inu Khan*, *supra*, at 696.

¹³ *Juggurnath Deb v. Mahomed Mokeem* [1872] 17 W. R., 161; *Maenooddeen v. Greesh Chunder* [1867] 7 W. R., 230; *Surbomohan v. Surut* [1871] 16 W. R., 34.

But there is no *res judicata* by reason of the order under section 9. An order or decree made under section 9 is final in the sense that no appeal lies against it to a superior tribunal,¹ nor may such an order or decree be reviewed.² But this does not mean that there may not be a rehearing under section 108, Code of Civil Procedure, where there has been no determination of the claim advanced,³ or revision by the High Court under section 115, where jurisdiction has been shirked.⁴ The remedy of the aggrieved party is a regular title suit. But this summary remedy is not available against the Government.⁵

Finality of order.

A point of procedural law of some importance is—whether in a suit for ejectment based on the plaintiff's title, if proof of title fails, a decree may be made in his favour, in the event of his being able to prove possession within six months, as required by section 9. There are some old cases in the Allahabad Court, in which it was roundly declared that to a suit to establish a title section 9 had no application.⁶ But in a later case, stress was laid upon the "most salutary object" which the first paragraph of that section had in view, and the Court ruled that effect should be given to it, even where the claim was for damages and for establishment of title,⁷ and the pleading of the right given by the section was an after-thought.⁸ The Madras High Court, however, has differed, and not without reason. To regard a suit partly as under section 9 of the Specific Relief Act and partly as based on the plaintiff's title, can but lead to inconvenience and inconsistency, in as much as no question as to title can be raised on either side in a possessory suit under the statute.⁹ The Allahabad High Court now agrees with the Madras Court and has reverted to its earlier view.¹⁰

Decree under S.R.A. s. 9, in suit for ejectment.

¹ Distinguish *Nasir Ali v. Meher Ali* [1895] 22 Cal., 830. See *Souza v. Gulam Moidin* [1902] 26 Mad., 438.

² S. R. A., s. 9, last para.

³ *Anthony v. Dupont* [1881] 4 Mad., 217.

⁴ *Rudruppa v. Narsingh Rao* [1904] 29 Bom., 213. But see *Ram Kishan v. Jai Kishan* [1911] 33 All., 647.

⁵ "No suit under this section shall be brought against the Government," S. R. A., s. 9, para. 3.

⁶ *Wajid Ali v. Ramsaran* [1884] 4 A. W. N., 39; *Chuthun Rai v. Sheo-*

ghulam Rai [1889] 9 A. W. N., 89.

⁷ *Ram Harakh v. Sheodihal* [1893] 15 All., 384.

⁸ *Mousi v. Kashi* [1897] 17 A. W. N., 145; *Maktula v. Kuleswar* [1910] 51 C. 482.

⁹ *Ramasami v. Paraman* [1901] 25 Mad., 448. Distinguish *Rudha v. Nabin* [1870] 5 B. L. R., 708, 712, F. B.; *Hanmantrav v. Secy. of State* [1900] 25 Bom., 287. *Lachman v. Shambhu* 7 A. L. J. R., 1078 F. B.

¹⁰ *Lachman v. Shambhu* [1910] 33 All., 174, F. B., *Pal Ahir v. Asghar* [1911] 8 A. L. J. R., 404.

Wrongful
transfer of
moveable
property.

So far I have been discussing suits for the recovery of possession of immoveable property. But moveable property¹ may also be tortiously transferred or detained. Where the possession of the particular article of moveable property in question has been wrongfully transferred from the claimant, who is entitled to its immediate possession, and the person who has possession or control of it is not the owner, he may be compelled to restore it to the claimant.² The transfer must be wrongful, that is, by the commission of an offence or fraud, so that no property passes. If the transfer be under a contract which is only voidable, then the plaintiff has to proceed under the ordinary law of contract.³ This is a relief analogous to that dealt with in section 9, with this distinction that the defendant may prove his title and defeat the plaintiff's claim.

Wrongful
detention.

Detinue.

But this is not the only instance where a person entitled to immediate possession of a moveable is allowed to recover it in *specie*. In the case of a wrongful detention, an adverse holding by another, if the goods are recoverable, such a person may sue for them⁴ The technical name of this action in England was *Detinue*. It is in substance and form an action for a wrong independent of contract,⁵ the injury complained of being not the taking or the misuse and appropriation of the goods, as it would be in the Common Law actions of trespass or trover or conversion, but detention, *i.e.*, withholding without authority, which, however, may not necessarily be wrongful, unless there has been a refusal to deliver on demand or something amounting to it. The goods must be specific, that is, ascertained and ascertainable, but if they have ceased to be recoverable, the claimant can get only compensation.⁶ If, however, the goods are still available, the plaintiff

¹ "Moveable property" means "property of every description, except immoveable property." Act X of 1897, s. 3, sub-s. 34.

² S. R. A., s. 11, (d), *Kartick Churn v. Gopalkisto* [1877] 3 Cal., 264. In his commentary on this clause (p. 116), Nelson refers to *Nutbrown v. Thornton* [1804] 10 Ves., 159. But as the farm-stock there was taken by the landlord, who was the owner, it is apprehended that the

section of the Indian Act would not apply to a case of that kind.

³ I. C. A., s. 108, and *ill.*

⁴ 3 Blackstone, *Comm.*, 151.

⁵ *Bryant v. Herbert* [1878] 3 C. P. D., 389; *De Pasquier v. Cudbury* [1903] 1 K. B., 104; Bullen and Leake, 370.

⁶ C. P. C., App. A (3) nos. 32-3. *Murugesu v. Jothuram* [1899] 22 Mad., 478.

may get them back on showing a right to immediate possession in himself. It is not necessary that the plaintiff should have been previously in possession or that the goods should have been removed from his possession. It is enough to found the action that he has acquired a right to present possession.¹ Such right may arise out of title, where the plaintiff is the owner, or it may be a special or temporary right, which may have been either granted by the owner or created by law. A factor, *e.g.*, to whom goods have been consigned, but by whom they have not been received, has a right to present possession.² So also a purchaser of goods who has paid the price or has bought on credit, payment of price being deferred.³ A special right to possession, which is not to be identified with special property,⁴ may, when arising by the act of the owner, take the form of a bailment,⁵ or a lien.⁶ In such a case, the right to possession of the owner is temporarily suspended, unless the bailment is of a simple character. In the latter case (*e.g.*, loan, custody, carriage, or agency), though the bailee has legal possession, the bailor retains his right to possession, and clearly either may sue a third person for recovery of possession.⁷ Where, however, the bailment was not revocable at will, *e.g.*, in the case of a pawn, hire or lien under the old Common Law of England, during the continuance of the bailment or debt, the bailor or debtor having no right to possession, apparently the pawnee, hirer or lienee could alone sue.⁸ The distinction was more a matter of procedure than principle, and is out of place in India. We therefore find section 180, Indian Contract Act, provides that if a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, either the bailor or the

Right to
present
possession.

Bailment.

¹ S. R. A., s. 10.

² *Fowler v. Down* [1796] 1 B. & P., 47.

³ I. C. A., s. 96; *New v. Swain* [1828]. 34 R. R., 767.

⁴ There may be a right to possession without any property, as in the case of a naked depositary, and there may be a special property without a right to possession, as in the case of the sender of a letter. *Gee v. Pritchard* [1818] 2 Sw., 402. *Collett*, 101.

⁵ I. C. A., ch. ix.

⁶ *Ibid*, s. 95 (unpaid vendor of property.)

⁷ *Pollock & Wright*, Pos, 93, 145. Cf. *Shankar v. Mohan Lal* [1887] 11 Bom., 704; *Seager v. Hukma*, [1906] 24 Bom., 458; see also *Greenwood v. Holquette* [1873] 12 B. L. R. 42.

⁸ The English law is explained with much learning in *The "Winkfield"* [1902] P. 42, C.A., *Radeliffe & Miles*, 319.

bailee may bring a suit against a third person for such deprivation or injury.

S. R. A. s.
10.

The illustrations to section 10 are all cases of special or temporary right to present possession.¹ Illustration (a) is the case of a legal life-tenant who is entitled to present possession of the title-deeds as against a remainderman.² Illustrations (b), (d) and (e) are instances of bailments of pawn, custody and carriage respectively. Illustration (c) recognises the right of the receiver of a letter to the possession thereof as against the writer.³

Wrong-doer
cannot plead
jus tertii.

As an instance of a special right which arises independently of any act of the owner, may be mentioned the case of a lost article which is found by a stranger. The finder is entitled, as we have seen, to hold it as against the whole world excepting the owner.⁴ A wrong-doer is not entitled to question the title of the party in peaceable and quiet possession and set up a *jus tertii*.⁵ "It is of the utmost importance," said Lord Campbell, C.J., "that a man shall not, having no good title of his own to the property, be allowed to seize it, and thereby probably bring about a breach of the peace, and occasion great mischief and confusion."⁶

Trustee.

A trustee, who in England is said to have the legal title,⁷ is entitled to the right to possession even as against the beneficiary, and therefore the legislature has expressly provided,—“A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.”⁸

I have indicated above that of the actions for the recovery of specific moveables that may be brought by persons entitled to present possession of them, some may be directed even

¹ See illustrations in App. C.

² *Lord Buckhurst's Case* [1572] 1 Co. Rep. 2a; *Leathes v. Leathes* [1877] 5 Ch. D., 221.

³ *Oliver v. Oliver* [1862] 8 Jur., N.S., 512.

⁴ *Armory v. Delamirie* [1721] 1 Sm. L. C., 12th. ed 396. As to his responsibility, see I. C. A., s. 71.

⁵ *Wilgraham v. Snow* [1669] 2 Wms. Saund. 87.

⁶ *Jeffries v. G. W. Ry. Co.* [1856]

25 L. J., Q. B., 107, Rad. & M., 315.

⁷ The Indian Law makes no distinction between a legal and an equitable title in the same sense.

⁸ S. R. A., s. 10, expl. 1. *Sathianamu v. Saravanabagi* [1894] 18 Mad., 266, 272. Cf. C. P. C., Sec. I, Or. 31, r. 1. Where a tenant for life has only an equitable estate, the trustees are entitled to possession of the title-deeds, *Duncombe v. Mayer* [1803] 8 Ves., 320.

against persons who are not the owners, but who happen to be in possession or control of the moveable in question. One such case I have already considered. There are three other cases provided for by section 11, Specific Relief Act. The first is "(a) when the thing claimed is held by the defendant as the agent or trustee of the claimant." There is a fiduciary relationship subsisting between the parties, and equity will fasten upon the conscience of the defendant and compel him to make specific delivery. If a trust or fiduciary relation exists in reference to the chattels, the trust may be either express or implied,—it may have been created by the contract or have arisen from the acts or omissions of the parties,—and the chattels may be either common or special, but a court of equity will always enforce a trust.¹ "Where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee or a broker, or whether the subject-matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power."² So said Lord Cottenham in the leading case of *Wood v. Rowcliffe*.³ There specific chattels were placed by Wood in the possession of Elizabeth Wright to be held by her as his agent, but, in breach of her duty to her principal, she contracted for the sale of these goods to a third party. "The question," said Wigram, V. C., "is, whether a court of equity will not, at the suit of the principal, restrain his agent from parting with the possession of his property, by which the plaintiff's title would be embarrassed, if not defeated?" His Honour had no hesitation in answering the question in the affirmative, and observed, "the right to be protected in the use or beneficial enjoyment of property in specie is not confined to articles possessing any peculiar or intrinsic value."⁴

S. R. A., s.
11 (a).

Fiduciary
relation.

Wood v.
Rowcliffe.

¹ 4 Pomeroy, *Eq.*, J. s. 1402 n.

² As to trusts of chattels, see note, 1 Ames, 44.

³ [1847] 2 Ph. 382 383. Cf. also *Fells v. Read* [1796] 3 Ves., 70; *McGowin v. Remington*, 12 Pa. St. 56; *Biddomoye v. Sittaram* [1879] 4 Cal., 497.

⁴ [1844] 3 Hare, 304. The illustra-

tion to cl. (a) of s. 11, S. R. A., is founded on this case. It runs thus: "A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises

This leads us to the consideration of the next two cases :

S. R. A., s. 11
(b), (c).

"(b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ;

"(c) when it would be extremely difficult to ascertain the actual damage caused by its loss."

Pretium affectionis.

An article may not have much intrinsic value, but, by reason of peculiar associations or some special considerations, it may have obtained in the eyes of its holder a value that cannot be estimated in any ordinary medium of exchange. Take the illustration put by the legislature, the case of a family idol. The stone or metal of which it is composed by no means represents its value. Non-Hindus may call the value that the family puts upon their idol sentimental or fictitious or anything they please. But there can be no doubt that if the proper custodian of the idol is deprived of its possession, no monetary compensation will afford him *adequate* relief. The leading English case upon the point is *Pusey v. Pusey*,¹ where the heir sued, and sued with success, to recover a horn, which bore an inscription and which had from time out of mind been the token by which the family estate had been held. Similar successful claims have been brought in respect of an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules,² dresses, decorations, books and papers of a Masonic lodge,³ heirlooms,⁴ private letters,⁵ a college memento in the shape of a wooden bowl,⁶ a cup won as prize,⁷ wampum belts belonging to Red Indians,⁸ and slaves (in America).⁹ As was

Pusey v. Pusey.

it for sale, C may be compelled to deliver the furniture to A, for he holds it as A's trustee."

¹[1684] 2 Wh. & T., 8th. ed. 458, 1 Ver., 273. The report is meagre, but the case, said Lord Eldon, "turned upon the *pretium affectionis*, independent of the circumstance as to tenure, which could not be estimated in damages," *Nutbrown v. Thornton* [1804] 10 Ves., 163.

²*Duke of Somerset v. Cookson*, [1735], 3 P. W., 390; 2 Wh. & T., 8th. ed. 459.

³*Lloyd v. Loring* [1802] 6 Ves., 773. ⁴*Macclesfield v. Davis* [1814] 3 V. & B., 18.

⁵*Dock v. Dock*, 180 Pa., 14.

⁶*Beasley v. Allyn*, 15 Phila., 97.

⁷*Wilkinson v. Stitt*, 175 Mass. 581.

⁸*Onondaga Nation v. Thacher*, 61 N. Y. Supp., 1027, affd. 65 N. Y. Supp., 1014.

⁹*Murphy v. Clark*, 9 Miss., 221, and other cases cited in 1 Ames, 40. In *Pearne v. List* [1849] Ambli. 77, a prayer for specific delivery of negroes was refused, Lord Hardwicke observing, "that is not necessary, others are as good." The case of a favorite slave is, however, different. As Taylor C.J., observed in an old American case, "For a faithful family slave endeared by a long course of service or early associations, no damages can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." *Williams v.*

urged in *Duke of Somerset v. Cookson*,¹ where the thing sued for was matter of curiosity and antiquity, it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *nolens volens*. Talbot, L.C., upheld the broad contention that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in *specie*.

Duke of Somerset v. Cookson.

Just as there may be moveable articles of special value to their owner, but of no general pecuniary value in themselves, so there may be other moveable articles of such great rarity and value that they cannot be replaced by money.² Such are many works of art, unique and uncommon, or at any rate not susceptible of reproduction at will. The Indian legislature gives as instances a picture by a dead painter and a pair of rare China vases, and says, "the articles are of too special a character to bear an ascertainable market value."³ It will probably be admitted on all hands in respect of such articles that they are of great value, but the value will depend upon such a variety of circumstances,—antiquity, design, rarity, etc.,—and will be so much a matter of æsthetic sensibility and artistic taste, that different people will put different values upon them, and their loss cannot be compensated for by any practical or certain measure of damages. So in one case monetary compensation is inadequate, in the other it is impracticable.⁴ Any damages allowed must be in a great measure conjectural.⁵ Take the case of a box of jewels,⁶ or a finely carved cherry stone,⁷ or an extraordinarily wrought piece of plate,⁸ or family pictures.⁹ The owner is entitled to insist that the value of none of these articles should be left to the estimate of a jury¹⁰ or to people who have

Rare and unique moveables.

Howard, 3 *Murphy*, 74, 80, 2 *Keener*, 50. *Waterman*, 23.

¹ [1735] 3 *P. W.* 390, 1 *Ames*, 30.

² 4 *Pomeroy*, *Eq. Jur.*, s. 1402 n. See also Vol. I, s. 185; *S. P.* s. 12.

³ *S. R. A.*, s. 11, cl. (c), ill.

⁴ Cf. 4 *Pomeroy*, *Eq. Jur.*, s. 1401; *S. P.*, 42.

⁵ Cf. 2 *Story*, *Eq.*, s. 722 (a).

⁶ *Saville v. Taucrad* [1748] 1 *Ves. Sr.* 101.

⁷ *Pearne v. Lisle* [1749] *Amb.* 75, 77.

⁸ *Ibid.*, 1 *Scott.*, 88.

⁹ *Arundell v. Phipps* [1804] 10 *Ves.*, 139.

¹⁰ Cf. *per Wood*, *V. C.*, *Dowling v. Betjemann* [1862] 2 *J. & H.*, 544, 1 *Ames*, 41.

not his feelings.¹ The rule, however, is not to be capriciously extended. As an American court observed, "These are cases which have their foundation in the refinement of society, and those affections of the heart which it would be a reproach to the country not to indulge. But still they depend on the plain, tangible principle that there is no adequate remedy at law, and the principle must not be extended to cases founded in weakness and folly. It would, therefore, be a perversion of the rule to apply it to the delivery of a favourite spaniel or a lady's lapdog."²

Deeds.

'This particular exercise of the jurisdiction, however, extends to suits to compel the delivery of deeds, muniments of title, and other written instruments, for the value of these cannot, with any reasonable certainty, be estimated in money.³

Before leaving this subject, it will be worth while to note a point of procedure in respect of sections 10 and 11, Specific Relief Act. When a suit is instituted under section 10, the decree will be framed under or. 20, r. 30, sch. I, of the Code of Civil Procedure. It will be a decree for the delivery of the specific moveables in suit and will "also state the amount of money to be paid as an alternative, if delivery cannot be had."⁴ To this may be added a further sum by way of compensation for any special loss caused by the wrongful detention.⁵ This decree may under or. 21, r. 31 be enforced by the attachment of the judgment-debtor's property or the imprisonment of his person or both, if the seizure and delivery of the specific moveable is not practicable. The defendant consequently has not the option, allowed to him formerly by the English law, to pay the damages and retain the goods.

C. P. C.,
Sch. I or. 20,
r. 10.

Or. 21, r. 31.

C. P. C.,
Or. 21, r. 32.

When, on the other hand, a suit is instituted under section 11,⁶ the decree is for specific delivery of the article

¹ Cf. *per* Loughborough, L.C., *Fells v. Read* [1796] 3 Ves., 70.

² *Living v. Geddes*, 16 Am. Dec., 606, 6 R. C., 646.

³ *Pomeroy, Eq. Jur.*, ss. 185, 1402n. *Jackson v. Butler* [1742] 2 Atk., 806 (mortgage deeds), *Goodale v. Goodale* [1848] 16 Sim., 316 (securities of estate), *Gibson v. Ingo* [1847] 6 Hare, 112 (certificate of registry of ship), *Beresford v. Driver* [1852] 16 Beav., 134 (title-deeds), *McGowin v. Reming-*

ton [1849] 51 Am. Dec., 584 (valuable private maps), *Battalion Westerly Rifles v. Swan*, 84 Am. St. R., 849 (books of a militia company).

⁴ *Kashee v. Debkrisho*, [1871] 16 W. R., 240.

⁵ *Ibid*; *Bombay Trading Corporation v. Mirzah Mahomed* [1873] 19 W. R., 123. As to the measure of damages, see Collet, 102 *sqq.*

⁶ See form of plaint App. A (3), no. 39 Act V of 1908.

in question, and may be enforced under or. 21, r. 32 of the Code. Here, too, the judgment-debtor may be imprisoned, and his property attached, but the attachment may last for a year, and if the decree-holder has applied for the sale of the attached property, the court may sell same and award to him out of the sale-proceeds "such compensation as it thinks fit." This compensation may or may not include the value of the particular article of moveable property in question, whereas the damages awarded by or. 20, r. 10 are paid as an alternative and the right of the plaintiff determines upon payment of these damages in full. Besides, an attachment of property under or. 21, r. 31 remains in force for only six months. "The amount of legal coercion, which can be brought against a defendant to enforce a decree for specific delivery under section 11, is therefore clearly greater than that which can be employed to enforce a decree under section 10."¹

¹ Nelson, S. R. A., 115.

LECTURE III.

CONTRACTS ENFORCEABLE.

Specific
performance
of contract.

I now proceed to consider the second branch of specific relief administered in British India, which is given by "ordering a party to do the very act which he is under an obligation to do."¹ "Obligation" includes every duty enforceable by law.² Consequently, whenever a man finds himself under a liability to do or forbear from doing anything, he lies under an obligation. The liability may spring out of either a contract or a tort. But an "obligation to do," as distinguished from an "obligation to forbear," is a positive duty generally imposed by contract. It is when one undertakes to do something that an obligation results which finds its solution in action; it is ordinarily by agreement that one becomes bound to perform acts in the law. This form of specific relief, therefore, may be briefly, if loosely, described as the "specific performance of contract,"³ and the granting of it constitutes a jurisdiction that is at once extensive, important and beneficent.

Agreements
other than
contracts.

Section 4 of the Specific Relief Act provides: "Except where it is herein otherwise expressly provided, nothing in this Act shall be deemed (a) to give any right to relief in respect of any agreement which is not a contract."⁴ Section 10 of the Indian Contract Act declares: "All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration with a lawful object and are not hereby expressly declared to be void." This is developed and

¹ S. R. A., s. 5 (b).

² S. R. A., s. 3. This definition is wider than that adopted by English lawyers. See I Austin, *Jur.*, 7.

³ This, Sir Edward Fry defines as "its actual execution according to its stipulations and terms." S. P., 2. See also Langdell, *Eq. J.*, 73. The more correct expression to use is 'specific

reparation for breach of contract,' *ibid.*, 40-1, *vide ante*, p. 28; but lawyers have got so accustomed to the other expression that I have not thought it necessary to abandon it.

⁴ Cf. "Equity will never make that a good agreement which is not good by law," *Normandy v. Devonshire* [1697] 2 Freeman, 216.

applied by the more specific provisions of the following sections in the second chapter, and a number of agreements is expressly declared to be *void* in sections 24-30. I have already dealt with the general nature of a contract, and I will have hereafter to deal specially with its various essentials. What I want to make clear at this stage is that, for purposes of specific performance, the law does not recognise an agreement that is not a contract. We shall find presently that even among contracts there are not a few which are not specifically executed, and we shall have to examine the grounds upon which such exclusion is justified. But void agreements¹ and void contracts² a student of the law of specific relief may for the present leave out of consideration. A voidable contract, it should be noted, however, stands on a different footing. It is enforceable at the option of one or more of the parties to the contract,³ and consequently may, if otherwise proper, be executed according to its terms, at their instance. We may therefore exclude from our consideration *void* agreements, and also, it seems, agreements of imperfect obligation.⁴ There may be things a man is morally or spiritually bound to do. Two friends may come to a mutual understanding that they will not compete with one another in trade or business. There may be things agreed to without any intention of creating a jural relation. I may ask a friend to dinner, and he may agree to come.⁵ In such cases, we have no agreement which is a contract, and they lie outside the pale of the Specific Relief Act, if not of all law whatsoever.

We may then start with the negative proposition that no agreement which is not a contract shall be enforced in *specie*. From such a proposition we cannot clearly deduce the universal affirmative, "all contracts shall be enforced in *specie*." We find therefore the Indian legislature speaking of (a) contracts

¹ I. C. A., s. 2 (g).

Ibid., s. 2 (j).

² *Ibid.*, s. 2 (i).

³ Collett, 70.

⁴ Cf. Pollock, *Con.* (W. W.), 3: "The agreement must be in our old English phrase an act in the law; that is, it must be on the face of the matter capable of having legal effects.

It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall if necessary be so dealt with or at least they must not have the contrary intention." This is Savigny's view, and seems to be unexceptionable.

Contracts to
be fairly and
liberally
performed.

which *may* be specifically enforced, and (b) contracts which *cannot* be specifically enforced.¹ But I am not at all sure that the latter expression is quite the correct one to use, or that it is appropriate in respect of all the various kinds of contracts enumerated in section 21. Lord St. Leonards in a classic judgment² expressed the principle thus: "That principle is to bind men's consciences to a fair and liberal performance of their agreements. I have always thought you may attribute a great deal of the right feeling and fair dealing that exists between Englishmen to the exercise of this jurisdiction. Men are not suffered by the law of this country to depart from their contracts at their pleasure. It does not leave the party with whom the contract has been broken to the mere chance of what a jury may give in the shape of damages,³ but it enforces, where it can, the literal performance of the contract; and this I believe has mainly tended to produce the good faith that exists to a greater extent in this country than in many others." Contracts are entered into with the object of being performed, and the law of contract has been described by Sir F. Pollock as "the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness."⁴ "Accordingly," says the learned author, "the most popular description of a contract that can be given is also the most exact one, *viz.*, that it is a promise or set of promises which the law will enforce."⁵ The aim and object of the law therefore is and should be to enforce the promise according to its terms and in the spirit of its intent, literally and liberally. We should therefore be involving ourselves in a moral absurdity (to adopt the words of Westbury, L. C.), if we pretend to declare a contract binding and yet refuse to extend to it the only remedy and the only mode of execution that can secure to the contracting parties the real benefit of the covenant⁶ "No

Jurisdiction
of specific
perform-
ance.

¹ S. R. A., pt. II, ch. II, ss. 12, 21.

² *Lumley v. Wagner* [1852] 21 L. J. Ch. 898, 902, 6 R. C. 658.

³ Cf. *Muncie Natural Gas Co. v. Muncie*, 60 L. R. A., 822.

⁴ *Con. (W. W.)*, 1.

⁵ *Ibid.*

⁶ *Hunt v. Hunt* [1862] 4 De G. F. & J., 221, 1 Ames, 132.

principle can be more sacred," said Jessel, M. R., "than that a man shall be compelled to perform his contract." In all cases "where a court of equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident or mistake, enter into contracts, the jurisdiction should be exercised."¹ "To my mind," says Farwell, J., "the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in *specie* the specific article for which he has contracted, and he is not bound to take damages instead. The right to sue on the contract is the same in law and in equity, but the remedies differ, and the court of equity will grant the equitable remedy in all cases, unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances unless there has been a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it."² So American judges have observed: "Every contract, the subject of which is susceptible of substantial enjoyment, should be enforced, provided always the circumstances surrounding connected with the contract bring it within the rules entitling the party to equitable relief."³ "In such cases, a court of equity will decree specific performance as a matter of course where the contract is in writing, is fair and certain, is upon an adequate consideration and is capable of being enforced."⁴ All the above quotations, however, recognise certain restrictions upon the right to enforce specific relief. It is no doubt true that in some cases a court may find the granting of such relief impracticable. It is difficult for a court to enforce specifically a contract which runs into minute particulars and involves supervision, possibly by a technical master or expert, for a long period of time. So it is difficult for a court to compel a person to carry out both in letter and in spirit a contract, the proper and honest execution of which depends on his volition. It is

¹ *Leech v. Schweder* [1874] 9 Ch. 467, 43 L. J. Ch., 488. Cf. *Davis v. Maung Shwe* [1911] 38 Cal. 805, P. C.
² *Hexter v. Pearce* [1901] 1 Ch. 341, 346, 69, L. J. Ch. 146, 148.

³ *Johnson v. Rickett*, 5 Calif. 218; *Bruck v. Tucker*, 42 *ibid.* 347; *Waterman*, 14.
⁴ *Chance v. Beall*, 20 Ga., 148; *Waterman*, 14.

not that courts have not sometimes sought to surmount these difficulties and practically and substantially secure specific performance, albeit without making a direct order. The arm of the law is long enough to reach almost every violator of the law.¹ But there may be practical difficulties and the law may, in view of all the circumstances, prefer to stay its hand. The restrictions, however, which are contemplated above do not owe their existence even mainly to such practical difficulties. "The law," says Dean Bigelow, "is necessarily a continuous stream from past times down which to our own day survivals of other social states and the wreckage of other times have floated. To change the figure, the law is handicapped in all its branches with historical survivals."² And it is to these historical survivals that we must look for the explanation of the restrictions.

Historical
grounds for
restricting
jurisdiction.

Formerly
separate
Courts of
Law and
Equity in
England.

One historical fact which even in India we cannot afford to lose sight of is that the Courts in England were formerly divided as Courts of Law and Courts of Equity. In India, we never had and now have not any such division, and even in England the Judicature Act of 1873 effected an amalgamation. Every division of the High Court in England therefore now possesses the jurisdiction to grant the primarily equitable relief of specific performance.³ But the text-books still repeat the rule that where there is a remedy at law, equity will not interfere,⁴—it is the "fundamental rule of equity jurisdiction that there is not a plain, adequate and complete remedy at law."⁵ There was a constant reference in the older cases to what a Court of law would or would not do with respect to a particular contract and, as equity was said to follow the law, a learned Chief Justice in England went so far as to say, "I take this to be a certain clear rule of equity that a specific performance shall never be compelled, for the not doing of which the law would not give damages."⁶ The rule in this

¹ Cf. *Fischer v. Secretary of State* [1898] 22 Mad., 270, 283, P. C.

² *Centralization and the Law*, Intr., 3.

³ *Dart, V. & P.*, 1023.

⁴ *Waterman*, 12; *Pomeroy, S. P.*, s. 4; *Fry*, 20; *Strahan and Kenrick*,

Equity, 362.

⁵ *Per Sheldon, J., Parker v. Garrison* [1871] 61 Ill., 250, 1 Ames, 46.

⁶ *Raymond, C. J., in Bettesworth v. Dean and Chapter of St Paul's*, [1723] Sel. Ch. Cas. 67, 69. The decision was reversed by the House of Lords.

form did not command the assent of a later Lord Chancellor,¹ and has been said to be confined to cases in which the party was not entitled to any remedy at law and there was no equity to be administered beyond the law.² But I refer to it here to show how the equitable jurisdiction grew in intimate relationship with and by constant reference to the legal.

The next historical fact to bear in mind is that the remedy that the old courts of law in England granted in cases of breach of contract was damages or monetary compensation. To quote Sir Edward Fry's felicitous language, "The Common Law treats as universal a proposition which is for the most part but not universally true, namely, that money is a measure of every loss."³ Where the contract relates, *e.g.*, to the sale of an ordinary article of merchandise, say corn or coal or even live-stock which is easily available in the market, it is clear that if the defaulting party pays the difference between the value at which it can be purchased in the bazar and that stipulated, the plaintiff may purchase an exactly similar article in the market and thus gain what he had bargained for and sustain no loss.⁴ The courts of law, reflecting possibly the spirit of the age, proceeded upon this ground and refused to recognise that the subject-matter of the contract in dispute might be of a special or unique character. It is thus that law, which really is the creature of the social forces and economic ideas at work at the time when it is in the making,⁵ and which originally aimed at specific relief rather than damages,⁶ gradually lost sight of the fact that such relief was the primary relief, and endeavoured to measure every loss in the ordinary medium of exchange. But all contracts cannot be reduced to a stereotyped pattern. Where there is a promise to pay money in consideration of a similar payment or promise, there can be no difficulty.

Money
taken as
measure of
every loss.

¹ Lord Macclesfield in *Cannell v. Buckle*, [1724] 2 P. Wms. 244, 1 Scott, 100: "Neither is it a true rule that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance."

² 2 Story, *Eq.*, s. 739. The maxim only means such a contract as the

law would have recognised if sued in proper time and under proper circumstances, *White v. Butcher*, 6 Jones, *Eq.*, 231; *Waterman*, 12.

³ Fry, 26.

⁴ 2 Story, *Eq.*, s. 746.

⁵ See *Centralization and the Law*, *passim*.

⁶ Ante, 189.

But there may be a promise to do or omit some act or acts in consideration either of a promise to pay or a payment of money or of the doing or undertaking to do certain acts. Whatever the consideration in this case the act is what is bargained for and not a sum of money.¹ Damages are ordinarily based upon the general value of the subject-matter, i.e., its value to persons generally, and not upon any special value which it may have for the contracting party or any special relations in which it may stand to him.² So judicial conscience was roused again and it was realised that pecuniary compensation did not always make for perfect and complete justice.³ Hence the equitable remedy of the specific performance of contracts came to be administered as a substitute for the legal remedy of compensation whenever this legal remedy was deemed to be inadequate or impracticable. And even some Common Law judges wanted apparently to think that they were granting specific relief when they made a decree for damages. Lord Mansfield, C. J., e.g., is reported to have observed, "Pecuniary damages upon a contract for the payment of money are from the nature of the thing a specific performance."⁴

Equity consciously attempted to do complete justice.

The foundation and measure of the equitable jurisdiction is thus the desire to do justice which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also to be protected.⁵

¹ Pomeroy, S. P., s. 6.

² *Ibid.*, s. 9.

³ "The principle which is material to be considered is that the Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice," per Lord Selborne, *Wilson v. Northampton Ry.*, [1874] 9 Ch. Ap., 279, 284. Cf. per Stuart, V.C., *Ord v. Johnston*, [1855] 1 Jur. N.S., 1063, 1064, 1 Scott, 40.

⁴ *Johnson v. Eland* [1760] 2 Burr., 1086. As Sir E. Fry points out, this remark is not strictly accurate. "No doubt the sum agreed to be paid will be the measure of damages and the amount paid will be the same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract, in the latter case it is paid as satisfaction for its non-per-

formance. It is evident that the consequences of the two payments would therefore be different." S. P., 7. Cf. *Ram Saran v. Dalip*, [1910] 6 I. C. 704 (zurpeshgi lease, possession not delivered, suit for money); *Kondugari v. Kavupati* [1912] 15 I. C., 352 (suit to recover money on fulfilment of condition); *Anuasami v. Ramasami* [1914] 22 I. C., 39.

⁵ "First, in a suit for the specific performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, there is no difference between the plaintiff and the defendant *as such*, i.e., they are both plaintiffs and both defendants, and any decree which is made is in favour of both and against both. Secondly, in such a suit it does not follow that the defendant—still less that the defendant alone—has broken the contract. The contract

Specific performance is therefore, says Pomeroy, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the juridical relations growing out of the contract between them.¹ We may consequently adopt the broad principle that a contract will be enforced in *specie* where the ends of justice can alone be thereby subserved.² The jurisdiction depending upon this broad principle is, according to Pomeroy, exercised in two classes of cases: (i) "Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representation of that subject-matter in the hands of the party who is entitled to its benefit—or, in brief, where the damages are *inadequate*. (ii) Where from some special and practical features or incidents of the contract inhering either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law—or, in brief, where damages are *impracticable*."³

Jurisdiction assumed where damages (a) inadequate

or (b) impracticable.

This classification is at once comprehensive and logical and it will be found to embrace the three classes dealt with in clauses (b), (c) and (d) of section 12, Specific Relief Act. The Indian legislature adds one more class, *viz.*, "(a) when the act agreed to be done is in the performance wholly or partly of a trust." English writers distinguish this class upon the ground that a trust is a matter within the exclusive jurisdiction of a Court of Equity, and relief is granted in the case of a trust without any consideration of the nature of the "legal" relief available to the plaintiff.⁴ In many parts of India, however, the execution of trusts is as much governed by statute law⁵ as

Execution of trusts.

may have been broken by both parties, or it may have been broken by the plaintiff alone." Langdell, *Eq. J.*, 45, 47.

¹ *S. P.*, 3 n.; 4 *Eq. J.*, s. 1401, where *Buxton v. Lister*, 3 *Atk.*, 383; *Wright v. Bell*, 5 *Price*, 325-9; *Alderley v. Dixon*, 1 *Sim. & St.*, 607-10; and

Ord v. Johnson, 1 *Jur.*, n. s., 1063, 1064, are cited.

² *Skinner v. Morris Canal and Banking Co.*, 27 *N. J. Eq.*, 364; 4 *Pomeroy Eq. J.*, s. 1403.

³ *S. P.*, s. 8; 4 *Eq. J.*, s. 1401.

⁴ *Fry*, 16; *Lewin, Trusts*, 15.

⁵ Act 11 of 1882.

the specific performance of contracts, and our law here does not recognise any distinction between legal and equitable estates. It will be proper therefore to advert, though briefly, to this class of cases.

It is desirable to note first of all that a trust may in some respects be regarded as a contractual obligation. In fact, some Scottish and American writers treat of trusts as a species of real contract.¹ Indian law looks upon it as an obligation annexed to the ownership of property, as the definition in the Indian Trust Act makes manifest: "A trust is an obligation annexed to the ownership of property and arising out of a confidence accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner."² The contract here is evidently executed, and as Lord Selborne pointed out in *Wolverhampton and Walsall Ry. Co. v. London and N.-W. Ry. Co.*,³ specific performance strictly so called cannot be decreed in respect of contracts that are not executory. But this does not prevent the granting of specific relief, and equity has always enforced every species of fiduciary ownership, be it express or implied or constructive. If, says Pomeroy, "a trust or fiduciary relation exists in reference to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such a contract, whether the chattels are common or special, since the court will always enforce a trust."⁴ And the same rule will apply where the trust relates to realty. "The only thing enquired of in a Court of Equity," says Story, "is whether the property bound by a trust has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it."⁵ Trusts will accordingly be enforced not only against those persons who are rightfully possessed of trust property as trustees, but also

'Trust'
defined.

Trust of
chattels.

Trust of
realty.

¹ See the general analogy discussed by Pollock, *Con. (W. W.)*, 230-1; Underhill, *Trusts*, 4-6.

² Act II of 1882, s. 3. Cf. *Re Williams, Williams v. Williams*, [1897] 2 Ch.,

12, 18.

³ [1873] 16 Eq., 433, 438.

⁴ *Eq. J.*, s. 1402, see cases cited there; Godefroi, *Trusts*, 805, 814.

⁵ 1 *Eq.*, s. 533, p. 549

against all persons who come into the possession of the property bound by the trust with notice of the trust.¹ The origin of the trust need not be enquired into. Thus if the Court finds that A, who held certain stock in trust for B, has wrongfully disposed of the same, it will compel A to restore the same quantity of stock to B,² or make over to him what he has sold it for (together with interest and any profit) or what he has invested it in.³ Take again a case where certain stock is purchased by A with B's money and A declares that he will hold it as trustee for B. The Court will here compel A to transfer the stock to the beneficiary B.⁴ The mere contract for the sale and delivery of a chattel cannot, as would a contract of sale in the case of land, create a trust.⁵ But if the contract in regard to personalty be complete so far as the vendor is concerned, if, *e.g.*, he has been paid all that he was entitled to and has no claim upon the property arising from the contract, and the contract only remains unperformed to the extent that the property has not been delivered to the purchaser, then the vendor would become a mere trustee of the property for the benefit of the purchaser and the latter would be entitled to specific relief.⁶

Contract to
devise land
by will.

A contract to devise land by a will where it is definite, clear and without doubt, may be in effect enforced after the death of the promisor by directing all who claim under him as volunteers to convey the property in question.⁷ Such a contract is a non-testamentary method of disposition of property and is not subject to the English Statute of Wills. And as performance is not due until the time of death, strictly speaking, there can be no compulsory specific performance by the would-be testator.⁸ But the theory on which Courts proceed is to construe such an agreement to bind the property of the testator

¹ *Pooley v. Budd*, [1851] 14 Beav., 34, 44; *Clark v. Flint*, 22 Pick, 231.

² *S. R. A.*, s. 12, cl. (a), *ill.*

³ *Forrest v. Elwes*, [1799] 4 Ves., 492, 497; cf. Act 11 of 1882, s. 23, *ill.* (g). But repugnant claims cannot be insisted upon, *e.g.*, B. cannot claim to have the stock replaced and interest instead of dividends, or to have the value and dividends, treating the stock as still existent, 2 Story, *Eq.*, s. 1263.

⁴ *Stanton v. Percival*, [1855] 5 H. L. C., 257, 10 E. R., 898.

⁵ *Parker v. Garrison*, [1871] 61 Ill. 250, 1 Ames, 46.

⁶ *Pooley v. Budd*, *supra*, 43, 51 E. R., 203.

⁷ *Synge v. Synge*, [1894] 1 Q. B., 486; *Walpole v. Orford*, [1797] 3 Ves. 402; *Logan v. Wienholt*, [1833] 1 Cl. & F., 611; Fry, 100; *Waterman*, s. 41.

⁸ 2 Pomeroy, *Eq. R.*, 1259-60.

or intestate so far as to fasten a *trust* on it in favour of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased or others holding under them charged with notice of the trust.¹ There is nothing in this contract which is repugnant to public policy.²

Breach of
trust.

It remains to note that an agreement to carry out some object, in itself not unlawful, by means of a breach of trust is unlawful and void.³ Great indeed is the solicitude that Courts of Equity profess in the matter of trusts. But this is not the place to consider at greater length this extensive jurisdiction. A trustee, *e.g.*, may be removed, even if he has not been guilty of misconduct, where the welfare of the beneficiaries requires such removal.⁴ And the Courts of Equity would go so far in cases of trust that a wrong order once made they would review and correct, where the error was due to misrepresentation or mistake of fact.⁵

There must
be a con-
tract,

I now come to cases of contract proper. The first thing to note is that you cannot specifically enforce a contract that does not exist. In the discussion that ensues therefore the existence of a contract or deed, the terms of which are before the Court, is presupposed and assumed.⁶ And the contract is assumed to be a complete contract. Where some terms, *e.g.*, have yet to be settled and the bargain has not been struck there can be no specific execution.⁷ For the parties have

¹ "Strictly speaking an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir-at-law, devisee, personal representative or purchaser with notice of the agreement, as the case may be." *Burdine v. Burdine*, 81 Am. St. R., 741.

² *Lolman v. Overall*, 80 Ala., 451, 60 Am. Rep., 107. In *re Parkin* [1892] 3 Ch., 510, Stirling, J., refused specific performance against a mere donee of a testamentary power of appointment.

³ *Pollock, Con.* (W. W.), 376, and cases *infra*.

⁴ *Letterstedt v. Broers* [1884] 9 A. C. 371, 386.

⁵ *Stanier v. Evans*, [1887] 34 Ch. D., 470.

⁶ *Mayaram v. Pragdat*, [1882] 5 All., 44, 51, *per* Stuart, C. J.

⁷ *Koylash C. Doss v. Tariney C. Singhee*, [1884] 10 Cal., 588. In this case, one of sale, though the price had been fixed, there was no absolute proposal or undertaking to purchase and the amount of the earnest money had yet to be ascertained.

not come to any contract, and it is not the function of the Court to make a contract for them.

Having got a contract then we have next to consider its nature. For specific performance is granted where that remedy is required by the nature of the contract,¹ that is, when the remedy given by a Court of law is imperfect and inadequate to fulfil and reach the real intent and object of the parties.²

which must
require per-
formance in
specie.

This, as we have seen, means where pecuniary compensation is not available. The Indian Legislature recognises three such cases :—

S. R. A., s. 12.

- “(b) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.
- (c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.
- (d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.”³

I will presently consider different classes of contract with reference to the principles embodied in these clauses. But before I proceed to do so I may point out that the distinction between the first two clauses above corresponds to that between clauses (c) and (b) of section 11, Specific Relief Act, already discussed. The subject-matter of the contract in either case is of special character, it may have for the party complaining a value over and above any pecuniary estimate or it may be incapable of being reproduced by money damages. As an instance of the former class the case of *Fells v. Read*⁴ may be referred to. The suit there was brought to recover a silver tobacco box which was adorned with engravings of public transactions and heads of distinguished persons. Loughborough, L. C., decreed

Fells v.
Read.

¹ “Upon the whole it may be said that jurisdiction will depend exclusively upon the nature of the thing contracted for, wherever the court can see its way to laying down an absolute rule; but where it cannot, it would be too much to say that all evidence as to the views and inten-

tions with which the thing was contracted for in the particular case will be excluded.” Langdell, *Eq. J.*, 49.

² *Per* Westbury, L. C., *Hunt v. Hunt*, [1862] 4 DeG. F. & J, 221, 1 Ames, 132.

³ S. R. A., s. 12.

⁴ [1796] 3 Ves., 70, 2 Scott, 37.

the claim and said, "The Pusey horn, the *patera* of the Duke of Somerset were things of that sort of value that a jury might not give two pence beyond the weight. It was not to be cast to the estimation of people who had not those feelings...It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." The Court therefore recognises and allows for what is known as *pretium affectionis*.

Falke v. Gray.

The second class may be illustrated by the case of *Falke v. Gray*,¹ where the plaintiff sought to enforce a contract for the sale of two rare China jars of much antiquity. The price settled between the parties was £40, but Kindersley, V. C., found that the jars were articles of unusual beauty, rarity and distinction, and their value must be both artificial and fluctuating, depending upon the taste and caprice of the community. His Honour therefore should have had no hesitation in decreeing specific performance, but for some special circumstances which were to be found in this case. The ground of the decision in such cases would therefore be (to quote Story) the utter uncertainty of any calculation of damages, which must in such cases be in a great measure conjectural.²

Unique chattels.

The above are cases of unique or exceptional chattels. A painting by Titian,³ the arch stone, the spandrel stone and the Bramley fall stone from old Westminster Bridge, after it had been dismantled,⁴ a barge,⁵ a foreign ship,⁶ a yacht,⁷ letters and

¹ [1859] 4 Drew., 458, 62 E. R., 250. Cf. S. R. A., s. 12, cl. (b), *ill.*: A agrees to buy and B agrees to sell a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

² 2 *Eq.*, s. 722a, p. 42.

³ *Lowther v. Lowther*, [1806] 13 Ves., 95. Cf. S. R. A., s. 12, cl. (c), *ill.*: A contracts with B to paint a picture for B who agrees to pay therefor Rs. 1,000, etc. Note here, the picture had been painted, otherwise there could be no specific performance under S. R. A., s. 21, cl. (b).

⁴ *Thorn v. Commissioners of Works*, [1863] 32 Beav., 490.

⁵ *Claringbould v. Curtis*, [1852] 21 L. J. Ch., 541. The claim in this case included the cargo. "A vessel engaged under a charter-party ought to be regarded as a chattel of a peculiar value to the charterer," said Lord Chelmsford in *DeMattos v. Gibson*, [1859] 4 DeG. & J., 276, 1 Ames, 104.

⁶ *Hart v. Herwig*, [1873] 8 Ch., 860; see about this case Fry, s. 130. It is extremely doubtful if an Indian Court would have assumed jurisdiction in such a case.

⁷ *Bathhyany v. Bouch*, [1881] 50 L. J. Q. B., 421.

papers relating to a title,¹ a promissory note,² private papers, maps and charts,³ a news-paper business, and the printing plant and materials used in the said business,⁴ heirlooms,⁵ and even slaves,⁶ have been treated as such chattels, and bills in respect of them have been sustained. Even if the thing sought to be recovered is susceptible of reproduction or substitution, chancery will interfere if damages cannot be so estimated as to cover present loss or compensate its future consequent inconvenience.⁷

But though an artist is entitled to insist that the value of his picture should not be left to the estimate of a jury⁸—or a judge in India,—where the parties have by agreement fixed a price, the non-payment of that price will entitle the seller only to damages to that extent. An artist accordingly, who agreed to sell his picture of "The Raising of Lazarus" to some picture-dealers at a given time and under certain circumstances for the sum of £300 and was paid only £50, was held not entitled to the surrender of the picture, as he had himself fixed a value for it.⁹ This value, being his own estimate, was taken by the Court to be a sufficient compensation.¹⁰

¹ *Pattison v. Skillman*, 34 N. J. Eq. 344.

² *McMullen v. Vanzant*, 73 Ill., 190. The maker of the note had here obtained possession of it from the holder under promise to return it or execute another note of the same tenour and amount, and had then destroyed it. He was compelled to execute another note. In *Tuttle v. Moore*, 16 Minn., 123, an agreement by a holder of notes to deliver them up to the maker to be cancelled, notwithstanding they were overdue and in the hands of the original payee, was specifically enforced. The Court said that as the defendant expressly agreed to cancel and deliver the notes, the granting of the relief sought was simply compelling the specific performance of his express contract and was in truth the only adequate and complete remedy for the plaintiff: that if an action were brought on the notes the plaintiff might be prevented from making a successful defence in consequence of lapse of time, death, removal or forgetfulness of witnesses, the loss of documentary evidence and other contingencies not

within his control; and that there was no good reason why the plaintiff should be subjected to this risk, nor any injustice in compelling the defendant to do what he agreed to do. *Waterman*, 20, n. 3.

³ *McGowin v. Remington*, [1849] 22 Pa., 56, 1 Scott, 91.

⁴ *Brady v. Yost*, [1898] 55 Pac. 542.

⁵ *Sloane v. Clauss*, [1901] 59 N. E. R., 884.

⁶ *Brown v. Gilliland*, 3 Dess., 539; *Sarter v. Gordon*, 2 Hill, Ch. 121; *Summers v. Bean*, 13 Gratt., 404.

⁷ *Per Bell, J.*, who continues, "And I take it this is always so where, from the nature of the subject-matter or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie." *McGowin v. Remington*, *supra*.

⁸ *Per Page, Wood, V. C., Dowling v. Betjemann*, [1862] 2 J. & H., 544, 1 Ames, 41.

⁹ *Ibid.*

¹⁰ *Pomeroy, S. P.*, 18n.

But articles of exceptional value do not exhaust the list of things that may form the subject-matter of contract. In fact there is hardly anything that may not form the subject of contract. But even a Court of Equity does not profess to decree a specific performance of contracts of every description.¹ By reason of certain historical conditions, to which I have adverted before, it is only where the legal remedy is inadequate or defective that English Courts of Equity have felt called upon to interfere. And the legal remedy is inadequate or defective where the party aggrieved cannot be compensated by a decree for money. Where the plaintiff must have the thing agreed upon in *specie* or suffer irreparable damage² the Courts of justice vindicate their name and compel the defendant to perform his part of the agreement. The first class of cases therefore that we have to consider is where money damages are an inadequate compensation for the breach of contract. Let us now take some specific instances.

Damages
inadequate.

Chattels
easily
available.

Considering chattels or moveable objects at first, it is important to note that some chattels are readily available and others are not. For instance, Government promissory notes or stock may be purchased every day in the market, but not shares in a railway company which are limited in number.³ In the leading case of *Cud v. Rutter*⁴ Parker, L. C. (afterwards Lord Macclesfield), observed: "£1000 South Sea Stock whether it be A, B, C, or D's is the same thing and in no sort variant." But the same observation would not apply to stock or shares of the East India Company,⁵ or the Patent Fuel Company,⁶ or the Imperial Mercantile Credit Company,⁷ or the Contract Corporation Limited,⁸ or to York Building Stock,⁹ or even Neapolitan Stock.¹⁰ The value of such stock is uncertain and it is difficult

Stock ;
shares

¹ *Flint v. Brandon*, [1808] 8 Ves., 159, 1 Ames, 69.

² *Cf. Errington v. Aynesly*, [1788] 2, Bro. Ch. 341.

³ *Duncuft v. Albrecht*, [1841] 12 Sim. 189, 1 Ames, 55; *Shaw v. Fisher*, [1848] 2 DeG. & Sm. 11, [1855] 5 DeG. M. & G., 596 *Cf. S. R. A.*, s. 12, cl. (c), *ill.*

⁴ [1719] 1 P.W. 570, 1 Ames, 34.

⁵ *Gardener v. Pullen* [1700] 2 Vern., 394, 23 E. R., 853.

⁶ *Poole v. Middleton*, [1861] 29 Beav., 646.

⁷ *Hawkins v. Maltby*, [1867] 3 Ch. 188, (1869) 4 Ch. 100.

⁸ *Paine v. Hutchinson*, [1868] 3 Ch. 388.

⁹ *Colt v. Netterville*, [1725] 2 P. Wms., 304. But see *Dorison v. Westbrook*, 5 Vin. Ab., 540, pl. 22.

¹⁰ *Doloret v. Rothschild*, [1824] 1 Sim & St., 590. But the plaintiff had here also prayed for the delivery of the

to do justice by an award of damages.¹ So where the plaintiff was the purchaser on the refusal of or option upon the stock in a steam-boat, an American Court held he "was dealing for an article which he could not go upon the market and buy, and which no one could deliver to him but the holder with whom he bargained. The shares of stock had for him a peculiar value which could not be compensated by mere damages such as would be recovered at law. Their possession would enable him to control the company and to retain his possession as master of the vessel."²

Again particular articles may be stocked or manufactured by particular dealers only. In such a case where one of these dealers enters into a contract to sell such articles, the contract will be specifically enforced; for even if the manufacture of the articles in question is not guarded by a patent the defendant has practically a monopoly, and "it is impossible with an approach to accuracy to ascertain how much the vendee would suffer from not being able to obtain such articles for use in his business."³ In *Rector of St. David's v. Wood*,⁴ for instance, the defendant undertook to build an edifice with stone of a peculiar kind and texture which he alone could furnish, but

Articles of
limited
supply.

certificates which would constitute him proprietor of the stock and it further appeared that as he was not the original scrip-holder his right to maintain an action at law was doubtful. A contract to pay dividends in a specified way was enforced in *Boardman v. Lake Shore R. R.*, 84 N. Y., 157.

¹ *Waterman*, s. 19. American Courts do not seem to be quite so liberal in decreeing specific relief in respect of corporate stock. See *Pomeroy*, S. P., ss. 18, 19; 3 *Page*, Con., s. 1630.

² *Bumgardner v. Leavitt*, [1891] 35 W. Va., 194; 12 L. R. A., 776; 6 R. C., 646. An agreement for the sale of shares in a company will be specifically enforced even if the sale is made subject to approval by the Directors, unless (*semble*) the latter refuse to permit the sale (*Poole v. Middleton*) [1861] 29 Beav., 646; *Birmingham v. Sheridan*, [1864] 33 Beav., 660. But Lord Chelmsford said in a later case, "The Directors may decline to register, but the transaction is complete as between transferor and trans-

feree" (*Hawkins v. Mallby*) [1867] 3 Ch., [188. 194], and this seems to be the better opinion. Cf. *Fry*, 628; *Re Coalport China Co.*, [1895] 2 Ch., 464. It is generally the duty of a purchaser to procure registration and the vendor may call upon him for indemnity against future calls in respect of the shares. *Shaw v. Fisher*, [1848] 2 DeG. & Sm., 11, *Wynne v. Price*, [1849] 3 DeG. & Sm., 310; *Walker v. Bartlett*, [1856] 18 C. B., 845; *Evans v. Wood*, [1867] 5 Eq., 9; *Paine v. Hutchinson*, [1868] 3 Ch., 388.

³ *Per Devens, J., Adams v. Messinger*, [1888] 147 Mass., 185, 1 Ames, 51. Cf. *Hapgood v. Rosenstock*, 23 Fed. R. 86; 2 *Pomeroy*, Eq. R. s. 749. Cf. *Hughes v. Græme*, [1864] 33 L. J., Q. B., 335, where upon a sale of goods of special mercantile value, inasmuch as exportable free of duty, no other like goods being in the market at the time, seller was enjoined from disposing of the goods in breach of contract.

⁴ (*Oregon*) 41 Am. St. Rep., 860; 6 R. C. 647.

having furnished enough to build two-thirds of the walls, he refused to go on. The Court granted specific performance because, if the defendant was not required to furnish the residue, it would be necessary to use other stone and thus "destroy the harmony and beauty of the building or to tear down the part already built and re-build with other materials." So in *Equitable Gaslight Co. v. Baltimore Coal Tar etc. Manufacturing Co.*,¹ specific performance was decreed of a contract to sell coal-tar which the plaintiff wanted for fulfilling existing contracts and which it was impossible to obtain otherwise than by purchasing "in other and distant cities and transporting the same at a great expense and loss, the amount of which it is impossible to estimate in advance." A similar case was that of *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*,² where a contract to furnish fish-skins for the manufacture of glue was specifically enforced. The Court found that fish-skins were of a very limited production, that most of the producers were under a contract with the defendant company, and that unless relief were given the plaintiff company would find it very difficult, if not impossible, to carry on their business. In all these cases the contract is made under special circumstances and for purposes requiring specific performance to render it of value.³

Necessity
and con-
venience.

Lord Hardwicke suggested an analogous case in *Buxton v. Lister*: "A man may contract for the purchase of a great quantity of timber as a ship carpenter by reason of the vicinity of the timber."⁴ And if the ship-builder is under contract to complete the ship by a given time and the seller fails to supply the timber, an award of damages would hardly answer the justice of the case.⁵ But a distinction should here be made between necessity and mere convenience. A contract therefore for the sale of a quantity of coal from a neighbouring mine, which,

¹[1884] 63 Md., 285, 2 Keener, 35. The Court adopted Pomeroy's proposition "that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced," S. P., s. 15, p. 20.

²[1891] 154 Mass., 92, 12 L. R. A., 563; 2 Keener, 51.

³*Clark v. Flint*, 33 Am. Dec., 733; Lawson, Con., 575.

⁴[1746] 3 Atk., 383, 1 Ames, 49.

⁵Cf. *Pollard v. Clayton*, [1855] 1 K. & J., 462, 477.

however, was not alleged to be either peculiar or such as could not be got elsewhere, was not enforced in *specie* by Jessel, M.R.¹

A contract to sell a certain quantity of wood pulp annually for a term of years has been enforced specifically at New York, as the future price of the wood and the cost of obtaining it was uncertain and damages were difficult to estimate, because of the chances of destruction of the timber by fire or possible action of the government in compulsorily acquiring it for public purposes.² The pulp, however, was to be made from timber growing on a specific tract, and the contract therefore in a sense involved an interest in realty.

An article may not be of exceptional value, but it may be of peculiar importance to a person who requires it for conducting a particular business. In *North v. Great Northern Railway Co.*,³ the plaintiff was a colliery owner who had been using certain waggons in his business. The defendant Company claimed to have a lien upon these waggons and sought to sell them. Stuart, V. C., said, "Where specific things, necessary for conducting a particular business, are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this Court has undoubted jurisdiction to interfere by injunction, and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming assets."⁴

Articles of special importance to requirer.

Similarly suppose a man wants to clear his land in order to turn it to a particular sort of husbandry and sells the timber, with that object, the seller may claim that nothing can answer the justice of the case but the performance of the contract in *specie*.⁵

As some articles may be necessary for a particular purpose that the plaintiff has in hand, so others may be necessary for the enjoyment of some property possessed by the plaintiff. Where, therefore, a landlord let to a tenant a farm together with the stock there and afterwards seized the stock under a distress and bill of sale, Lord Eldon held that there was an

Articles necessary for enjoyment of property.

¹ *Fothergill v. Rowland*, [1873] 17 Eq., 132, 1 Ames, 111. Cf. *Paddock v. Davenport*, [1890] 107 N. C., 710, 717.

² *St. Regis Paper Co. v. Lumber Co.*, 173, N. Y., 149.

³ [1860] 2 Giff. 64, 66 E. R., 28.

⁴ *Ibid*, 69.

⁵ *Per Hardwicke, L. C., Buxton v. Lister*, [1746] 3 Atk., 383, 1 Ames, 49.

entire contract to let both the estate and the chattels, and the enjoyment of the latter was requisite for the enjoyment of the former, and the landlord was bound specifically to restore the stock.¹ So a covenant in a lease relating to alum works to leave certain stock on the premises was specifically enforced, because it was found that the non-performance of the covenant would greatly damage the trade at the works.² It may be generally said that a stock of goods connected with an existing business has a special and peculiar value in connection with the transfer of such business. A contract therefore to sell an entire stock of goods³ or an interest in a partnership⁴ will be specifically enforced. An agreement for the sale of a business as a going concern together with the business premises is clearly a subject for specific performance.⁵

Stock connected with business.

Lord Westbury's view.

Lord Westbury seems to have thought that where there was a contract for the delivery of specific chattel, a court of equity should decree specific performance. His Lordship said, "A contract for the sale of goods, as for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract and for an injunction (if necessary) to restrain the seller from delivering it to any other person."⁶ But it may be respectfully doubted if the rule is not too broadly stated in the above *dictum*. It is not so much the specific character of the subject-matter of the contract which is the real test, as the importance of that

Test: not specific character, but importance.

¹ *Nutbrown v. Thornton*, [1804] 10 Ves. 159.

² *Ward v. Buckingham*, 10 Ves. 161 (cited). *Perin v. Megibben*, 53 Fed., 86 (sale of corporate stock of distillery).

³ *Roymond Syndicate v. Brown*, 124 Fed., 80.

⁴ *Ralston v. Ihmsen*, 204 Pa. St., 588; 3 Page, Com., 2469.

⁵ *Hawskley v. Oultram*, [1892] 3 Ch.,

359.

⁶ *Holroyd v. Marshall*, [1862] 10 H. L. C., 209, 210. Cf. *Tailby v. Official Receiver*, [1888] 13 A. C., 523, 535. It has been suggested that in such a case the option ought to lie with the purchaser whether he will have the chattel contracted for or damages in lieu thereof. 2 Wh. & T., 8th ed. 430 (notes).

specific subject-matter which renders monetary compensation inadequate. It is upon this ground that an agreement entered into to pay in gold coins has been specifically enforced when gold and silver bankbills have been found to have different market values.² And where delivery of chattels is part of a contract otherwise capable of being enforced, specific performance may be decreed.³ So where a plaintiff has purchased several articles and can be compensated in damages only for some he will have a decree for specific performance in respect of all⁴. A contract to convey real and personal property together, *e.g.*, to sell a furnished house,⁵ will be enforced in *specie*.

A distinction has been drawn by many judges, in exercising this equitable jurisdiction, between personalty and realty, or moveable and immoveable property, as Indian lawyers are accustomed to call them. And the Indian Legislature has attempted to formulate this distinction in the form of a more or less rigid presumption of law. The explanation appended to section 12 of the Specific Relief Act runs thus :—

Moveable
and
immoveable
property.

“Unless and until the contrary is proved the court shall presume⁶ that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer moveable property can be thus relieved.”⁷

This is unfortunate, for though there is no doubt that Courts of Equity in England and America act upon the general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, yet as has been pointed out more than once, this rule “does not rest on the ground of any distinction between the two classes of property other than that which arises from

¹ Cf. Fry, 35, where are cited, among others *Heathrote v. North Staffordshire Ry. Co.* [1850] 2 Mac. & G., 112; *Hoare v. Dresser*, [1859] 7 H. L. C., 317-8 (per Lord Cranworth).

² *Hall v. Hills*, 2 Bush, 532; *Waterman*, 2.

³ *Marsh v. Milligan*, [1857] 3 Jur.,

N. S., 979.

⁴ *McGowin v. Remington*, [1849] 12 Pa. St. 56, 1 Scott, 90.

⁵ *Fowler v. Sands*, 50 Atl., 1067.

⁶ Cf. I. Ev. A., s. 4 (def. ‘shall presume’)

⁷ Cf. *Pomeroy*, S. P., 14.

their character."¹ Vice-Chancellor Leach said in *Adderly v. Dixon* :²

"Courts of Equity decree the specific performance of contracts not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not generally decree performance of a contract for the sale of goods or stock, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for ; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods."

So Mr. Justice Devens of the Supreme Judicial Court of Massachusetts observed :

"Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded."³

Test : inadequacy of damages.

The test therefore that a Court should apply in determining if a particular contract should be specifically enforced is not whether the subject-matter of the contract is moveable or

¹ *Adams v. Messinger*, [1888] 147 Mass, 185, 1 Ames, 50. "It is well settled," says Pomeroy, "that the different modes of treating the two kinds of contracts do not result from any different qualities inherent in the very nature of land and chattels, which make it possible to

enforce the one and not the other, but from matters which are entirely incidental and collateral to the subject-matter." *S.P.*, 11. But see Bigelow's note, 2 Story, *Eq.*, 31-2.

² [1824] 1 Sim. & St., 607 ; 1 Ames, 58.

³ *Adams v. Messinger*, *supra*, 1 Ames, 50-1.

immoveable property, but whether the said subject-matter would find a complete and satisfactory equivalent in money. "If damages would not be a sufficient compensation, the principle on which a Court of Equity decrees specific performance, is just as applicable to a contract for the sale and purchase of chattels, as to a contract for the sale and purchase of land.¹ But as a matter of experience we often find that a plot of land or a house has some special features which makes it an object of desire, quite irrespective of its market-value.² "The locality, character, vicinage, soil, easements or accommodations of the land generally may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations; and therefore a compensation in damages would not be adequate relief."³ "One parcel of land may vary from and be more commodious, pleasant or convenient than another parcel of land,"⁴ besides it is property of a permanent nature.⁵ But the same cannot always be said of moveables. This matter of experience we reduce to the form of a rule of practice, which in course of time easily slides into a stereotyped provision of positive law. As a result, we find Courts of Equity enforcing in *specie* contracts for sale of realty as a matter of course,⁶ whereas contracts for sale of personalty are weighed with great nicety.⁷ The explanation of this rule has to be sought in the historical conditions under which the jurisdiction of the Court of Chancery has grown up,⁸ and not in any considerations of equity or principle.⁹ For, strictly speaking, it is immaterial whether the contract relates to realty or to personalty,

¹ *Per* Kindersley, V. C., *Falcke v. Gray* [1869] 4 Drew., 651. Cf. 3 Parsons, *Con.*, 388.

² "One landed estate, though of precisely the same market-value as another, may be entirely different in every other circumstance that makes it an object of desire," Pomeroy, *S. P.*, 10.

³ 2 Story, *Eq.*, s. 746, p. 63.

⁴ *Per* Parker, L. C., *Cud v. Rutter* [1719] 1 P. Wms., 570, 1 Ames, 54.

⁵ *Per* Hardwicke, L. C., *Buxton v. Lister* [1746] 3 Atk., 383, 1 Ames, 48.

⁶ "The remedy in equity is not

refused, because in the individual case these reasons may not hold good, and damages in an action at law may be adequate relief," 1 Pomeroy, *Eq. J.*, s. 221; *S. P.*, 12. It is doubtful, however, if, in view of the provisions of s. 12, (c) and Explan., and s. 21 (a), *S. R. A.*, Indian Courts will take an equally broad view.

⁷ *Per* Hardwicke, L. C., *Buxton v. Lister*, *supra*, 1 Ames, 50; *Mechanics' Bank v. Setton*, 1 Peters, 299, 304.

⁸ Pollock, *F. M. M.*, 22.

⁹ *Phillips v. Berger*, 2 Barb., 609; Pomeroy, *S. P.* 13 n.

Agreement
to sell or
let realty.

in either case it is equally against conscience that a promisor should have a right of election whether he will perform his contract or only pay damages for the breach of it. The restriction of the relief therefore stands not so much upon any general principle *ex æquo et bono*, as upon the general convenience of leaving the promisee to his remedy in damages where that will be effective, that is, give him a clear and full compensation.¹ A contract therefore to sell a plot of land or a house will generally be specifically performed,² and so will most contracts relating to realty. For instance, there may be a bond to convey land,³ or an agreement for a tenancy from year to year,⁴ or for even a shorter period.⁵

Renewal or
assignment
of lease.

An agreement to give or renew or assign a lease is specifically enforced.⁶ Lord Thurlow doubted where a man entitled to an estate of inheritance agreed to make a lease with a covenant for perpetual renewal, each lease to contain the same covenant for ever, such covenant was really intended by the lessor and could be executed by the Court.⁷ But Lord Eldon maintained that decided cases had established the rule that covenants of this character were to be specifically performed.⁸ A covenant to renew on the part of the defendant, however, must be distinctly and clearly shown, and it must appear that the plaintiff has not been lacking in diligence.⁹ But an agreement for a perpetual renewal will not be inferred unless the intention is expressed in a manner free from all ambiguity.¹⁰

¹ 2 Story, *Eq.*, 717a.

² *Lennon v. Napper*, [1802] 2 Sch. & L., 684; *Hunsraj Morarjee v. Ranchordas Dharmsey* [1905] 7 Bom. L. R., 319 (contract to sell land situate outside the jurisdiction of the original side of the Bombay High Court enforced by that Court); *Hari Chand v. Bura Mal* [1906] P. L. R. No. 27 (contract of sale of land entered into before the Punjab Alienation of Land Act came into force).

³ 4 Pomeroy, *Eq. J.*, s. 1402.

⁴ *Manchester Brewery v. Coombs* [1901] 2 Ch., 395; *Fawcett, L. & T.* 117.

⁵ *Lever v. Koffler*, [1901] 1 Ch., 543, (ex plig. *Clayton v. Illingworth* [1853] 10 Hare, 451). *Distinguish Glasse v. Wooleger*, [1897] 41 Sol. J., 573 (lease for a day).

⁶ *Harding v. Metropolitan Railway Co.* [1872] 7 Ch., 154.

⁷ *Somerville v. Chapman* [1779] 1 Bro. Ch., 61; *Tritton v. Foote* [1789] 2 ibid, 636; *Rees v. Dacre*, 9 Ves., 332 (cited).

⁸ *Willan v. Willan* [1810] 16 Ves., 72, 84.

⁹ *Lennon v. Napper* [1802] 2 Sch. & Lef., 682; *Eton v. Lyon*, [1798] 3 Ves., 690. In *Jaggi Lal v. Cooper* [1905] 27 All, 696, it was held, upon a construction of the lease, that time was not of the essence of the contract and the plaintiff was entitled to renewal, though he had allowed some months to elapse after the expiry of the original term.

¹⁰ *Brown v. Tighe* [1834] 2 Cl. & F., 396; *Boynham v. Guy's Hospital*

An agreement by a tenant to surrender a given estate to his landlord upon a certain event is deemed eminently fit for specific performance.¹ Surrender of tenancy.

An agreement to execute a mortgage with an immediate power of sale has also been specifically enforced, where it has appeared that money has actually been advanced by the plaintiff, and the defendant is not prepared to pay off the advance at once.² In fact, as a consequence of the right to specific performance of such an agreement, it has been held in England that an agreement for value to give a mortgage or pledge of even specified chattels creates an equitable lien.³ Mortgage for money advanced.

Where property is agreed to be secured for certain purposes and in certain events, and there is danger of its being alienated or squandered, the contract may be specifically enforced by securing the property for the agreed purposes.⁴

A compromise is an agreement and will be enforced as such, if otherwise unobjectionable.⁵ The relinquishment or abandonment of a claim in good faith is consideration for the compromise.⁶ It is not required that the claim should be a good one, for the right must always be on one side or the other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of rights contrary thereto.⁷ Where, therefore, parties, "whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective claims among themselves, every Court must feel disposed to support the conclusions or Compromise.

[1796] 3 Ves., 295; *Swinburne v. Milburn* [1884] 9 A. C., 844, 850; *Nicholson v. Smith*, [1882] 22 Ch. D., 64; *Fawcett, L. & T.*, 166-7; *Waterman*, s. 36.

¹ *Crocker v. Orpen* [1846] 3 Jones & Lat., 601.

² *Hermann v. Hodges* [1873] 16 Eq., 18; *Ashton v. Corrigan* [1871] 13 Eq., 76; cf. *Sporle v. Wheyman* [1855] 20 Beav., 607, 2 Keener, 55 (copyhold); *Taylor v. Eckersley* [1876] 2 Ch. D., 302 (chattels); *South African Territories v. Wallington* [1898] A. C., 309; *Deau v. Anderson*, 34 N. J., Eq., 496. *Contra*, *Brown v. Van Winkle Co.*

[1906] 6 L. R. A., N. S., 585.

³ *Martin v. Read* [1862] 11 C. R., n.s., 730. In America, a different rule seems to prevail. See *Williston, Cases on Bankruptcy*, 338, n. 1. *Secus* as to realty, 1 Jones, *Mort.*, s. 163; 3 *Pomeroy, Eq. J.*, s. 1237.

⁴ 2 *Story, Eq.*, s. 730; *Flight v. Cook* [1755] 2 Ves. Sr., 619, 28 E. R. 394.

⁵ 1 *Story, op. cit.*, ss. 131-2.

⁶ *Pollock, Con.* (W. W.), 215. Cf., *Bharath Singh v. Balbhadur* [1913] 20 I. C., 429.

⁷ *Story, supra*; *Lucy's case*, [1853] 4 DeG. M. & G., 355.

agreements to which they may come fairly at the time, and that notwithstanding the discovery of some common error,"¹ or the subsequent decision of a court which shows that the rights of the parties were different from what they supposed.²

Family
arrange-
ment.

It is upon this ground that family settlements or arrangements involving the giving up, partition or exchange of land are always looked upon favourably by Courts of Equity. "Whenever doubts and disputes have arisen," said Sugden, C., "with regard to the rights of different members of the same family and fair compromises have been entered into to preserve the harmony and affection, or to save the honour, of the family, those arrangements have been sustained by Courts of Equity, albeit perhaps resting on grounds which would not have been satisfactory if the transaction had occurred between mere strangers."³ But the agreement in settlement of a family dispute must be final, otherwise it may be only the germ of future litigation, and specific performance in that case will be refused.⁴

Compromise
respecting
personalty.

But the equitable jurisdiction in respect of compromises is not limited to those which relate to⁵ or create a charge upon land.⁶ An agreement between a creditor and a third person

¹ *Per* Lord Langdale, *Pickering v. Pickering* [1839] 2 Beav., 31, 56. Cf. *Gibbons v. Caunt* [1799] 4 Ves., 840, 849, 31 E. R., 440.

² *Lantou v. Campion* [1854] 18 Beav., 57; *Shib Lal v. Collector of Bareilly* [1894] 16 All., 423, 433.

³ *Westby v. Westby* [1842] 2 Dr. & War., 503; *Stapilton v. Stapilton* [1737] 1 Wh. & T., 223; *Gordon v. Gordon* [1816] 3 Sw., 400; *Stockley v. Stockley*, [1812] 1 V. & B., 23. Even a voluntary conveyance made with a view to a family settlement, if there be no fraud on a third person, is binding in equity; *Clavering v. Clavering* [1704] 2 Vern, 473, 23 E. R., 904; *Boughton v. Boughton* [1739] 1 Atk., 625; *Johnson v. Smith*, [1749] 1 Ves. Sr., 314. Defective conveyances by parents as a provision for children have often been aided in equity, and the principle is applicable to brothers and sisters; *Waterman*, s. 40, citing *Browne v. Browne*, 1 Har. & Johns., 430, *Jones v. Jones*, 6 Conn., 111. In *Chubb v. Peckham*, 13 N. J. Eq., 207, a

decree was given that the defendant should perform his contract to support his parents by paying a weekly provision. 1 Ames, 83, n. 1.

⁴ *Wistar's Appeal*, 80 Pa. St., 484; *Waterman*, 57.

⁵ Thus where two persons agreed upon a boundary line between their lands by a compromise in writing and there was no appearance of unfairness, fraud or mistake, specific performance was decreed. *Fugatt v. Robinson*, 18 B. Mon., 680; *Waterman*, 56. Compromise will bind a corporation too. Cf. *Holsworthy Urban Council v. Holsworthy Rural Council* [1907] 76 L. J. Ch., 389, 393.

⁶ Thus where a father and a son compromised a dispute as to a title to a farm by an agreement under seal, binding the father to pay the son 2,500 dollars in three instalments and sell the land, an American Court held there was a charge upon the land and the son was entitled to a decree for specific performance. The unpaid money became due after a reasonable



whereby the former promised to compromise his claim against his debtor, has been specifically enforced in America.¹ The principle is clear that even in the case of personal property, its nature must be examined to see if pecuniary damages are an adequate or a practicable remedy.²

It is proper to mention here that a vendor of such property as is regarded of peculiar value by Courts of Equity and in respect of which contracts of sale are enforced in *specie* at the instance of the purchaser, is also entitled to ask for specific performance of the contract of purchase as against the purchaser.³ This may seem anomalous, for, generally speaking, the vendor, say of a plot of land, has only to receive a certain fixed sum of money,⁴ and he can always bring an action to recover damages for breach of contract. But, as was answered by the counsel for the plaintiff in the old case of *Lewis v. Lord Lechmere*,⁵ "upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and in equity, the vendor would not be upon a par with him, unless he had so too: that the remedy the vendor had at law was not adequate to what he had in this (Chancery) Court; for at law they only could give him the difference in damages, whereas he might for particular reasons

Vendor's rights similar to purchaser's.

lapse of time for the father to sell the land and realise from its sale, and the Court might in such a case properly appoint a trustee to make the sale. *Johnson v. Johnson*, 40 Md., 189; *Waterman*, 57.

¹ *Phillips v. Berger*, 8 Barb., 527; *Waterman*, 56.

² *Clark v. Flint*, 22 Pick., 231. 2 Story, *Eq.*, s. 718.

³ *Clifford v. Turrel* [1841] 1 Y. & C. Ch., 138, 150, 62 E. R., 826, 831; *affd.*, 14 L. J. Ch. 359 (lease of land; *Walker v. Eastern Counties Ry., Co.* [1848] 6 Hare, 594 (land); *Kenney v. Wexham* [1822] 6 Madd., 355 (annuity); *Hope v. Walter*, [1899] 1 Ch., 877 (land); *Cogent v. Gibson* [1864] 33 Beav., 557, 1 Ames, 56 (patent right); *Withy v. Cottle* [1823] 1 Sim. & St., 174, 1 Ames, 57 (annuity); *Adderley v. Dixon* [1824] 1 S. & S., 667 (debts). Sir E. Fry remarks: "It does not appear to follow from the authorities referred to or from principle that the vendor of a chattel can maintain an action for specific performance in all cases where a purchaser of the same chat-

tel could do so" (*Sp. Per.*, 35). But *vide* the last three cases cited; and if the rule is to be accounted for by reference to the doctrine of mutuality, it is not easy to see why, wherever an equitable remedial right in the vendee is recognised, a corresponding remedial right should not be admitted in favour of the vendor. Cf. 2 Pomeroy, *Eq. R.*, s. 747, p. 1262; 2 Wh. & T., 12th. ed. 431 (notes).

⁴ "The suit by the vendor for the specific performance of an ordinary land contract is really brought for the recovery of money alone and it differs from the suit to enforce a vendor's lien in the fact that the judgment is for the recovery of money generally and not out of the land itself as a special fund," 1 Pomeroy, *Eq. J.*, s. 112, n. 1. In Massachusetts, where the plaintiff is entitled to recover the same amount of money at law, as he would receive in equity, he cannot apparently sue in equity. *Jones v. Newhall* [1874] 115 Mass., 244, 1 Ames, 56. But no such difficulty can arise in India.

⁵ [1722] 10 Mod., 503.

stand in need of the whole sum.¹ Besides by the articles the land is bound, and the vendor is in nature of a trustee for the vendee; and whether a recovery in an action of law upon the articles may make cease to be so is not entirely clear." Lord Macclesfield allowed this contention, and ruled that the remedy the vendor had at law was not adequate to that of a bill in equity for specific performance. The sale may have been made for other than a mere money consideration, and the right of the vendor to be relieved from the responsibilities appertaining to the ownership, has been said to be sufficient to sustain the suit even where the consideration is paid.² Sir Edward Fry refers to *Eastern Counties Ry. Co. v. Hawkes*³ and *Lewis v. Lord Lechmere*,⁴ and remarks that "damages will not place the vendor (of land) in the same situation as if the contract had been performed; for then he would have got rid of the land and of all the burdens and liabilities attaching to it, and would have the purchase-money in his pocket; whereas, after an action for damages, he still has the land and, in addition, damages,—representing, in the opinion of a jury, the difference between the stipulated price and the price which it would probably fetch, if resold, together with incidental expenses and any special damage which he may have suffered. The doctrine of equity with respect to the conversion of the land into money, and of the money into land upon the execution of the contract, and the lien which the vendor has on the estate for the purchase-money and his right to enforce this by the aid of the Court, are additional reasons for extending the remedy to both parties."⁵

Whatever may be the reasons—and it is possible that different reasons may have influenced different judges at different times—it is now quite settled that a vendor is entitled to ask for specific performance whenever a purchaser is, though a Court may feel more inclined to listen to objections made against him seeking such relief, "because he can get complete

¹ *Hodges v. Kowing* [1889] 58 Conn., 12, 2 Keener, 95.

² *Shaw v. Fisher* [1855] 5 DeG. M. & G., 596; *Wynne v. Price* [1849] 3 DeG. & S. 310; *Cheale v. Kenward* [1858] 3 DeG. & J., 527; *Humble v. Langston* [1844] 7 M. & W., 517; *Walker v.*

Bartlett [1856] 18 C. B., 845.

³ [1855] 5 H. L. C., 331, 359, 379.

⁴ [1722] 10 Mod., 503.

⁵ *S. P.*, s. 72, pp. 30-1. Cf. 2 Dart., V. & P., 1024; *Waterman*, s. 15, pp. 17-19; 2 *Pomeroy*, *Eq. R. s.* 747, pp. 1261-3.

relief at law."¹ The principle in Professor Langdell's words is this: "If both sides of the contract be of such a nature that equity *can* enforce them, and one side be of such a nature that equity *ought* to enforce it, then equity will enforce both sides, though the other side consists merely, *e.g.*, in the payment of money; and this equity will do, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well."²

An award has been specifically enforced by Chancery Award. Courts in England and America where it directs the performance of some specific thing, *e.g.*, the conveyance of an estate or the assignment of securities,³ the renewal of a lease at a rent fixed by arbitrators or the adoption of a boundary line.⁴ The reason, in Lord Eldon's words, is "because the award supposes an agreement between the parties and contains no more than the terms of that agreement ascertained by a third person," the bill therefore "calls only for a specific performance of an agreement in another shape."⁵ But the arbitrators being judges of the parties' own choosing, Lord Hardwicke ruled that the award could not be objected to on the ground of its being unreasonable.⁶ Even if judges so chosen erroneously decide a question of law, the court will abide by that decision.⁷ An agreement embodied in an award therefore cannot be placed on quite the same footing as a common agreement. "Having

¹ *Webb v. Direct London and Portsmouth Ry. Co.* [1852] 1 DeG. M. & G., 521, 528-9. The decree granted to the vendor is not for the money agreed to be paid with an award of execution, if it is not, but it should direct a sale of the premises in case of default, and should require the plaintiff to deposit with the court a proper conveyance of the land. *Andrews v. Sullivan*, 43 Am. Dec., 53; *Lawson, Con.*, 578. In *Porter v. Frenchman's Bay Co.*, [1892] 84 Me., 195, 2 Keener, 96, relief was refused, because remedy at law was not shown to be inadequate and incomplete.

² *Eq. J.*, 51.

³ *Norton v. Mascal*, [1687] 2 Vern., 24, 2 Keener, 109; *Hall v. Hardy* [1733] 3 P. Wms., 187 (the reporter

notes that an award simply to pay money is not enforced, p. 190), 1 Ames, 65; *Walters v. Morgan* [1792] 2 Cox., 369; *Bouck v. Wilber* [1820] 4 John. Ch. 405, 2 Keener, 125.

⁴ *Waterman*, s. 45, n. 3.

⁵ *Wood v. Griffith* [1818] 1 Sw., 43, 54, 2 Keener, 114. "An award is treated as the continuation (and consummation) of the agreement to submit. If it directs acts to be done which, if stipulated in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced," 4 Pomeroy, *Eq. J.*, s. 1402; *S. P.*, s. 21.

⁶ *Ives v. Metcalfe* [1737] 1 Atk., 64.

⁷ *Cf. Gholam Khan v. Muhammad Hasan* [1901] 29 Cal., 167.

submitted to a judge chosen by themselves," says Lord Eldon, "the parties give to his acts an authority which the court would not allow to their own."¹ But, where an arbitrator acts in excess of the authority given him, the court will refuse to enforce his award. The case of *Nickels v. Hancock*² is in point. There the judgment of the arbitrator went to the length of destroying the right of one of the parties to the agreement of submission, though the parties never authorised him to decide that one of them had no right and should acquire no interest in the subject in dispute.³ In India, too, a suit may be brought to enforce an award,⁴ but a more convenient and expeditious procedure is to have it made a rule of court under the provisions of Schedule II of the Code of Civil Procedure.⁵ Upon an application being made under paragraph 20 the proceedings are registered as a suit, and notices are issued to the parties other than those who have applied. Cause may be shown under paragraph 21 upon the grounds indicated in paragraphs 14 and 15. That is, it may be shown (a) in respect of the award itself, that (i) it goes beyond or falls short of the terms of reference,⁶ or (ii) it is too uncertain to be executed,⁷ or (iii) it is *ex facie* illegal;⁸ (b) in respect of the arbitrator, that he has been guilty of corruption or misconduct;⁹ and (c) in respect of a party to the reference, that he has been guilty of fraudulent concealment or of wilful deceit towards the arbitrator. There is an implied

Summary
procedure,
C. P. C.,
paras. 20-1,
Sch. II.

¹ *Wood v. Griffith*, *supra*.

² [1855] 7 DeG. M. & G., 300.

³ *Ibid.* at 325. Cf. *Mustafa v. Phulja* [1905] 27 All., 526.

⁴ *Muhammad Newaz Khan v. Alam Khan* [1891] 18 Cal., 414, P. C.; *Sarabjeet v. Gouree Pershad* [1807] 7 W. R., 269; *Kota Seetamma v. Kollupurla* [1875] 8 Mad. H. C. R., 81; *Gowdu Magata v. Gowdu Bhagavan* [18 8] 22 Mad., 299, 300; and other authorities cited in D. C. Banerjee's art., 4 A. L. J. 219-222. See also S. R. A., s. 30; *W. Wathawa v. Nga Po* [1906] U. B. R.; 30. Cf. *Jafri Begam v. Ali Raza* [1901] 23 All., 383, P. C.

⁵ Indian Arbitration Act (IX of 1899) also lays down a special procedure for the presidency towns. See Morison's edition.

⁶ Cf. Russell on Arbitration, 195, 370,

371-2; *Dandekar v. Dandekar* [1882] 6 Bom., 663; *Juala Singh v. Narain Das* [1881] 3 All., 541; *Dagdusa v. Blunkan* [1884] 9 Bom., 82.

⁷ Cf. *Wakefield v. Llanelly Ry. & Dock Co.* [1885] 3 DeG. J. & S., 11.

⁸ Cf. *Dinn v. Blake* [1875] 10 C. P., 388; *Hutcheson v. Eaton* [1884] 13 Q. B. D., 861, 867; *Nanak Chand v. Ram Narayan* [1879] 2 All., 181.

⁹ *Malmesbury Ry. Co. v. Budd* [1876] 2 Ch. D., 113; *Beddow v. Beddow* [1878] 9 Ch. D., 89 (in these cases, prior to the making of the award, injunctions were issued against corrupt or misconducting arbitrators not to proceed with the arbitration.) As to misconduct, see *Adams v. Great North Scotland Ry.* [1891] A. C. 41; *Ganga Suhai v. Lekhray Singh* [1886] 9 All., 253.

condition in the submission of the parties that the award shall dispose of all the matters referred, but neither more nor less,¹ that it must be a final decision in relation to their agreement. An unintelligible or inconsistent or vague award cannot be put into execution, but the interpretation of an award should be fair and reasonable, sensible and liberal, and not according to any technical canons of construction.² An award that directs an illegal thing to be done will not be enforced, nor apparently one which proceeds upon a gross and palpable mistake of law, unless a doubtful question of law has been expressly left to the arbitrator's determination.³ Misconduct in an arbitrator does not necessarily imply moral impropriety,⁴ and though he need not be technically accurate in his procedure, he should carry out whatever is essential to the administration of justice.⁵ If the court finds any of these objections well founded,⁶ or if it appears that there was no submission to arbitration at all,⁷ it should reject the application; otherwise it shall pass a decree in accordance with the terms of the award. But the validity of an award will not be affected, because the party in whose favour it was, had never applied to have it filed in court.⁸ And a valid award operates to merge and extinguish all claims embraced in the submission, and after it had been made, the submission and the award furnish the only basis by which the rights of the parties are to be determined, and they constitute a bar to any action on the original demand.⁹

All contracts which relate to realty are looked upon with favour by courts of equity. We have already seen that Lord Eldon enforced a contract part of which related to realty and part to personalty, *viz.*, stock on a farm.¹⁰ The learned

¹ *Makund Ram v. Saligram* [1894] 21 Cal., 590. 6-0, P.C. Cf. *Rani Bhagoti v. Itani Chunder* [1885] 11 Cal., 386, P.C.

² Cf. Russell, *op. cit.*, 198.

³ *Knox v. Symmonds* [1791] 1 Ves., 369; Russell, *Arb.*, 355.

⁴ *Kalicharan v. Sarat Chunder* [1903] 30 Cal., 397.

⁵ *Thorburn v. Barnes* [1867] 2 C. P., 384.

⁶ *Mustafa Khan v. Phuljibibi* [1905] 27 All., 526.

⁷ *Manilal Haragorandas v. Vanamaldas Amratlal*, [1905] 29 Bom., 621, F. B. (authorities collected).

⁸ *Muhammad Nawaz Khan v. Alam Khan* [1891] 18 Cal., 411, P. C.

⁹ *Per Mookerjee, J., Bha'aburi Saha v. Beluri Lal Basak*, [1906] 33 Cal., 881, 4 C. L. J. 162, 168, citing *inter alia*, *Curley v. Dean* [1822] 10 Am. Dec., 140, and *Clegg v. Dearden* [1848] 12 Q. B., 576.

¹⁰ *Nutbrown v. Thornton* [1791] 10 Ves., 159, ante., 117.

Contract to
build.

Chancellor treated the whole contract as single. Similarly, Lord Hardwicke enforced against a lessee a covenant to build, upon the ground that "to build is one entire single thing and, if not done, prevents that security which the City of London (lessor) has for the rent by virtue of the lease."¹ But the views of the courts of equity seem to have gone through a process of development with regard to the subject of building contracts. To quote Collins, L. J.: "In early times they seem to have granted decrees for specific performance in such cases.² Then came a period in which they would not grant such decrees on the ground that the court could not undertake to supervise the performance of the contract.³ Later on, again, they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner."⁴ In the case from which the above quotation is taken, A. L. Smith, M. R., summed up the result of the authorities thus: "Where there is a definite contract by which a person who has acquired land in consideration thereof has agreed to erect on the land so acquired a building of which the particulars are clearly specified and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by courts of equity in relation to such matters, specific performance ought to be ordered."⁵ The conditions necessary to confer jurisdiction then are:—

(i) the work to be done is clearly defined,⁶

¹ *City of London v. Nash* [1747] 3 Atk., 512.

² Cf. *Holt v. Holt* [1694] 1 Eq. Ab. 274, pl. 11, 1 Ames, 68; *Allen v. Harding* [1708] 2 Eq. Ab. 17, pl. 6; *Pembroke v. Thorpe*, [1740] 3 Sw., 437.

³ Of this objection, A. L. Smith, M. R., observed (in the same case), "I have never seen the force," 1 Ames, 77. See also *Storer v. G. W. Ry. Co.* [1842] 2 Y. & C. Ch., 48, 53, 63 E. R., 23: "There is no difficulty in enforcing such a decree. The court has to order the thing to be done, and then it is a question capable of solution,

whether the order has been obeyed," per Knight-Brace, V. C.

⁴ *Mayor, etc., of Wolverhampton v. Emmons* [1901] 1 K. B., 515, 523, 1 Ames, 78. Cf. *Moseley v. Virgin* [1796] 3 Ves., 184; *Cubitt v. Smith* [1864] 11 L. T., 298; *Ryan v. Mutual*, W. C. Association [1893] 1 Ch., 116, 128; *Molyneux v. Richard* [1906] 1 Ch., 34.

⁵ *Ibid.*, 70 L. J., K. B., 434 (Romer, L. J.)

⁶ But mere statement of estimated value is not sufficient definition, *Brace v. Wehnert* [1858] 25 Beav., 348.

(ii) the plaintiff has a material interest in its execution which cannot be adequately compensated for by damages,

(iii) the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done.¹

And the authorities seem to establish that, where these conditions are satisfied, specific performance will be ordered irrespective of the fact that the case arises between a vendor and a vendee,² a lessor and a lessee, or parties who stand in some other relation to one another. The plaintiff, however, should be shown to have an interest in the use or maintenance of the buildings, works or roads, either by way of reservation or as an adjoining landowner or even as one of the public.³ The Scotch courts⁴ and some of the American courts⁵ exercise a more extensive jurisdiction in respect of these building contracts, and Mr. Justice Story justifies this upon the following forcible grounds:—

“If the suit is brought before any building or rebuilding by the party claiming the benefit of the covenant, the damages must be quite conjectural and incapable of being reduced to any absolute certainty; and if the suit is brought afterward, still the question must be left open, whether more or less than

Story's
views.

¹ *Fry*, 42; 2 *Williams, V. & P.* 995, where it is pointed out (*n. y.*) that *Hepburn v. Leather* [1884] 50 L. T., 66, in which the third condition was not satisfied—the covenant being by a purchaser to erect buildings on adjoining land of the vendor—was not a case for specific performance. Prof. Pomeroy classifies English cases under four heads, *viz.*, (1) where the agreement is in its nature defined; (2) where the defendant has contracted to construct some work, which is defined, on his own land and where the plaintiff has a material interest in the execution thereof, which is not susceptible of adequate compensation in damages; (3) where the defendant has undertaken to construct certain works upon land acquired by conveyance from the plaintiff, so that the plaintiff, having parted with his land, cannot erect the stipulated structures thereon at his own cost, and thus ascertain the amount which he should be entitled to recover from the de-

fendant as damages for the breach of the contract; and (4) where there has been a part performance of such a contract, so that the defendant has received and is enjoying the benefits of it in *specie*. *S. P.*, s. 23. *Lawrence v. Saratoga L. Ry. Co.* [1885] 36 Hun. 467, 2 Keener, 175.

² *Waterman, Sp. Per.* 35, suggests a distinction between such cases and other cases.

³ 2 *Williams, V. & P.*, 995; *Price v. Mayor, etc., of Penzance* [1845] 4 Ha., 506. So, where it was part of an agreement to sell land that the vendor should execute works on adjoining land of his own, the agreement would be specifically enforced against him. *Wells v. Maxwell* [1863] 32 Beav., 408.

⁴ *Clarke v. Glasgow Assurance Co.* [1854] 1 McQu., 668.

⁵ *Stuyvesant v. Mayor of New York* 11 Paige Ch. 414 (agreement to open drain through defendant's land), and other cases cited in 1 Ames, 79 *u.*

the exact sum required has been expended upon the building, which enquiry must always be at the peril of the plaintiff. Such a covenant does not admit of any exact compensation in damages from another circumstance: the changing value of the materials at different times according to the various demands of the market. It seems against conscience to compel a party at his own peril to advance his money to perform what properly belongs to another, when it may often happen, either from his want of skill or means, that at every step he may be obliged to encounter personal obstacles or to make personal sacrifices, for which no real compensation can ever be made. In all such cases, courts of equity ought not to decline the jurisdiction whenever the remedy at law is doubtful in its nature, extent, operation or adequacy."¹

Scotch and
French
practice.

When Scottish courts have to deal with contracts to build they generally appoint some properly qualified person under whose superintendence the work is directed to be executed.² The French Law, on the other hand, authorises the injured party to execute the work at the expense of the defaulter, where default has been made in the execution of works contracted to be done.³ There is no reason why either or both of these courses should not be followed by courts in India, and the second illustration of clause (c), section 12, Specific Relief Act, possibly indicates an inclination of the Indian Legislature in favour of the Scotch practice.

Price v.
Penzance
Corp.

I will now give a couple of instances of cases where building contracts have been specifically enforced. Price had sold to the Municipal Corporation of Penzance certain lands, and the vendees by the deed of sale had covenanted forthwith to make a road and erect a market-house on the parcel sold. The Corporation entered and made the road, but neglected to build the market-house. Price's bill for specific performance was sustained by Wigram, V. C., who observed that the defendants having had the benefit of the contract in *specie*, the court would

¹ 2 Eq., s. 728. But see *Ross v. Union Pacific Ry. Co.* [1863] 1 Woolw., 26, 2 Keener, 150 (*per* Miller, J.).

² Fry, 43.

³ Code Civil, ss. 1142-4; Fry, p. 43. Cf. *Wells v. Maxwell* [1863] 32 Beav., 408, 419.

go to any length which it could to compel them to perform their contract in *specie*.¹

In another case, the plaintiffs were the Corporation of Wolverhampton. They were possessed of a piece of land abutting on a street upon which they were desirous of having new buildings erected for the improvement of the town and also for the purpose of increasing the rateable value of the property. The defendant, who was desirous of engaging in a building speculation, purchased this piece of land and covenanted to erect a building or buildings thereon which were specifically defined in all particulars by a subsequent agreement. Upon the defendant failing to perform this agreement, it was directed by the court to be specifically executed. A. L. Smith, M. R., observed :—

*Mayor of
Wolver-
hampton v.
Emmous.*

"It is specially important to the plaintiffs as the sanitary authority for the borough of Wolverhampton that a piece of land like that in question should not be left vacant in the middle of the town and that houses should be built upon it which may be the subject of assessments to the rates. It appears to me that the value of their right to have houses erected by the defendant on the piece of land conveyed to him cannot adequately be estimated by pecuniary damages and that such damages would not be adequate compensation to them for the breach by the defendant of the contract."²

The larger number of cases, however, upon this subject has arisen where a railway company has taken lands from a landowner on certain terms, one of them being that it will carry out specified works of construction.³ The promise to

*Railway
cases.*

¹ *Price v. Mayor, etc., of Penzance* [1845] 4 Ha., 506. Cf. *per* Learned, P. J.: "Certainly there is seldom a case which calls more strongly for the active aid of the court than the present. A corporation gets possession of the plaintiff's land by his consent, and on terms to which they agree; it pays nothing for the land, and is spared the trouble and expense of proceedings to condemn; and then, when in possession, it refuses to perform the things it agreed to." *Lawrence v. Saratoga*

Lake Ry. Co. [1885] 36 Hun., 467, 2 Keener, 178.

² *Mayor of Wolverhampton v. Emmous* [1901] 1 K. B., 515, 1 Ames, 77.

³ In *Ryon v. Mutual T. W. C. Assn.* [1893] 1 Ch., 116 at 126, Kay, L. J., referred to these cases as an exception to the rule that ordinarily the court will not enforce specific performance of building works. *Portescue v. Lostwithiel and F. Ry. Co.* [1894] 3 Ch., 621.

construct these works is part of the consideration for the sale, and the works are to be constructed with a view either to rendering the railway less injurious to the vendor or to affording facilities to him for using the railway.¹ Under the circumstances, equity assists the vendor. The Indian Legislature has put its *imprimatur* upon such cases by appending an illustration to clause (c) of section 12, Specific Relief Act. This illustration is founded on the well-known case of *Storer v. Great Western Railway Co.*,² and runs thus:—"In consideration of being released from certain obligations imposed on it by its act of incorporation a Railway Co. contract with Z to make an archway through their railway, to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this, and also to construct a siding³ and a wharf,⁴ as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for in money; and the court may appoint a proper person to superintend the construction of the archway, road, siding and wharf."⁵

Similarly, in *Hood v. North-Eastern Railway Co.*,⁶ an agreement by the Great North of England Railway Co. for the permanent use of some land then purchased by the company as "a first-class station for the purpose of taking out and setting down passengers travelling along the said railway" as also a goods depôt, was specifically enforced by James, V. C. His Honour held that there was no substantial difficulty in ascertaining the meaning of the agreement and that he was

¹ Langdell, *Eq. J.*, 47 n.

² [1842] 2 Y. & C. Ch., 48, 2 Keener, 141.

³ *Lytton v. G. N. Ry. Co.* [1856] 2 K. & J., 394; *Green v. West Cheshire Co.* [1871] 13 Eq., 44.

⁴ *Wilson v. Furness Ry. Co.* [1869] 9 Eq. 28, 2 Keener, 164; here an agreement to build road and wharf on land conveyed was enforced by James, V. C., who said, "It would be monstrous if the company having got the whole benefit of the agreement could turn round and say, 'this is a sort of thing which the court

finds a difficulty in doing and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed, the court will struggle with any amount of difficulties in order to perform the agreement."

⁵ Cf. S. R. A., s. 22, III, *ill.*

⁶ [1869] 8 Eq., 666, 1 Ames, 82; *affd.* 5 Ch., 525. Cf. *Laurence v. Saratoga Ry. Co.* [1885] 36 Hun., 467, 2 Keener, 171 (agreement to erect two bridges and a "neat and tasteful station building" at which all trains were to stop).

in a position to give the plaintiff substantial relief based upon the breach of the covenant committed by the company (which had gradually withdrawn the accommodation originally provided at the station and had ceased to stop there the trains which ought to have been stopped, so that the place had become as bad as a third class station) without imposing any unnecessary or unreasonable burden upon the company. The learned judge therefore was not "obliged to do that which is almost a scandal to our law—drive a man to what used to be called 'the other side of Westminster Hall' and say I will dismiss your bill without prejudice to an action."

There have been other cases where agreements to make such roads, ways and slips for cattle as might be necessary,¹ or to build a road and bridge,² or to make railway crossings,³ or to build bridges for overhead crossings and a neat and tasteful station building,⁴ have been specifically enforced. As an American Judge observed, "Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them and, although the work to be done necessarily involved engineering skill as well as labour, he was not bound to assume the responsibility or the labour of doing that which the defendant had agreed to do."⁵

In these cases the railway company has generally been compelled to construct or do works which are consistent with the company's large duty to operate the railway, so as to promote the public convenience.⁶ But in some recent cases, specially in America, trackage and operating contracts between railways of the utmost complexity have been the subject of decrees of specific performance, although in making their decrees the courts have conceded that they would be called upon from time to time to alter and adapt to changing circumstances their

Complex
trackage and
operating
contracts.

¹ *Sanderson v. Cockermouth Ry. Co.* [1849] 11 Beav., 497.

² *Raphael v. Thames Valley Ry. Co.* [1867] 2 Ch. Ap., 147; *Firth v. Midland Ry. Co.* [1875] 20 Eq., 100.

³ *Darnley v. London Ry. Co.* [1863] 1 DeG. J. & S., 204 [1865] 3 Ibid., 24, [1867] 2 H. L., 43 *Post v. Westshore &*

B. Ry. Co., 123 N. Y., 580.

⁴ *Lawrence v. Saratoga Lake Ry. Co.*, supra.

⁵ *Per Devens, J., Adams v. Messinger* [1888] 147, Mass., 185, 1 Ames, 52.

⁶ *Conger v. New York W. S. & B. Ry. Co.* [1890] 120 N. Y., 29. But see *Raphael v. Thames Valley Ry. Co.*, supra.

Wolverhampton and W. Ry. Co. v. London and N. W. Ry. Co.

regulations for carrying the decrees into effect during a long period of years.¹ As an illustration, reference may be made to the case of *Wolverhampton & W. Ry. Co. v. London & N. W. Ry. Co.*,² in which two railway companies had contracted that the defendant should work the plaintiff's line and, during the continuance of the agreement, develop and accommodate the local and through trade thereof and carry over it certain specific traffic. The defendant carried a portion of the traffic, which ought to have passed over the plaintiff's line, by other lines of the defendant. Upon the plaintiff's suing for specific performance, it was objected that the court could not undertake to enforce this contract, because it would require a series of orders and a general superintendence to enforce the performance, and this could not conveniently be administered by a court of justice. Lord Selborne said, "The question is whether the defendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession,"³ and an injunction was issued.

Prospect Park R.Co.v. Coney Island R. Co.

An interesting case which came before the New York Court of Appeals was *The Prospect Park & C. J. R. Co. v. Coney Island & B. R. Co.*⁴ Here the plaintiff company owned a steam railway and certain horse-car railroads; the defendant company, who were operating certain horse-car lines in the neighbourhood, covenanted to run during parts of the year to plaintiff's depôt cars to connect with certain ferries and all plaintiff's trains to and from Coney Island, upon the plaintiff company granting the right to use some of its tracks free of charge for 21 years and furnishing them with necessary terminal facilities at the depôt. The object was to secure a through route. For over seven years the contract was acted upon by both the parties, when there was a change in the defendant's management; the defendant then became an active competitor of the plaintiff and discontinued the connection. The plaintiff company sued for specific performance, and Bartlett, J., delivering the opinion of

¹ 2 Pomeroy, *Eq. R.*, 1280-1 and cases cited in *n.* 76; also 1 Ames, 86, *n.* 7.

² [1873] 16 *Eq.*, 433.

³ *Ibid* 438. In this case, however, a distinction was taken between in-

junction as a right flowing from an executed contract and the specific performance of executed contracts. Fry, s. 342. Cf. S. R. A. s. 22, 111, *ill.* (1894) 144 N. Y., 152, 1 Ames, 83.

the court,¹ said, "The provisions of this contract are neither complicated nor difficult, and are such as a court of equity can enforce in its discretion."² Reference was made, among others, to the leading case of *Joy v. St. Louis*,³ where the defendant railway company had agreed to permit the use of its tracks through Forest Park immediately west of St. Louis by the plaintiff company, the defendant company to have control of the running of the trains of both companies through the park and to maintain and keep in order tracks and terminal facilities. The contract was unlimited in time and contained complicated provisions regulating the running of trains and prescribing the duties of superintendents, train masters and other officers. But the courts held that it could take charge of the running of the railway by means of a receiver, and Blatchford, J., remarked: "Railroads are common carriers and owe duties to the public. Rights of the public in respect to these highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the developments of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which in order to maintain its usefulness as a park must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way and a single set of tracks to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity which thus will be exercising one of its most beneficent functions."⁴

*Joy v. St.
Louis.*

These decisions have been criticised, and it has been pointed out that a receiver is a provisional and temporary remedy.⁵

¹ Andrews, C. J., dissented.

² 1 Ames, 34.

³ (1891) 133 U. S., 1.
Ibid, 49.

⁵ 2 Pomeroy, *Eq. R.*, 1232, n. 77. Cf. also, *Port Clinton Ry. Co. v. Cleveland and T. R. Co.*, 13 Ohio, St., 544, 556; Pomeroy, *S. P.*, 31 n.

But they are a striking illustration of the proposition that law is the resultant of actual conflicting forces in society which has been recently insisted upon by a prominent law-school in America.¹

Among other contracts that relate to or savour of realty and are therefore specifically enforced by courts of justice may be mentioned contracts of fire insurance,² contracts of indemnity,³ contracts to exonerate property by paying off a mortgage-lien or decretal debt.⁴ A contract to exchange stock for specific immoveable property has been enforced,⁵ though, as we have seen, an agreement relating to stock does not ordinarily attract the equity jurisdiction; and a contract to cut trees on a specific tract of land and to saw them into lumber⁶ has been treated as passing an interest in realty. An agreement for the division of water in a running stream has been specifically executed.⁷ So also the covenant in a lease "to deliver possession of (part of a basement in a building not then erected) to the lessee upon completion of the said building and thereafter during the term of this lease reasonably to heat and light the demised premises" was specifically enforced by Holmes, J., who observed that neither a judge nor a jury would find difficulty in deciding whether the heating and lighting was "reasonable," and so there was no want of certainty in the covenant. He said: "We do not doubt that an expert will find it easy to frame a scheme for doing the work. It fairly is to be supposed in the

¹ *Centralization and the Law*, passim.

² *Tayloe v. Merchants' Fire Insurance Co.* [1850] 9 How., 390, 1 Ames, 59.

³ *Ranalaugh v. Mayes* [1883] 1 Vern., 189, 1 Ames, 64, where the assignee of several shares of the excise in Ireland covenanted to indemnify the assignor against payments to the king and other matters that were to have been performed by the assignor. The assignor was sued by the king for £20,000, and Lord Keeper Guilford decreed that the assignee should perform his covenants. See also upon this subject Fry, Part VI., Ch. XI, 674, 675. The equitable jurisdiction extends to contracts to indemnify that do not relate to realty, *Chamberlain v. Blue*, 6 Blackf., 491, and a surety

may file a bill for exoneration against his principal or co-surety and compel the one to pay the entire liability and the other to pay his contributive share to the creditor. *Wolmershausen v. Gullick* [1893] 2 Ch., 514; 1 C. A., ss. 145, 146. An agreement to satisfy a judgment against a third person was specifically enforced in *Phillips v. Bergen*, 8 Barb., 527.

⁴ *Reilley v. Roberts*, 34 N. J. Eq., 299 and other cases cited in 1 Ames, 64, n. 1.

⁵ *Burton v. Shotwell*, 13 Bush, 271; *Leach v. Fobes*, 71 Am. Dec., 732.

⁶ *Borner v. Canaday*, 55, L. R. A., 328. Cf. *St. Regis Paper Co. v. Lumbar Co.*, 178 N. Y., 149. But see *Mathura v. Jadubir* [1905] 3 A. L. J. R., 138.

⁷ *Coffman v. Robbins*, 8 Oreg., 278.

present case that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done."¹

Where a purchaser of immovable property enters into a covenant with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon such property or with reference to the user to which any building is or is not to be put, it has been held that the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any and, if any, what injury or damage is consequent on the breach of the covenant.² Where, therefore, the defendant had purchased some building sites and covenanted not to erect thereon any building nearer to a certain road than five neighbouring houses, and then built two houses with bay windows projecting about three feet beyond the line of frontage of the other houses, Hall, V. C., held that the defendant having committed a violation of the covenant was not entitled to allege that the amount of damage and injury was nil or that what had been done was actually an improvement to the plaintiff's property.³ The feeling of anxiety is damage in such cases,⁴ and it is

Covenant relating to building scheme.

¹ *Jones v. Parker* [1895] 163 Mass. 564, 1 Ames, 73. This decision has been criticised, see 2 Pomeroy, *Eq. R.* 1279, n. 72, where *Keith Preusse & Co. v. National Telephone Co.* [1894] 2 Ch., 147 is cited as *contra*. See also *Taylor v. Portington* [1855] 7 DeG. M. & G., 323; S. R. A., s. 21, ill. (ii) of cl. (b). But see *Samuda v. Lawford* [1862] 4 Giff., 42; *Deur v. Verity* [1869] 38 L. J. Ch. 297, 486. Holmes, J., refers to Y. B., 3 Ed. IV, pl. 11 and *Tyngelden v. Warham*: [1467-73] 2 Cal. Ch. LIV; but Prof. Ames points out that in both these cases there is an ambiguity, and it does not appear whether the plaintiff sought specific performance or repayment, 1 Cases 68, n. 4.

² *Lord Manners v. Johnson* [1875] 1 Ch. D., 673; *Leech v. Schweder* [1874]

9 Ch. 465, n. (1): *Doherty v. Allman* [1878] 3 A. C. 725; *Holloway Brothers Ltd. v. Hill* [1902] 2 Ch. 618. Cf. *Franklyn v. Tuton* [1821] 5 Madd. 469, where a lessee was held to her covenant that the house to be built by her should correspond with the adjoining houses in elevation.

³ *Manners v. Johnson*, *supra*.

⁴ "A person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept, and the feeling of anxiety is damage." *Per Cranworth, L. C., Kemp v. Sober* [1851] 1 Sim. (N. S.) 517, 520, 61 E. R., 200. Here the defendant purchased houses, subject to the covenant not to carry on any trade, business or calling therein.

for the parties to judge whether the agreement shall be preserved so far as they are concerned in its integrity, or whether they shall permit it to be violated.¹ "If the construction of the instrument be clear and the breach clear, then it is not a question of damage," said Wood, V. C., "but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction."²

Penalty to
secure per-
formance of
contract.

In some contracts we find a stipulation to pay a certain sum of money in the event of default in performance.³ To take the illustration appended to section 20, Specific Relief Act, by the Indian Legislature,—“A contracts to grant B an underlease of property held by A under C, and that he will apply to C for a license necessary to the validity of the underlease, and that if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license, and offers to pay B the 10,000 rupees.” In such cases, “the general rule of equity,” said Lord St. Leonards, “is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done.”⁴ Equity has regard to the substantial agreement between the parties and its real object, and not to what seems to be the object.⁵ The question therefore is really one of intention to be gathered from the instrument, if any, and all the circumstances.⁶ If a sum is mentioned with the object of securing the performance of an agreement and not as the price for doing what a man has expressly agreed not to do, the court will fasten upon the express contract and will say to him, “You cannot fall back upon the penalty, but must do the act.”⁷ On

¹ *Per Romilly, M. R. Dickenson v. Grand Junction Co.* [1852] 15 Beav., 260, 272.

² *Tipping v. Eckersley* [1855] 2 K. & J., 264, 270. Indian courts may not possibly recognise any such hard and fast rule.

³ *Cf. S. R. A., s. 20.*

⁴ *French v. Macaulay* [1842] 2 Dr. & War. 269, 274-5.

⁵ *Waterman*, 26.

⁶ *Per Turner, L. J.*, “The question in such cases as I conceive is whether the clause is inserted by way of penalty or whether it amounts to a

stipulation for liberty to do a certain act on payment of a certain sum.” *Coles v. Sims* [1854] 5 DeG. M. & G., 9. *Cf. Diamond Match Co. v. Roeber* [1887] 106 N. Y., 473, 1 Ames, 124; *Dooley v. Watson*, 1 Gray, 414; *Bray v. Fogarty* [1870] Ir. R., 4 Eq., 544, 547.

⁷ *Ropes v. Upton*, 125 Mass., 253; *Waterman*, 44, n. 2; *Chilliner v. Chilliner* [1754] 2 Ves. Sr., 523; *Logan v. Wienholt*, [1833] 1 Cl. & F., 611. *Cf. Grave v. Peer*, 43 N. J. Eq., 553, 2 Keener, 1244 n.

the other hand, if the object was to secure for the promisor the option either to do the act or pay a certain sum of money, the payment of the penalty would be the price of non-performance and must be accepted by the promisee in lieu of performance.¹ In these cases, the contract is optional or alternative and is as fully performed by the payment of the money as by the doing of the act at the election of the promisor.² As the parties have formally agreed upon the compensation and have assessed the damages, an appeal to equity is unnecessary.³ In English and American cases a distinction is made between penalty and liquidated damages,⁴ but the Indian law does not recognise this distinction,⁵ and there is no reason to import any such distinction in the consideration of a case for specific performance. The distinction in India may be said to be between contracts containing any stipulation by way of penalty and those containing stipulations for "liquidated satisfaction."⁶ In the former case, if damages are asked for in the event of breach, the court will award reasonable compensation not exceeding the amount named or penalty stipulated for.⁷ If, on the other hand, specific performance is asked for, such agreement may be deemed "not to be the weaker but the stronger for the penalty."⁸

Optional contract.

English judges have been at the pains to formulate rules for guidance in the determination of the question of construction referred to above. It has been said, for instance, that the apparently alternative form of the agreement,⁹ or the largeness or smallness of the sum named as penalty,¹⁰ is an uncertain index. But if the value of the subject of the contract is much larger than the penalty named,¹¹ or the latter sum is single,

Construction of contract.

¹ *Woodward v. Gyles* [1690] 2 Vern., 119; *Legh v. Lillie* [1860] 6 H. & N., 165; *Magrane v. Archbold* [1813] 1 Dow., 107, 3 E. R., 639. *Ramdhan v. Mohan Lal* 1 A. L. J. R., 688.

² *Fry*, 63. See Pt. I, Ch. III, for an exhaustive discussion of the subject. 1 *Pomeroy, Eq. J.*, ss. 436-447.

³ *Pomeroy, S. P.*, s. 50, p. 73.

⁴ *Leake, Con.*, Pt. V., Ch. I, s. 3. The latest case is *Pye v. British Automobile Commercial Syndicate, Ltd.* [1906] 1 K. B., 425.

⁵ *I. C. A.*, s. 74. See Sir F. Pollock's commentary.

⁶ *Elphinstone v. Monkland Iron & Coal Co.* [1886] 11 A. C., 332, 347.

⁷ *I. C. A.*, s. 74.

⁸ *Per Lord Maclesfield, Holson v. Trever* [1723] 2 P. Wms., 191, 192.

⁹ *Finch v. Earl of Salisbury* [1675] Rep. Finch., 212, 23 E. R., 117 (contract to renew lease with addition of 3 years to original term or to answer want thereof in damages).

¹⁰ *Roy v. Duke of Beaufort*, [1741] 2 Atk., 190.

¹¹ *Chilliner v. Chilliner*, *supra*; *Prebble v. Boghurst* [1818] 1 Sw., 309.

whereas the act stipulated for is continuing or recurring,¹ or the benefit of the contract would flow in one channel and that of the sum if paid in another,² a presumption may be raised against a construction of the contract as alternative. On the other hand, the contrary presumption may be raised where the agreement would be unreasonable, unless the person stipulating to pay the sum was held to have an option.³ But no hard and fast rules can be laid down in matters of construction and it is elementary that the language of one document can seldom throw light on the interpretation of another.⁴ The contracts of the people of India specially, it has been authoritatively laid down, should be liberally construed, and the form of expression, the literal sense, should not be so much regarded as the real meaning of the parties disclosed by the transaction.⁵ All that can be said usefully, therefore, is that a court of equity is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid,⁶ and when it is doubtful what the parties really intended, the inclination of the courts is to regard the amount named as penalty.⁷ The proper rule for the construction of a contract is that it should be established rather than defeated, and equity desires not forfeiture, but compensation.⁸ "The penalty," said Lord Loughborough, "is never considered in this court as the price for doing what a man has expressly agreed not to do."⁹ Therefore, in the ordinary case of a stipulation on the sale of real estate that, if the purchaser failed to comply with the condition he shall forfeit the deposit, the "purchaser," said Lord Eldon,

¹ *French v. Macale*, supra.

² *Chilliner v. Chilliner*, supra (bond to pay £600 to A, if land not conveyed to A's daughter and her husband).

³ *Magrane v. Archbold* [1813] 1 Dow., 107, 14 R. R., 15 (covenant to renew sublease under penalty of £70, where fines on head-lease were raised on renewal, according to the value of the property).

⁴ Cf. *Subbarayar v. Subammal* [1900] 24 Mad., 214, 218, P. C.; *Aspden v. Seddon* [1875] 10 Ch. Ap., 394; *Dhanukdhari v. Nathuni* [1907] 6 C. L. J., 62, 68-9.

⁵ *Narain v. Mohendra* [1912] 15 C. L. J., 332.

⁶ Per Lord Cranworth, *Ranger v. Great Western Railway Company* [1854] 5 H. L. C., 72, 94. Cf. *Sloman v. Walter* [1784] 1 Bro. Ch., 418, 419.

⁷ *Foley v. Keegan*, 4 Iowa, 1; *Waterman*, 29, n. 5.

⁸ *Page v. Broom* [1827] 4 Russ., 6 [1830] 2 R. & M., 214; 3 *Parsons, Con.*, 372.

⁹ *Hardy v. Martin* [1783] 1 Cox, 26, 1 Scott, 124. But see *Aslay v. Weldon* [1801] 2 Bos. & Pul., 346, 352.

"has no right to say that he will put an end to the agreement forfeiting his deposit."¹

As in some cases of breach of contract, damages in money may be an inadequate remedy, so in others it may be an impracticable remedy. In this latter case, two classes may be distinguished, according to Pomeroy, *viz.* :—

Damages impracticable.

I. Where from the lack of some legal formality or condition in the contract, no action at law can be maintained.²

II. Where from some peculiar feature of the contract either in its subject-matter or its terms or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all or at least with any sufficient degree of certainty.³

This division corresponds roughly to clauses (b) and (d) of section 12, Specific Relief Act. I have already tried to illustrate clause (b) to some extent. Wherever the amount of damages has to be fixed by conjecture, the case may be treated as one under this clause. There is no basis for the computation of damages.⁴ Where, for instance, upon the dissolution of a partnership it was agreed between two partners that a particular book used in the trade should be considered the exclusive property of one of them and that a copy of it should be given to the

¹ *Crutchley v. Jerningham* [1817] 2 Mer., 506. Cf. *Long v. Bowring* [1864] 33 Beav. 585; *Howard v. Hopkins* [1742] 2 Atk., 371; *Dooley v. Watson*, 1 Gray, 414. *Waterman* 28, n. 2.

² "Under this head are included :—
I. Contracts in which plaintiff has not performed or even cannot perform all the conditions on his part so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance, with such allowances or compensations as are just; *Mortlock v. Buller*, 10 Ves., 292, 305, 306; *Stewart v. Aliston*, 1 Mer., 26, 32 [Cf. S. R. A., ss. 14, 15]. Even where the partial failure or inability results from the plaintiff's own fault; *Davis v. Hone*, 2 Schoales & L., 341, 347; *Voorhees v. Dayer*, 2 Barb., 37; *Coal v. Barney*, 1 Gill & J., 324; *McCorkle v. Brown*, 9 Smedes & M., 167. II. Contracts not valid at law, but which

equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the Statute of Frauds, but which, if part performed, equity will enforce: *Kirk v. Bromley Union*, 2 Phill. Ch., 640; *Gough v. Crane*, 3 Md., Ch., 119; *Crane v. Gough*, 4 Md., 316 [Cf. S. R. A., s. 22, III, but see s. 4, cl. (c)]. Under this head are also included certain agreements void at the old common law but which equity enforces; e.g. assignments of expectancies; agreements to assign things in action; contracts between a man and a woman who afterwards marry: *Cannel v. Buckle*, 2 P. Wms., 243; *Gould v. Womack*, 2 Ala. 83. III. Contracts incomplete in their terms, *Buxton v. Lister*, 3 Atk., 383; *Doleret v. Rothschild*, 1 Sim. & St., 590; *Phillips v. Thompson*, 1 Johns, 131." 4 Pomeroy, *Eq. Jur.*, s. 1403 n.

³ 4 Pomeroy, *Eq. J.*, s. 1403.

⁴ *Palmer v. Graham* [1850] 1 Pars. Eq. 476, 479.

Negative
agreements.

other, the agreement as to the copy was enforced in *specie*, it being clear that no standard could exist as a measure of damages.¹ So where a partner has agreed to retire from business,² or not to carry on the same trade with other persons or within a certain distance or in a certain place.³ And even where the parties are not partners, it is universally conceded that equity will decree specific performance of a contract not to carry on a trade or profession in competition with the plaintiff, where the contract is not bad, as in restraint of trade.⁴ Among other negative contracts which courts of equity have enforced may be mentioned agreements not to play,⁵ or work for,⁶ or sell to⁷ a different company, or manufacture machines infringing patents claimed by plaintiff,⁸ not to sue for a certain time⁹ or appeal to a superior court,¹⁰ as also agreements by a husband not to molest his wife¹¹ or by a wife not to claim her dower.¹² But I shall have to deal with negative contracts in more detail later on.¹³ It will therefore suffice to state now that specific relief is enforced in such cases by means of an injunction, damages being purely conjectural.¹⁴

Damages
conjectural.

Returning to affirmative contracts, I may instance an agreement to accept chattels in satisfaction of claim on a bond and mortgage,¹⁵ or an agreement by the payee of a note to

¹ *Lingen v. Simpson* [1824] 1 Sim. & St., 600.

² *Gray v. Smith* [1890] 43 Ch. D., 208.

³ *Per Eldon, L. C.*, "In partnership agreements a covenant that partners shall not carry on for their private benefit that particular concern in which they are jointly engaged, is not only permitted, but is the constant course." *Morris v. Colman* [1812] 18 Ves., 437. Cf. *Kemble v. Kean* [1829] 6 Sim., 333; *Angier v. Webber* [1867] 14 Allen, 211. 2 Scott, 126.

⁴ I. C. A., s. 27 (see Pollock's Com.). The leading English case now is *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C., 536, 6 R. C., 292; but the Indian law has been interpreted in a much more narrow and restricted sense, *Madhab Paramanick v. Rajcoomar Das* [1874] 14 B. L., R. 76; *Brahmaputra Tea Co. v. Scarth* [1885] 11 Cal., 545. See

Pollock, Con. (W. W.), 467; also cases cited, 1 Ames, 124, n. 3.

⁵ *Lumley v. Wagner* [1852] 1 DeG. M. & G., 604, 1 Ames, 93.

⁶ *Dietrichsen v. Cabburn* [1846] 2 Ph., 52, 1 Ames, 108.

⁷ *Donnell v. Beunet* [1883] 22 Ch. D., 835, 1 Ames, 114.

⁸ *American Co. v. Grossman*, 57 Fed. R., 1021, Ames, 134.

⁹ *Blake v. White* [1835] 1 Y. & C. Ex., 420. But see I. C. A., s. 28.

¹⁰ *Amir Ali v. Inderjit Koer* [1871] 9 B. L. R., 460, P. C.; *Anant Das v. Ashburner & Co.* [1876] 1 All., 267.

¹¹ *Sanders v. Rodway* [1852] 16 Beav., 207.

¹² *Dyke v. Rendall* [1852] 2 DeG. M. and G., 209.

¹³ Lect., XII *infra*. Cf. Langdell, *Eq. J.*, 68, 72.

¹⁴ 2 Story, *Eq.*, 1850, s. 722 a.

¹⁵ *Very v. Levy* [1851] 13 How., 345, 2 Keener, 101.

indorse payments thereon,¹ as the case of a contract, for the breach of which it is not practicable to estimate damages in money. In *Phillips v. Berger*,² the contract was about a chose in action, viz., the sale or compromise of a judgment-debt; there was an agreement to accept a promissory note given by a third party for a portion of this debt, and the court held that damages would furnish no just and adequate compensation.

Actionable claim.

Under this head also should the cases of contract to sell or supply patented or scarce articles, referred to above, be probably brought.³ An agreement to renew a lease of a newspaper has been specifically enforced in America.⁴

Patented or scarce articles.

Lord Hardwicke, C., was of opinion that an agreement for the sale of several timber trees, marked and growing at the time it was reduced into writing, was capable of specific performance. The peculiar features of the agreement were that the consideration was payable in six annual instalments, and that the purchasers were to have eight years for disposing of the same. The Lord Chancellor, following *Taylor v. Neville*,⁵ thought such a contract differed from those that are immediately to be executed.⁶ The reason was stated by Leach, V. C., in a later case,⁷ to be this,—“The profit upon the contract being to depend upon future events; cannot be correctly estimated in damages, where the calculation must proceed upon conjecture.”⁸ And upon this ground an agreement to purchase from an assignee for 2s. 6d. in the pound certain debts which had been proved under two commissions of bankruptcy, was enforced *in specie* against the purchaser. The learned Vice-Chancellor said it was a “contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts,” and “a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take

Contract of deferred performance.

Profits dependent on future events.

¹ *Kopplien v. Kopplien*, 8 Fox Civ App., 625; 2 Pomeroy, *Eq. R.*, 1271.

² 2 Barb., 609, 8 Barb., 527.

³ Ante, 91; 2 Pomeroy, *Eq. R.*, s. 749, p. 1265.

⁴ *Floyd v. Storrs*, 144 Mass., 56.

⁵ “A case not in Peere Williams, not reported at all, and apparently

only cited from manuscript,” per Wood, V. C. *Pollard v. Clayton* [1855] 1 K. & J., 462, 476.

⁶ *Buxton v. Lister* [1746] 3 Atk., 383, 1 Ames, 47.

⁷ *Adderly v. Dixon* [1824] 1 Sim. & St., 607., 1 Ames, 58.

⁸ Cf. 2 Story, *Eq.*, s. 718.

such damages would be to compel him to sell these dividends at a conjectural price.”¹ He referred to *Ball v. Cogg*,² in which case the House of Lords decreed specific performance of a contract to pay the plaintiff a certain annual sum for his life and also a certain other sum for every hundred-weight of brass wire manufactured by the defendant during the life of the plaintiff.³

The reason that in the case of a sale or assignment of a chose in action, legal damages may be too uncertain or conjectural to constitute an adequate compensation,⁴ is easily intelligible. The price would depend upon a mere guess. But the distinction sought to be made between a contract regarding chattels the performance of which may be distributed over a number of years and another which is immediately to be executed,⁵ seems to be artificial and unsound, and has, not unnaturally, been questioned by high authority.⁶ As Jessel, M. R., said in a more recent case.⁷ “To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years, is to limit the power of ascertaining damage in a way which would rather astonish gentlemen who practise on what is called the other side of Westminster Hall.”⁸ There is never considered to be any difficulty in ascertaining such a thing.” The mere want of exactitude in the measure of damages at common law has not always been held a sufficient ground for the equitable jurisdiction.”⁹

On the ground of uncertainty of assessment of damages

Payment or
performance
by instal-
ments.

¹ 1 Ames, 59.

² [1710] 1 Bro. P. C., 144.

³ In *Withy v. Cotile* [1823] 1 Sim. & St., 174, an agreement for the purchase of an annuity payable out of the dividends of stock was specifically enforced. *Clifford v. Turrell* [1841] 1 Y. & C. Ch., 138; *Kenny v. Wexham* [1822] 6 Madd., 355; *Keenan v. Handley* [1864] 2 DeG. J. & S. 288; *Swift v. Swift*, 3 Ir. Eq., 267. So also a contract for the payment of alimony to a divorced wife (in America). *Fleming v. Peterson*, 167 Ill., 465. But a contract to sell a life-interest in the public funds was not specifically enforced in *Brealey v. Collins*, [1831] You., 317, 330, 34 R. R.,

277. An agreement to give a deed of annuity was enforced in *Aubin v. Holt* [1855] 2 K. & J., 66.

⁴ 4 Pomeroy, Eq. J., s. 1402.

⁵ See also some American cases cited, 1 Ames, 48, n. 2.

⁶ *Pollard v. Clayton* [1855] 1 K. & J., 462, 476 (Wood. V. C.); *Fothergill v. Rowland* [1873] 17 Eq., 132, 140 (Jessel, M. R.); Austin, *Juris.*, p. 808; Fry, 37; cf *Jones v. Newhall* [1874] 115 Mass., 244, 2 Keener, 87, 92. But see Pomeroy, S. P., s. 15 and note.

⁷ *Fothergill v. Rowland*, supra; 1 Ames, 112.

⁸ That is, Courts of Common Law.

⁹ Fry, 28.

must also be justified the cases in which agreements for sale or assignment of patents have been specifically enforced. "I am of opinion," said Romilly, M. R., "that where there is a valid contract for the sale of a patent, this court will specifically enforce it in a suit by the purchaser against the vendor and will make the latter execute a conveyance. I am also of opinion that the opposite is equally true and that the vendor may come into equity for the purchase-money."¹ The jurisdiction may be supported in fact on two grounds. A patent is a thing which the vendor alone can supply,² and the value of a patent right cannot be ascertained by computation. As an American judge explained the matter: "All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition and give its owner a practical monopoly of all branches of business to which it is applicable. In any event, its value cannot be known with any degree of exactitude until after the lapse of time, and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages."³

Assignment
of patents.

Upon the same ground of damages being uncertain and conjectural, I apprehend decisions ordering specific performance of a contract to insure life⁵ must be supported. The jurisdiction has been said in America to be based upon the complications and embarrassments incident to an action at law to enforce the contract.⁶ But this *ratio* is not likely to be sustained by

Contracts of
insurance.

¹ *Cogent v. Gibson* [1864] 33, Beav., 557, 1 Ames, 56 (patent for improvement in the manufacture of saddles). Cf. *Printing Co. v. Sampson* [1875] 19 Eq., 462 (agreement to assign future patents); *Sweet v. Cater* [1841] 11 Sim., 572; *Sims v. Marryat* [1851] 17 Q. B., 281 (copyrights); and American cases cited in 2 Pomeroy, *Eq. R.*, 1267, n. 34.

² 2 Pomeroy, *Eq. R.*, s. 751.

³ *Adams v. Messinger*, supra (Patent

for working steam injectors).

⁴ *Per Carpenter, J., Corbin v. Tracy* [1867] 34 Com., 325, 2 Keener, 34.

⁵ *Herbert v. Mutual Life Insurance Company*, 12 Fed. R., 807, other cases cited. 2 Pomeroy, *Eq., R.*, 1270, n. 41, 1 Ames, 60, n. 4, Pomeroy, *S. P.*, s. 16, p. 21.

⁶ 2 Pomeroy, *Eq. R.*, s. 753. Cf. *Taylor v. Merchants Fire Insurance Co.* [1850] 9 How., 390, 1 Ames, 60.

judges in India. Agreements for sale¹ and purchase² of a debt or to execute evidence of indebtedness³ or to deliver a paid-up life insurance policy for a certain sum⁴ or to give up notes in the hands of a holder, in order that the maker may cancel them,⁵ have been similarly enforced in *specie*.

Contracts of
separation.

I have already referred to some contracts between husbands and wives. There has been some doubt expressed in England and America as to the validity of agreements for separation between them. In Lord Eldon's opinion, *e.g.*, a settlement creating a separate maintenance by voluntary agreement between husband and wife was in its consequences destructive to the indissoluble nature and sanctity of the marriage contract.⁶ It is now, however, well established that a court of equity has jurisdiction to enforce the specific performance of an agreement for present separation of husband and wife by the execution of proper deeds for that purpose⁷ or, if the deed has been executed, to enforce its stipulations, *e.g.*, not to sue for restitution of conjugal rights.⁸ As in England a husband cannot contract with his wife without the intervention of some third person, it used to be usual at one time for trustees to be appointed by whom the provisions for the wife's separate maintenance might be enforced.⁹ But this does not seem necessary now.¹⁰ Consideration to support contracts for separation is also sometimes peculiar.¹¹ Except where creditors and purchasers are

¹ *Cutting v. Dana* [1874] 25 N. J. Eq., 265, 2 Keener, 60.

² *Wright v. Bell* [1818] 5 Price, 325, 2 Keener, 9.

³ *Hicks v. Turck* [1888] 72 Mich., 311, 2 Keener, 57.

⁴ *Hughes v. Piedmont Life Ins. Co.*, 55 Geor., 111.

⁵ *Tuttle v. Moore*, 16 Minn., 123.

⁶ *St. John v. St. John* [1805] 11 Ves., 526, 530; *Westmeath v. Salisbury* [1831] 5 Bl. N. S., 339. See 2 Kent, Com., 175; also *Collins v. Collins*, 93 Am. Dec. 606; Schouler, *Domestic Relations*, Ch. XVII. See Eversley, *Dom. Rel.*, Ch. XVII.

⁷ *Wilson v. Wilson* [1848] 1 H. L. C., 538 [1856] 5 H. L. C., 811, 840; *Besant v. Wood* [1879] 12 Ch. D., 605. *Contra* as to agreements for separation, *Cartwright v. Cartwright* [1853] 3 DeG. M. & G.

982, 6 R. C., 368. "I apprehend the theory of the law to be," said Knight-Bruce, L. J., "that a man and his wife cannot live in a state of separation from each other without some failure on the part of one or both in the performance of duties, in the fulfilment of which society has an interest," *ibid.*, 989. But see Eversley, *op. cit.*, 452.

⁸ *Hunt v. Hunt* [1862] 4 DeG. F. & J., 221, 1 Ames, 131.

⁹ *Hope v. Hope* [1857] 26 L. J., Ch., 417; *Legard v. Johnson* [1797] 3 Ves., 352, 359.

¹⁰ *Vansittart v. Vansittart* [1858] 4 K. & J., 62; *McGregor v. McGregor* [1888] 21 Q. B. D., 424. See Pollock, *Con.*, (W. W.), 92.

¹¹ Fry, *Pt. VI.*, ch. vi; Waterman, s. 42.

concerned; the court will not weigh the consideration in too nice scales, says Mr. Eversley, and the mere agreement of the parties to execute a deed of separation and to live apart is sufficient to render it binding on both of them, both as regards their pecuniary and social status towards one another.¹ But, as cases of this description in India are still happily very rare, I will not pursue the topic further. I will only add that performance of a contract on marriage for the settlement of either personal or real property or both, will generally be enforced by the court.²

An agreement to transfer the right of an heir apparent or *spes successionis* is invalid under the statute law of India. Such a transfer is said to defeat the intentions of testators or be in fraud of parental authority. An agreement for the assignment of an expectancy as such is therefore no more enforceable in India than it was by the civil law of Rome⁴ or the common law of England.⁵ Where, however, the estate expectant subsequently vested in the assignor, courts of equity compelled him to carry out his agreement and make a legal conveyance, if necessary.⁶ Thus, where two sons entered into an agreement to divide equally whatever they might receive from their father by will or otherwise, the contention that this was a scheme on the part of the sons to protect themselves from the consequences of misconduct and to defy parental authority was repelled, and the agreement was specifically enforced. Shadwell, V. C., thought that, as the testator (father) had the power to give property to his sons without the power of alienation but did not choose to do so, he had allowed it to become liable to all their antecedent contracts.⁷ As Tilghman, C. J., observed: "If one enter into articles to

Transfer of
spes
successionis.

¹ Dom. Rel., 460.

² *Harvey v. Ashley* [1748] 3 Atk., 611; *Jeston v. Key* [1871] 6 Ch., 610. Eversley, Dom. Rel., 147.

³ T.P.A., s. 6 (a); *Samsuddin v. Abdul Hussien* [1906] 31 Bom., 166; *Dhoorjeti v. Dhoorjeti* [1906] 30 Mad., 201. Cf. *Sitaram v. Harihar* [1910] 12 Bom., L. R., 910 (Hindu Law); *Thattoli v. Kunhammad* [1910] 20 M. L. J. R., 946 (agreement not to divide *spes*).

⁴ Pothier, *Obligations*, pt. I., ch. i. s. 4, para 2.

⁵ *Shep. Touch.*, 319; *Jones v. Roe* [1789] 3 T. R., 88, 93.

⁶ Fry, pt. V, ch. ii; Waterman, s. 37.

⁷ *Wethered v. Wethered* [1828] 2 Sim., 183. Cf. *Beckley v. Newland* [1723] 2 P. Wms., 182; *Lyde v. Mynn* [1833] 1 My. & K., 683; *Harwood v. Tooke* [1812] 2 Sim., 192; *Cook v. Field* [1850] 15 Q. B., 460 (agreement to sell estate if devised to vendor by person then living); *Ramchandra v. Dharmo* [1871] 7 B. L. R., 341, 345; *Ram Nirunju v. Prayag Singh* [1881] 8 Cal., 138; *Gitabai v. Bala* [1892] 17 Bom., 232; *Kanti Chandra Mukerji v. Al-i-Nabi*, [1911] 33 All., 414; 1 Wh. & T., 8th ed. 30-1.

convey, in case subsequent events should make it lawful, there could be no doubt that in equity he would be decreed to convey when he afterward acquired the power."¹ So in England it has been said to be an "undeniable proposition that when a person enters into a contract without the power of performing that contract and subsequently acquires the power of performing that contract, he is bound to do so."⁴ Thus, where an heir apparent or contingent remainderman conveyed an estate absolutely or in fee to a purchaser for valuable consideration, and afterwards succeeded to the estate (the life in being having determined or the contingency having happened), he would be held bound to make good his sale.³ For, in such cases, the conveyance proving to be defective the vendor could not plead that the contract had been already discharged by performance,⁴ and the interest, when it accrued subsequently, would feed the estoppel.⁵ The Indian Legislature has adopted the same principle in the case of contracts to sell or let property made by a person, who has only an imperfect title thereto. The purchaser or lessee in such case has the right, if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, to compel him to make good the contract out of such interest.⁶ The title must be imperfect at the date of the contract,⁷ and some interest must have been acquired at the date of the enforcement of the sale or lease.

Interest
feeding
estoppel.

S. R. A.,
s. 18, cl. (a).

Imperfect
title.

¹ *McWilliams v. Neely*, 2 Serg. & R., 507. Cf. *Varick v. Edwards*, 11 Paige Ch., 290; *Waterman*, 48, n. 6.

² *Carne v. Mitchell* [1846] 15 L. J. Ch., 287; cf. *Holroyd v. Marshall* [1862] 10 H. L. C., 191, 211.

³ *Clayton v. Duke of Newcastle* [1682] 2 Ch. Cas., 112, 22 E. R., 871; *Ascough v. Johnson* [1688] 2 Vern., 66; *Neel v. Bealey* [1829] 3 Sim., 103, 116; *Smith v. Baker* [1842] 1 Y. & C. Ch., 223, 62 E. R., 864; *Smith v. Osborne*, [1857] 6 H. L. C., 375, 390, 398.

⁴ 2 Williams, V. & P., 1055.

⁵ "If the conveyance to the purchaser contained a precise averment of the vendor's seisin in fee or other right sufficient to work an estoppel at law, then, if the vendor had not the estate specified at the time of conveyance, but afterwards acquired it,

the same would immediately pass to the purchaser, his heirs or assigns, without any further conveyance, by the effect of the estoppel." Ibid, 1056-7. Cf. 2 Dart. V. & P., 818-9; Sugden, 745. Hair also bound by the estoppel, *Bigelow, Estoppel* 459, 479, *Chota Bahira v. Purna* [1914] 21 C. L. J., 144, 152.

⁶ S. R. A., s. 18 (a). *Ram Nirunjun Singh v. Prayag Singh*, [1881] 8 Cal., 138, 143-5.

⁷ Or subsequently become so after the agreement for sale or lease is effected, *Sarju Prasad v. Wazir Ali* [1900] 23 All., 119, (here, after agreeing to grant plaintiff a lease, the lessor granted a lease to a third party, who had no notice of the previous contract; held first lease would take effect after expiry of second lease).

Thus, where a member of a joint Hindu family which consisted of the vendor, his adopted son, and an uncle, sold, without necessity, some joint land, and during the pendency of the purchaser's suit for specific performance, the uncle died and a gift made by him was declared invalid, the purchaser was held entitled in Madras to a decree for one-half of the land, that being the share to which his vendor had become entitled on the date of the decree.¹

S. R. A.,
s. 18, cl. (b).

Where the defendant has not the present ability to perform the contract, but he is able to acquire it, equity will compel him to do so and carry out his agreement.² This rule we find embodied in two clauses (b) and (c) of section 18, Specific Relief Act. Clause (b) runs thus:—

“Where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence.”

It is important to note here that the defect in the vendor's or lessor's title must be due to inability to convey without the concurrence of a third person, and this third person must be under a legal obligation to convey at the vendor's or lessor's request. A Hindu father, governed by the Mitakshara, *e.g.*, may be compelled to obtain the assent of his son when transferring family property for the discharge of an antecedent debt. You will further notice that the clause has been so worded as effectually to repudiate the extraordinary doctrine maintained by some old judges in England that, where a husband possessing a contingent or immediate interest in an estate, covenanted for valuable consideration that his wife should join him in the conveyance of that estate, he could be decreed to procure her concurrence.³ Under the Indian law, a person cannot be

Third party's consent.

¹ *Virayya v. Hanumanta* [1890] 14 Mad., 459. Distinguish *Ramasami v. Ramasami* [1907] 30 Mad. 255, 262 (mortgage).

² *Carne v. Mitchell* [1846] 15 L. J. Ch., 287; *Brown v. Warner* [1808] 14 Ves., 412; *Walker v. Barnes* [1818] 3 Madd., 247 (indemnity secured on real estate).

³ “There have been an hundred

precedents,” said Jekyll, M. R., “where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it.” *Hall v. Hardy* [1733] 3 P. Wms., 187, 1 Ames, 66, “But the absurdity of such a course,”

indirectly compelled by a decree to do what he or she is not legally bound to do.¹ Clause (c) runs thus:—

S. R. A.,
s. 18, cl. (c).

“Where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee.”

Sale of
encumbered
property.

This is an exception to the maxim *Caveat emptor*,² and it covers only the case of a contract of sale, where the vendor professes to sell unencumbered property. This profession may be made either by a false statement or by silence where there is a duty to speak.³ The vendor must at the time of making such profession, still own the equity of redemption, and the amount of the incumbrance should not exceed the purchase-money. Where all these conditions co-exist, the vendor has both the right to perfect his title and the means of doing so, and he may be compelled to do so at the instance of the purchaser.⁴ Equity, accordingly, will even compel a vendee to take a title, subject to a pecuniary charge against which there is adequate security.⁵ Where the mortgage-money may be without difficulty deducted in full from the purchase-money, there is no ground for the vendee's refusal to perform.⁶ On the other hand, where a mortgaged property is sold as free from incumbrance, the purchaser is entitled to compel the vendor to pay off any incumbrance that may be found to exist.⁷

Collett's
view.

Mr. Justice Collett thinks that this clause was intended to be limited to the case where the transaction between the parties is still incomplete by reason of the conveyance not having been

says Sir E. Fry, “is obvious, because the Court of Chancery was thus putting all the compulsion it could upon the wife to an act of which the essence is that it is done without compulsion; the Court of Chancery was distressing her to give her consent, while the Court of Common Pleas was examining her to see that she was acting from free will alone” *Sp. Per* 432. The doctrine is now exploded; *Bryan v. Wooley*, 1 Bro. P. C., 184; *Emery v. Wise* [1803] 8 Ves., 505. Cf. *Riesz's Appeal* [1873] 73 Pa., 485; 1 Ames, 254.

¹ Cf. 2 Story, *Eq.*, 731-5.

² Broom, *Legal Maxims*, 589, 599.

³ “Silence is innocent and safe where there is no duty to speak.” *Per* Lord Macnaghten, *Chadwick v. Manning* [1896] A. C. 231, 238. See also *Turner v. Green* [1895] 2 Ch., 205, 1 Ames, 366.

⁴ Nelson, S. R. A., 157.

⁵ *Hulsey v. Grant* [1806] 13 Ves., 75; *Horniblow v. Shirley* [1806] *ibid.*, 81.

⁶ *Guyonet v. Mantel*, 4 Duer 86; *Waterman*, 709.

⁷ *Khetsidas v. Shib Narain* [1905] 9 C. W. N., 178.

made or the purchase-money paid or both. For, after the transaction has been completed, if the purchaser is charged with a prior incumbrance, his remedy, if any, is to sue the vendor for damages for breach of contract.¹ This learned commentator also points out that the words, "obtain a conveyance from the mortgagee," cannot be taken to imply that the English rule that the legal estate is in the mortgagee and on a redemption it must be reconveyed and vested in the mortgagor, is applicable or in force in respect to mortgages in India.² The expression used is probably loose, for the Indian Transfer of Property Act clearly recognises no such doctrine. Of course, the conveyance from the mortgagee can be only of such interest as he has under the mortgage.³

I now come to another class of cases where damages in money are not practicable. This is the class contemplated by clause (d), section 12, Specific Relief Act. The illustration given in the Act is as follows:—

S.R.A.
s. 12, cl.(d).

"A transfers, without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent and C is appointed as assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless."

C is the assignee of A, and endorsement by him is necessary to substantiate the right of the transferee.⁴ But the legislature here seems further to sanction the doubtful doctrine that insolvency of the defendant is a ground for decreeing specific performance. No doubt, an insolvent defendant is not liable to respond in damages, and "although this view of the personal responsibility of a defendant seldom seems to enter into the consideration of courts of equity, they taking it for granted that what a party is bound by law to do, he can do and will do, this consideration of personal responsibility is not always disregarded."⁵ But the doctrine in an unqualified form seems in conflict with sound principle, in at least two respects. "In the

Defendant's
insolvency.

¹ *Sp. Rel.*, 136.

² *Ibid.*

³ 1 Stokes, *A.-I. Codes*, 956, n. 6.

⁴ *Watkins v. Maule* [1820] 2 J. & W., 237, 243. Distinguish *Edge v. Bumford*

[1862] 31 Beav., 247.

⁵ *Per Sheldon, J., Parker v. Garrison* [1871] 61 Ill., 250, 1 Ames, 45. See cases cited in n. 1, 1 Ames, 47.

first place," to quote Mr. Pomeroy, "such a rule makes one under such a contract a preferred creditor." In the second place, the inadequacy of the legal relief, which is the basis of equitable remedies, is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of collection of damages in the individual instance.¹ "It is the contract itself," said Andrews, C. J., "which gives to or takes away from the court its jurisdiction; not the wealth or poverty of the party defendant."²

Personal
acts and
proceedings.

Clause (d) will also apparently apply to contracts for personal acts and proceedings.³ I have already dealt with a number of such contracts. So I will content myself here with two or three illustrations. An agreement to invest money in lands and settle them in a particular manner, or to settle the boundaries between two estates, or to enforce a right of pre-emption (or restrain its violation) may be the proper subject of a decree for specific performance, as it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done. So also an agreement between the plaintiff and the defendant that the former should furnish a large number of peach trees, and the latter should plant them on his farm, market the fruit, and account for the profits.⁴ In an old case, a contract to keep the banks of a river in repair was specifically enforced.⁵ The court may not be disposed to order specific performance of an agreement to repair or farm or mine, by reason of practical difficulties in the way of the execution of its decree,⁶ but where the agreement is for the execution of a deed or lease, there will not be the same hesitation to interfere. Wood, V.C., expressed his concurrence in the view that "where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically

¹ 2 Pomeroy, *Eq. R.*, 1266, n. 80. Cf. Pomeroy, *S. P.* ss. 26-7.

² *Dills v. Doebler*, [1892] 62 Conn., 366, 2 Keener, 294. Cf. *Knott v. Manufacturing Co.*, [1888] 30 W. Va., 790, 796.

³ See 2 Story, *Eq.*, ss. 729-730.

⁴ *Melnight v. Robbins*, 1 Halsted, Ch., 229 (plaintiff had furnished the trees as contracted).

⁵ *Kilmorey v. Thackeray*, 2 Br. Ch., 343 (cited).

⁶ Lect. IV, *infra*.

performed; and that it will in such cases consider it to be the substantial part of the agreement, that a deed should be executed so as to vest in the parties the legal rights which they have mutually agreed to confer."¹

Here it will not be out of place to note that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.² Specific performance therefore is not restricted to the cases for which precedents exist, but is given wherever the broad principles which control the subject make such relief proper.³ Equity courts in England have, for instance, entertained jurisdiction in respect of cases where the contract, if any, is not, strictly speaking, a matter of agreement between the parties, but is 'statuteable.' The Lands Clauses Consolidation Act confers upon railway and other companies compulsory power to acquire the land of private owners for public uses. Where a notice to treat for certain land, as prescribed by the statute, is served on the owner by the company, and specially where, in pursuance of such notice, the price to be paid for the land has been fixed by the arbitrator, the parties, by virtue of the statute, acquire the rights and obligations of vendor and purchaser. There is no *contract* properly so called, for the private owner has no power to refuse and no acceptance by him is necessary, but equity treats the relation as contractual and will grant specific relief against either of the parties at the suit of the other.⁴ In India, as in the United States,⁵ apparently no such relation arises from the commencement or prosecution of the proceedings, for under section 48 of our Land Acquisition Act, the Government is at liberty to withdraw from the acquisition of any land of which possession has not been taken,

Expansion
of equitable
remedies.

Land
acquisition
proceedings.

¹ *Stocker v. Wedderburn* [1857] 3 K. & J. 393, 403. *Paxton v. Newton* [1854] 2 Sm. & G., 437, 440; *Kay v. Johnson* [1864] 2 H. & M., 118; *Wharton v. Stoutenburgh*, [1882] 35 N. J. Eq. 266, 278; see also *Stewart v. Kennedy* [1890] 15 A. C., 75, 104.

² *Union Pacific Ry. Co. v. Chicago R. I. Ry.* [1896] 163 U.S., 564, 600.

³ 3 Page, 2442.

⁴ *Walker v. Eastern Counties Ry. Co.* [1848] 6 Hare, 594, 2 Keener, 82, Cripps, *Comp.*, 213; also, 56; 1 Wh. & T., 8th. ed. 361-2 (notes).

⁵ *Stacey v. Vermont Central Ry.*, 27 Vt., 39; *Pomeroy*, S. P. s. 32, p. 43. 'There are statutes regulating what is called the right of eminent domain.'

except in the case provided for in section 36.¹ Where possession has, however, been taken,² it is compulsory on the Government to complete the acquisition, and a suit for specific relief will, it is apprehended, lie even in this country, unless no award has been made as to the amount of compensation payable for the land in question.³

¹ *Ezra v. Secretary of State* [1902] 30 Cal., 85, 86.

² Possession may be taken *after* the award, under s. 16. Act I of 1894, or *before* the award, either under s. 17 or by special agreement with the owner, *Beverley, Land Acqn. Acts*, 32.

³ Special procedure is prescribed

by Act I of 1894 regarding the award; see ss. 11, 18, 30, and it does not appear that the ordinary civil court can by compulsory process require the Collector to adopt and carry out the statutory procedure. Cf. *Cripps, Comp.*, 214; *Rameswar Singh v. Secy. of State* [1907] 34 Cal., 470.

LECTURE IV.

CONTRACTS NOT ENFORCEABLE.

I propose to discuss to-day, in a general way, those contracts which a court of equity does not ordinarily enforce. Now, there are some agreements that a court of law does not enforce. In the case of these agreements, in the event of a breach, there can be no decree for damages, much less can there be a decree for specific performance.¹ These agreements are spoken of as void by the Indian Contract Act. It is not my purpose to discuss in detail the provisions of the Indian Contract Act in respect of void agreements, but it is desirable, before I proceed further, that I should briefly indicate the nature of these agreements.

Void agree-
ments.

Now, it needs no argument to show that where the parties have never agreed at all, there can be no agreement of which the law can take notice. "It is essential," said Lord Hannen,² "to the creation of a contract that both parties should agree to the same thing in the same sense."³ Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them, *Raffles v. Wichelhaus*.⁴ So where A agreed to sell and B agreed to buy an object which was not in existence on the date of the supposed agreement, there was nothing to buy and sell, and there could be no contract.⁵ Cases like these are said to be void for mistake. Now, it should be noted that mistake, whether of fact or of law,

Mistake.

¹ See, e.g., case of agreements for sale of ships in England, *McCalmont v. Rankin* [1852], 2 DeG. M. & G., 403 42 E. R., 928.

² *Smith v. Hughes* [1871] 6 Q. B., 597, 609.

³ Cf. I. C. A., s. 13.

⁴ [1864] 2 H. & C., 906, Finch, 459,

6 R. C., 198. Cf. I. C. A. s. 20.

⁵ I. C. A., s. 20, *ill.* (a), (b) and (c); Pollock's Com., 93; *Couturier v. Hastie* [1856] 5 H. L. C., 673, 6 R. C., 204; *Strickland v. Turner* [1852] 7 Ex., 208. See also Pollock, *Con.* (W.W.), 611-4.

does not denote any general legal principle, nor is capable, taken alone, of explaining any departure from the normal grounds of decision.¹ We shall see later on that mistake may be a ground of special relief. At the present moment, it will suffice to note that, where an agreement is nullified by reason of a fundamental error, this error may relate either to (a) the nature of the transaction, or (b) the person of the other party, or (c) the subject-matter of the agreement.² An error as to the subject-matter of the agreement is illustrated by the cases already referred to, where the subject-matter of the supposed agreement was either different in the intention of each party or it was non-existent.³ In the first class of cases, there is no common intention: in the second class, there is a common error. Where the error relates to the nature of the transaction, *e.g.*, "if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed."⁴ In the case in which the above observation was made, a very old man was induced to endorse a bill of exchange for £ 3,000, being told that it was a guarantee. The court held that an indorsee for value was not entitled to recover from the defendant, who never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his signature was appended. Such cases, however, are generally complicated with circumstances of fraud.⁵

*Cundy v.
Lindsay.*

An error as to the person of the party with whom one is contracting, may be illustrated by the leading case of *Cundy v. Lindsay*.⁶ The facts of this case briefly were these: One Alfred-Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to Lindsay & Co., linen manufacturers,

¹ *I. C. A.*, 57.

² *Pollock, Con. (W. W.)*, 583 *et seq.* also his commentary on *I. C. A.*, s. 13.

³ *Cf. S. R. A.*, s. 21, cl. (h), *ill.*; *Cochrane v. Willis* [1865] 1 Ch. 58, (agreement for sale of annuity, annuitant dead)

⁴ *Foster v. Mackinnon* [1869] 4 C. P. 704, 711; *Thorough good's case*, [1582] 2 Co., Rep., 9 A., 9 B., 6 R. C., 202; *Benjamin, Sale*, 100; *Lawson, Con.*, ss. 212-3 (citing a number of American cases). Distinguish *Howatson v.*

Webb [1907] 1 Ch., 537. *affd.* [1908] 1 Ch., 1.

⁵ *Kennedy v. Green* [1834] 3 M. & K., 699; 40 E. R., 266. Distinguish *Hunter v. Walters* [1871] 7 Ch., 75, 84, and *Terry v. Tuttle*, 24 Mich., 206, 212; *Pollock (W. W.)* 588, *n.*

⁶ [1878] 3. A. C., 459, *Finch*, 441; *Dolton v. Jones* [1857] 2 H. & N., 564, *Finch*, 450; *Boston Ice Co. v. Potter* [1877] 123 Mass., 28. Distinguish *Hollins v. Fowler* [1874] 7 H.L., 757, 2 R. C., 410.

proposing a considerable purchase of their goods, and in his letter he used the address, "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." Now, there was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood Street. Lindsay & Co. sent letters, and afterwards supplied goods, the letters, goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood Street." The goods were received by Blenkarn at that place, and disposed of to Cundy and another, who were entirely ignorant of the fraud. The House of Lords, affirming the decision of the Court of Appeal, held that as Lindsay & Co. thought they were dealing with Blenkiron & Co., and knew nothing of Blenkarn, and had no intention of dealing with him, there was no contract, and Blenkarn acquired no property in the goods.

Nor will an agreement be enforceable at law unless made by parties competent to contract.¹ This incompetency may be by reason either of minority² or lunacy³ or disqualification created by any law to which the person is subject.⁴

Incompetency of parties.

Nor is an agreement enforceable in India, unless it is supported by consideration. This consideration may be good or valuable, and will generally be found to consist in some detriment suffered by the promisee.⁵

Consideration.

This negative rule is not to be found expressly formulated in the earlier sections of the Indian Contract Act, but it is pre-supposed throughout,⁶ and is stated with its exceptions in section 25.⁷ This topic of consideration will have to be considered in greater length hereafter.

¹ I. C. A., s. 10.

² *Mohori Bibee v. Dhurmodas Ghose* [1903] 30 Cal., 539, P. C.; see as to this case, 1 A. L. J., 50.

³ *Kamola v. Kaura* [1912] P. R. No. 12.

⁴ I. C. A., ss. 11, 12, *Lachmie Narain v. Fateh Bahadur Singh* [1902] 25 All., 195. In England, plaintiff's knowledge of defendant's lunacy has also to be shown, *Imperial Loan Co. v. Stone* [1892] 1 Q. B., 602; but the agreement is not void there, as it apparently is in India.

⁵ I. C. A., s. 2(d); Pollock's Com., 13-23.

⁶ I. C. A., s. 10.

⁷ Sir F. Pollock comments on this curious method of drafting, I. C. A., 124. But this is not peculiar to the Contract Act. The Indian Legislature adopted the same method in the Evidence Act (I of 1872), and the fundamental rule that hearsay is not admissible in evidence is to be deduced from the exceptions to that rule, formulated in s. 32. See Sir W. Markby's commentary thereon.

Lawful
object.

I. C. A.,
s. 23.

Illegal
agreements.

Section 10 of the Indian Contract Act further requires that an agreement to be a contract should be made for a lawful consideration and with a lawful object. Section 23 of that Act provides: "The consideration or object of an agreement is lawful unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." I have no desire to criticise the language of this enactment—to enquire, for instance, if "the consideration of an agreement" means the consideration for a promise, and if "the object of an agreement" means its actual performance or the creation of an obligation to perform it;¹ or to examine whether the divisions are quite logical, and an agreement entered into with a fraudulent object is not a particular species of the genus of agreements contemplating or involving injury to the person or property of another.² Of fraud and cognate topics, I may mention in passing, I shall have occasion to treat in some detail later on. What I would ask you to realise now is that law deliberately refuses to recognise agreements the enforcement of which would result (i) in its stultification, (ii) in injury to the person or property of a member of the public, and (iii) in the frustration of the social, political, economical or ethical ends which the state seeks to promote. Where any rule of positive law directs that people shall not enter into a particular kind of agreement, it goes without saying that such an agreement, if entered into, the law will not support. Where, again, the immediate result of an agreement will be to defeat the provisions of any legislative enactment or the rules of any personal or customary or judge-made law for the time being in force in British India, such an agreement cannot be enforced in a law court. Even the consent of the parties cannot attract the jurisdiction of the court.³

¹ Pollock, *J. C. A.*, 99.

² *Ibid.*, 101.

³ *Surbesh v. Hari Dayal* [1910] 14

C. W. N. 451, 456; *Fowler v. Senilly* [1872] 72 Pa. 456.

Agreements, therefore, to sub-let a license to sell opium issued under Opium Act, 1878,¹ or a license to manufacture and sell country liquor granted under the N.-W. P. Excise Act, 1881,² are illegal and void. So an agreement by an occupancy tenant in the United Provinces to sell his occupancy rights³ or by an ex-proprietary tenant to transfer his rights as such⁴ is, in view of the provisions of the Tenancy Act in force there, illegal and void. An agreement made by a proprietor of an estate taken charge of by Government under the Encumbered Estates Act (VI of 1876) is similarly contrary to the statute.⁵ So an agreement to grant an annual allowance to a Hindu father, in consideration of his giving his son in adoption,⁶ or an agreement by a Hindu husband that he will not be at liberty to remove his wife from her parent's abode to his own house,⁷ contravenes the spirit of the Hindu Law and is unenforceable. On a similar principle, in view of the well-established rule of law that no probate can be granted of a will, unless it is proved in some form, it has been recently held by the Calcutta Court that an agreement of compromise as regards the genuineness and due execution of a will, the effect of which is to exclude evidence in proof thereof,⁸ is not lawful, and cannot be enforced under the provisions of order 23, rule 3, Code of Civil Procedure. Where a person had undertaken to purchase at a court sale certain property for a minor and deliver possession of the same to the latter, but he purchased the property in his own name and kept it, a suit for specific performance and possession by the minor (through a next friend)

¹ *Raghunath v. Nathu Hirji* [1894] 19 Bom., 626.

² *Debi Prasad v. Rup Ram* [1888] 10 All., 577; cf. *Thithi Pakunibaon v. Bheemdu* [1902] 26 Mad., 430; *Marudamuthu v. Rangasami* [1900] 24 Mad., 401; *Hormasji v. Pestanji*, [1887] 12 Bom., 422; *Beharilal v. Jagadish Shaha* [1904] 8 C. W. N., 635.

³ *Jhinguri v. Durga* [1885] 7 All., 878.

⁴ *Kashi Prasad v. Kedar Nath Sahu* [1897] 20 All., 219. Cf. *Kamal Kant Ghose v. Kalu Mahomed* [1869] 3 B. L. R., A. C., 44 (agreement to collect illegal cess) *Manmohandas v. Mac*

lead [1902] 26 Bom., 765 (composition deed void against Official Assignee).

⁵ *Jagadis v. Satrugan* [1906] 33 Cal., 1065.

⁶ *Eshan Kishore v. Haris Chandra* [1874] 13 B. L. R., App. 42.

⁷ *Manmohini v. Basanta Kumar* [1901] 28 Cal., 751; cf. *Sitaram v. Aheeree Heerahnee* [1873] 11 B. L. R. 129. Distinguish *Govind Rani v. Radha* [1910] 15 C. W. N. 205, 209.

⁸ *Manmohini Guha v. Bauga Chandra Das* [1908] 31 Cal., 357 cf. 14 C. W. N. 1068.

was dismissed by the Madras Court as barred by section 66 of the Code.¹

Construc-
tion of sta-
tute.

In determining, however, the question "whether the consideration or object of an agreement" is forbidden by law or calculated to defeat the provisions of any law, it has to be considered not only what the exact scope of the rule of law in dispute is, but also what the proper construction to be placed upon the agreement is. And, in particular, it may have to be considered whether the intention of the legislature was to prevent certain things from being done, or only to lay down terms and conditions on which they might be done.² The English cases have been well digested by Sir Frederick Pollock, who formulates the principle thus: "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void, if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed and are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, for instance, the convenient collection of the revenue."³ But it should be borne in mind that an agreement may be forbidden without being void,⁴ or void without being forbidden.⁵

Supervening
illegality.

It may be noted here that supervening illegality may also dissolve the contractual relation. An act may be perfectly legal when agreed upon, but subsequent legislation, prior to its execution, may render it illegal and thus discharge the promisor.⁶

¹ *Ponnusami v. Vilhilingam* [1910] 8 I. C., 258.

² Pollock, I. C. A., 102.

³ Pollock; *Con.* (W. W.) 401, 402. The subject is well discussed on pp. 398-410, where the American notes should also be perused. *Pangborn v. Westlake* [1873] 36 Iowa, 546, H. & W., 315. *Bonnard v. Dott* [1906] 1 Ch. 740.

⁴ *Manohar Das v. Ram Autar* [1903] 25 All., 431 (alienation pending temporary injunction, under (s. 492, C.P.C., 2882.)

⁵ *Lalji Singh v. Gaya Singh* [1903]

25 All., 317, F. B., s. 257 A., C. P. C., 1882; *Juggernath Sew Bux v. Ram Dayal* [1883] 9 Cal., 791, 796 (agreements by way of wager void, but not illegal); *Haribhai v. Sharafali* [1897] 22 Bom., 801, 866 (ditto, agreements in restraint of trade). *Harriman, Con.*, s. 236.

⁶ I. C. A., s. 56 para 2. Cf. *Atkinson v. Ritchie* [1808] 10 East, 530 10 R. R. 372; *Barker v. Hodgson*, [1841] 3 M. & S., 267, 15 R. R., 485; *Esposito v. Bowden* [1857] 4 El. & Bl., 963; also *Baily v. De Crespigny* [1869] 4 Q. B., 180.

Equity courts have sometimes tried to execute the contract *cy pres*,¹ but the general principle seems to be clear,—“you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realised from it.”²

An agreement is generally deemed immoral when it involves sexual immorality.³ A landlord, therefore, has been held not entitled to recover the rent for lodgings knowingly let to a prostitute, who carries on her vocation there,⁴ and a bond given in consideration of future illicit cohabitation is void in law, as also in equity.⁵ But illustration (j) to section 23 shows that the term “immoral” is used in a larger sense by the Indian Legislature. It has accordingly been held that money paid by the wife of a convict in jail to be given as a bribe to a jailor for procuring the release of her husband could not be recovered back on failure of such person to procure the release.⁶ So an agreement to pay money to a would-be witness, in consideration of his giving evidence in a civil suit for the defendant, was not enforced; for if the evidence was true, there was no consideration, since “the performance of a legal duty is no consideration for a promise,” and if untrue, the consideration was vicious.⁷

The next class of “consideration or object” that vitiates an agreement is one “opposed to public policy.” Public policy is a term not at all easy either to define or describe. A learned English judge described it figuratively as a very unruly horse, and said, “when once you get astride of it, you never know where it will carry you.”⁸

Public policy.

¹ *Bettesworth v. Dean of St. Paul's* [1728] 1 Bro. P. C., 250, 1 E. R., 541; Fry., s. 10(8).

² *Per Jessel M. R., Sykes v. Beadon* [1879] 11 Ch. D. 170, 197.

³ *Pollock, Con.*, (W. W.) 410

⁴ *Gouri Nath v. Madhumoni* [1872] 9 B. L. R., App., 37, Cf. 1 C. A., s. 23 III. (k) *Pearce v. Brooks* [1866] 1 Ex., 213, 6 R.C., 326. *Distinguish Khubchand v. Beram*, [1888] 13 Bom., 150 (loan made for Choga Lal v. Piyari, [1908] 31 All., 58, teaching singing to dancing girls).

⁵ *Muthu Kunun v. Shanmugavelu* [1905] 28 Mad., 413; *Hill v. Clarke* [1904] 27 All., 266; *Walker v. Perkins* [1764] 3 Burr., 1568. *Distinguish Dhirai Kuar v. Bikramajit Singh* [1881] 3 All., 787 (past cohabitation; see also to this case, *Pollock, J.C.A.*, 110. *Ayerst v. Jenkins* [1873] 16 Eq., 275, 282, 3 Keener, 854.

⁶ *Protima Aurat v. Dukhia Sirkar* [1872] 9 B. L. R., App. 38.

⁷ *Seshannah v. Ramasamy* [1863] 4 Mad., H. C. R., 7.

⁸ *Per Burrough, J., Richardson v.*

Public policy varies with the habits, capacities and opportunities of the public,¹ it varies with time and place ; what may be against public policy at one time or in one state or country may not be so in another.² *Salus populi suprema lex* ; this much is certain. So also *ex dolo malo non oritur actio*.³ But "what public policy requires is often a vague and difficult enquiry. It is clear that public policy and the interests of society favour the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions."⁴

Sir George Jessel, therefore, remarked in words that have become classical : "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."⁵

The Indian Legislature does not attempt to illustrate section 23 by any suppositional cases that may be described as opposed to public policy, but in about half-a-dozen subsequent sections it declares void some agreements that may be so treated. Text-writers have, however, tried to classify the cases on the subject. Sir Frederick Pollock, for instance, enumerates the several heads of this topic thus : (a) public policy as touching external relations of the state ; (b) public policy as touching internal government ; (c) public policy as to legal duties of individuals ; and (d) public policy as to freedom of individual action.⁶ These heads are sufficiently comprehensive, and I will take them in order.

Pollock's
classification.

Mallish [1824] 2 Bing. 252 ; see also *per* Esher, M.R., *Cleaver v. Mutual Reserve Association* [1892] 1 Q. B., 147.

¹ *Davies v. Davies* [1887] 36 Ch. D., 359, 364.

² *Lawson, Con.*, 364.

³ *Holman v. Johnson* [1775] Cowp.,

341, Finch, 619.

⁴ *Per* Andrews, J., *Diamond Match Co. v. Roeber* [1887] 106 N. Y., 473, *Huff & Wood*, 367.

⁵ *Printing & Numerical Registering Co. v. Sampson* [1875] 19 Eq., 462.

⁶ *Pollock, Con. (W.W.)*, 426, *et seq.*

(a) An agreement may relate to matters which concern the commonwealth in its relations with foreign powers. Now, it has been ruled in England that it is not competent to any domiciled British subject "to enter into a contract which may be detrimental to the interests of his own country"¹ The king's subject, therefore, cannot trade with an alien enemy, that is, a person owing allegiance to a government at war with the king, without the king's license.² So the comity of nations requires that an agreement to contravene the laws of a foreign country should in general be treated as unlawful.³

External
relations of
state.

(b) Again, an agreement may relate to matters which touch good government and administration of municipal justice. Where parties, therefore, agree to exercise corrupt or improper influence on public officers or legislature,⁴ or to sell offices in which the public are interested,⁵ or to assign military pay, or

Internal
government.

Anson has a seven-fold classification, *Con.*, 242 sqq., so Lawson, *Con.*, 354 sqq. Harriman's classification is three-fold, *Con.*, 97 sqq.

¹ *Esposito v. Bowden* [1857] 7 E. & B., 763, 782.

² *Janson v. Driefontein consolidated Mines* [1902] A.C., 484, 499.

³ *Graves v. Johnson* [1892] 156 Mass., 211, H. & W., 391 (action for price of intoxicating liquors sold and delivered in Massachusetts for resale in Maine, against the laws of that State): Pollock, *op. cit.*, 432.

⁴ *Egerton v. Earl Brownlow* [1853] 4 H. L. C., 1, 99, 163, 172, 232; *Marshall v. Baltimore and Ohio Railroad Co.* (1853) 16 How., 314. The U.S. Supreme Court said in the last case: "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions.....Legislators should act from high considerations of public duty. Public policy and sound morality do, therefore, imperatively require that courts should put the stamp of their disapprobation on every act and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is

confided (*ibid.*, 334, Pollock, 435). *Trist v. Child* [1874] 21 Wall, 441, H. & W., 340.

⁵ *Blachford v. Preston* [1799] 8 T. R., 89, 93, 6 R.C., 338. *Per* Kenyon, C. J. "Public policy requires that there should be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." "These offices," says Mr. Mechem, "are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power." (*Public Offices*, s. 351). "The public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices" (Lawson, *Con.*, s. 308) *Rajah Vurmah Valia v. Ravi Vurma Kunhi* [1876] 1 Mad., 235, P. C. (trustee of Hindu temple); *Kuppa Gurukul v. Dorasami* [1882] 6 Mad., 76 (Shebait); *Wahid Ali v. Ashruff Hossain* [1882] 8 Cal., 732 (*mulwalli of wakf*), *Distinguish Giri anund v. Sailajanund* [1896] 23 Cal. 645; *Muncha Ram v. Pran Shankar* [1882] 6 Bom., 298.

Compound-
ing offences.

judicial salary, or a pension,¹ the agreement is contrary to public policy and cannot be enforced. So it has been said, "you shall not make a trade of a felony ; if you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself."² An agreement for stifling a prosecution has, therefore, been always treated as void, since it tends to obstruct the course of public justice, and this whether the party accused be innocent or guilty of the crime charged. For "if innocent, the law was abused for the purpose of extortion ; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe."³ In India, however, the law allows various offences under the Indian Penal Code to be compounded.⁴ A compromise, therefore, of criminal proceedings relating to any such offence is perfectly legitimate.⁵ Where, however, the law does not allow a compounding of the offence, an agreement with that object will clearly be illegal.⁶ Among other agreements that tend to the perversion or abuse of municipal justice are those of champerty and maintenance. The promotion of litigation in which one has no interest of one's own is strongly condemned in England. Maintenance is the more general term and is a tort ; champerty is the unlawful maintenance of a suit in consideration of a bargain, for a part of the thing or some profit out of it.⁷ But the English law relating to maintenance and champerty has not been introduced into India,⁸ and it has been said by the Judicial Committee : "A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy.

Champerty
and main-
tenance.

¹ See notes to *Ryall v. Rowles* [1749] 1 Wh. & T., 8th. ed. 156-7. *Arduhnnot v. Norton* [1846] 5 Moo., P. C., 219, 230, 13 E. R., 248.

² *Per* Lord Westbury, *Williams v. Bayley* [1866] 1 H. L., 200, 220, 6 R. C., 455.

³ *Keir v. Leeman* [1844] 6 Q.B. 308 ; *affd.* 9 Q.B., 371, 6 R.C., 382 ; *Collins v. Blantern* [1767] 1 Sm. L.C., 12th. ed. 412, and notes. *Partridge v. Hood* [1876] 120 Mass., 403, H. & W. 345.

⁴ Cr. P. C., s. 345, also Sch. II.

⁵ *Subraya Pillai v. Subraya Mudali* [1867] 4 Mad. H. C., 14 ; *Pollock, I. C.*

A. 112. Cf. Amir Khan v. Amir Jan [1898] 3 C. W. N., 5. *Chetan v. Hari* [1911] 8 A. L. J. R., 498.

⁶ *Majebar v. Mukhtashan* [1912] 16 C. W. N., 854. *Nagappa Chetty v. Ma*, [1905] 3 L. B. R., 42. *Cf. Kessow'i v. Hurjivan* [1887] 11 Bom., 566 ; *Nelson, I. C. A.*, 274-6.

⁷ *Stevens v. Bagwell* [1808] 15 Ves., 139, 33 E. R., 707 ; *Stanley v. Jones* [1831] 7 Bing., 369, 6 R. C., 376 ; *Hutley v. Hutley* [1873] 8 Q. B., 112 ; *Bradlaugh v. Newdigate* [1883] 11 Q.B.D., 1.

⁸ *Chedambra Chetty v. Renga Krishna* [1874] 13 B. L. R., 509, P. C.

Indeed, cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression that a suitor who had a just title to property and no means except the property itself should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to them."¹ Indian courts, therefore, do not give effect to agreements "got up for the purpose merely of spoil or of litigation," but they may in a proper case award compensation for legitimate expenses incurred by the lender to enable the borrower to carry on the law suit.²

Another general rule, which the English courts recognise, prohibits all agreements which purport to oust the jurisdiction of the courts.³ This has been adopted in section 28 of the Indian Contract Act.

Ouster of
Court's
jurisdiction.

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

An Indian court will therefore refuse to give effect to an agreement not to sue at all, or not to sue in the court which ordinarily

Shortening
or extending
limitation.

¹ *Ram Coomar Condon v. Chunder Kanto Mookerji* [1876] 2 Cal., 233. See also, *Fischer v. Kamla Naicker* [1860] 8 M. I. A., 170, 187, where the Privy Council observed, "It must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary." Cf. *Fatch v. Narsingh* [1913] 16 I. C., 988.

² *Ramlal v. Nil Kanth* [1893] 20 I.

A., 112; *Mohkam Singh v. Rup Singh* [1893] 15 All., 352, P. C.; *Chunni Kuor v. Rup Singh* [1888] 11 All., 57; *Husain Buksh v. Rahmat Husain* [1888] 11 All., 128; *Hari Valabhdas v. Bhai Jevan i* [1902] 26 Bom., 689; *Abdool Hakim v. Doorgu Proshad* [1879] 5 Cal., 4. Distinguish *Goculdas v. Lakmidas* [1879] 3 Bom., 402.

³ *Anant Das v. Ashburner & Co.* [1876] 1 All., 267. *Kistnasamy Pillay v. Municipal Commissioners of Madras* [1868] 4 Mad. H. C. R., 120, 123.

would have jurisdiction,¹ or an agreement not to sue after a certain period of time which is shorter than what the statute of limitation allows. It is apparently not competent to parties to make a new law of limitation for themselves. Where, therefore, there was an agreement that, in consideration of an enquiry into the merits of a disputed claim, advantage was not to be taken of the statute of limitations in respect of the time employed in the enquiry, the Privy Council held that the agreement was no answer to the plea of limitation, but an action would lie for its breach.² The fact, however, that an action, presumably for damages, will lie for the breach of such an agreement, shows that the agreement is neither 'void' within the meaning of the definition in section 2 (g), nor 'unlawful' within the meaning of section 23, Indian Contract Act. In fact, clause (3) to section 25 shows that a debt, barred by limitation, may be a good consideration under certain circumstances. An agreement therefore to extend the period of limitation, if otherwise proper, does not seem to stand on the same footing as an agreement to shorten it.³ It must be remembered, however, that in British India a defendant cannot waive the plea of limitation.⁴

Agreement
not to
appeal.

Nor does an agreement not to appeal stand on the same footing as an agreement not to sue.⁵ The Full Bench of the Allahabad Court said, "By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is, in our judgment, prohibited neither by the language nor the spirit of the Contract Act, and an Appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with the appeal."⁶

¹ *Crawley v. Luchmee Ram* [1866] 1 Agra, 129.

² *East India Company v. Odit Churn Paul* [1849] 5 M. I. A., 43, 70. *Krishna Kamal v. Hiru Sardar* [1869] 4 B. I. R., F. B., 101, 105; *Daya Narain v. Secy. of State* [1880], 14 Cal., 256.

³ Cf. *Pollock, I.C.A.*, 146; *Mitra, Lim.*, 94.

⁴ Act IX of 1908, s. 3.

⁵ *Amir Ali v. Inderjit Koer* [1871] 9 B. I. R., 460, P. C.

⁶ *Anant Das v. Ashburner & Co.*, *supra*, 269.

Upon the principle above referred to, an agreement to substitute a "domestic forum" for the ordinary tribunal cannot also be sustained. We therefore find that at common law an agreement to refer a dispute to arbitration did not oust the ordinary jurisdiction of the court. An action might be brought for damages if it was violated,¹ but it could not be set up as a bar to a suit, brought in the ordinary way, in respect of the dispute which the parties had agreed to refer to arbitration. And equity so far followed the law in England that such an agreement was not specifically enforced.² But the law was altered by statute,³ and the courts in England and India have now a discretion to stay proceedings in actions or suits on the subject-matter of an agreement to refer. This enables parties, indirectly no doubt, to enforce such an agreement. The agreement is clearly not illegal, especially if it has been reduced to writing and refers to a question which has already arisen between the parties,⁴ and the Code of Civil Procedure provides for its enforcement in certain cases.⁵ Section 19 of the Indian Arbitration Act⁶ lays down :

"Domestic forum."

"Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was,

Act IX of 1899, s. 19.

¹ *Livingston v. Ralli*, [1855] 5 E. & B., 132; *Leake, Con.*, 6th ed 695.

² *Street v. Rigby* [1802] 6 Ves., 815; *Agar v. Mucklew* [1825] 2 Sim. & St., 418, 1 Ames., 67; *Cooke v. Cooke* [1867] 4 Eq., 77, 867. 1 Story, *Eq.*, 670.

³ 52 & 53 Vict. c. 49 (Arbitration Act), superseding 17 & 18 Vict. c. 125, s. 11 (Common Law Procedure Act); *Law v. Garret* [1876] 8 Ch. D., 26 covenant to refer disputes in a trade partnership in Russia to a particular court there), *Distinguish Davis v. Starr* [1889] 41 Ch. D., 242 (stay not

ordered in exercise of discretion).

⁴ 1. C. A., s. 28, exc. 2.

⁵ Sch. 11, §§ 17, 21. But "in each case, this is done by moulding the matter into the form of a suit between the parties, and then dealing with it under the rules for arbitrations or awards in the course of ordinary suits." Collett, *S. R. A.*, 172.

⁶ Act IX of 1899, another unhappily expressed piece of legislation (see, e.g., s. 3, prov. 1, s. 6 and sch. 1), which purports to follow the English Arbitration Act, 1889, above referred to.

at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

This fully gives effect to the recently growing inclination of judges to encourage private settlements of disputes through umpires of their own choosing.¹ But the Act is yet restricted in its operation to the Presidency towns and Rangoon, and the general law of the land is to be sought in the Specific Relief Act. But now see Act V. of 1908, Sch. II, § 18. The last clause of section 21 of that Act runs thus:—

S. R. A,
s. 21.

"And save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit."

This is a provision of more limited scope and gives only a negative advantage to the party aggrieved. It presupposes a valid and operative contract,² which has not been broken up by the conduct of all the parties to it, and it can be taken advantage of only if the plaintiff can be shown to have refused to perform the contract. Where, therefore, the parties were "contentious" among themselves with reference to the arbitration proceeding and so it could not come off, and the plaintiff sued more than a year after the date of the submission to arbitration, a Division Bench of the Allahabad Court held that there was no bar to the maintainability of the suit.³ The contract may be rescinded by mutual agreement of both parties or by one of them for a just cause, and where one party refused to go on with the arbitration and the other did nothing for a long time, the court inferred rescission by mutual consent.⁴ The mere filing of a suit on the part of the plaintiff is not tantamount

¹ Sec. 5 of this Act makes every submission irrevocable save with the leave of the court.

² *Ram Bharose v. Kallu Mal*, [1899] 22 All., 135,

³ *Tahal v. Bisheshar* [1885] 8 All., 57.

⁴ *Ramkumar v. Jagmohan* [1910] 33 All., 315, F. B.

to a refusal to refer to arbitration.¹ A distinct act of withdrawal before the action is brought, must be shown on the plaintiff's part,² and the suggestion should further be negatived that the defendant had acquiesced in such withdrawal or refusal.³ As the law therefore stands at present, a party who has deliberately entered into an agreement to refer a dispute, whether present⁴ or future,⁵ to arbitration, may be prevented from transgressing it wilfully and capriciously, and yet the other and innocent party is not precluded from seeking in the ordinary way the remedy to which he is entitled. He who seeks equity must do equity,⁶ and so the contract is enforced.⁷ The law, however, is unsatisfactory, in so far as it makes one of the contracting parties practically the master of the situation. A may enter into a contract, *e.g.*, with B to have a certain dispute decided by arbitration, but if he does not choose to have this done, he has only to institute a suit without allowing B an opportunity to obtain a refusal from him.⁸ This leaves in the hands of the party, who does not desire to abide by the contract, the option whether the contract should be enforced, which is not a very desirable state of things.

Agreement to arbitrate as condition precedent.

A distinction may here be pointed out between an agreement to arbitrate which is intended to operate as a condition precedent to any liability arising and one which is only a collateral provision. For instance, parties may stipulate that the amount of loss consequent upon the breach of a covenant is to be valued by one or more arbitrators, and it is only after the amount has been so ascertained that the liability to pay it is to arise. The adjustment by arbitration is here a condition

¹ *Koomud Chunder Dass v. Chunder Kant Mookerjee* [1879] 5 Cal., 498; *Tahal v. Bisheshar*, *supra*.

² *Crisp v. Adlard* [1896] 23 Cal., 956. An application for leave to withdraw from the agreement may be effective evidence of refusal, *Sheoambar v. Deodat* [1886] 9 All., 168.

³ *Adhibai v. Cursandas* [1886] 11 Bom., 199. In this case, the distinction between an agreement to refer and an actual submission to arbitration was pointed out, and it was suggested that a withdrawal from the latter was not within S. R. A. s. 21 (pp.

213-4).

⁴ *Sheoambar v. Deodat*, *supra*; *Sheo Dat v. Sheo Shankar Singh* [1904] 27 All., 53 (pending suit).

⁵ *Fazulbhoy v. Bombay & Co.* [1895] 20 Bom., 232.

⁶ *Cheslyn v. Dalby* [1836] 2 Y. & C. Ex., 170 Fry, s. 1603.

⁷ *Salig Ram v. Jhunna Kuur*, [1882] 4 All., 546.

⁸ The Recorder of Rangoon saw the difficulty and attempted, possibly, to strain the law, but he was overruled by the Calcutta High Court, *Crisp v. Adlard*, *supra*.

precedent to the right to recover, and the agreement is perfectly legitimate.¹ Damages may be recovered for breach of such an agreement, but, as we shall presently see, it will not be specifically enforced by a court of equity.

(c) Legal
duties of
individuals.

(c) There are matters again which touch legal (and possibly moral) duties of individuals, the performance of which is of public importance. An agreement providing for the non-performance of such a duty is opposed to public policy. It is upon this ground that English courts have refused to recognise, for instance, an agreement by a father to deprive himself of the right to the custody or education of his children,² or by a mother of an illegitimate child to deprive herself of her parental duties and rights regarding the same.³ And it was upon this ground apparently that Cockburn, C. J., questioned the validity of a covenant by a landowner to let all his cultivated land lie waste, or a clause in a charter-party prohibiting deviation even to save life.⁴

(d) Freedom
of individual
action.

(d) I now come to agreements which unduly limit the freedom of individual action. "As a rule," says Sir F. Pollock, "a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone."⁵ Upon grounds of general convenience, however, judges have specially refused to uphold agreements, the object of which is to impose improper and unreasonable restrictions on the free choice of individuals in marriage or their liberty to exercise any lawful trade or calling. Section 26 of the Contract Act, therefore, declares "every agreement in restraint of the marriage of any person, other than a minor" to be void. In the well-known case of *Lowe v. Peers*⁶ Lord Wilmot,

¹ *Viney v. Bignold* [1887] 20 Q. B. D. 172; *Scott v. Avery* [1855-6] 5 H. L. C. 811; *Dawson v. Fitzlerland*, [1879] 1 Ex. D., 257, 260. Cf. I. C. A., s. 28 exc. 1; *Hamilton v. Liverpool &c. Insurance Co.* [1889] 136 U. S., 242 H. & W. 351.

² *Re Andrews*, [1873] 8 Q. B. 153. But now see 36 & 37 Vict., c. 12, s. 2.

³ *Humphrys v. Polak* [1901] 2 K. B. 385.

⁴ *Scaramanga v. Stamp* [1880] 5 C. P. D., 295, 305.

⁵ Pollock, *Con.* (W. W.), 464.

⁶ [1770] Wilm., 364, 6 R. C. 347. (Lord

Wilmot described matrimony as the "seminary of mankind," and called depopulation "the greatest of all political sins." This was before the days of Malthus). "The rule rests upon the proposition that the institution of marriage is the fundamental support of national and social life and the promoter of individual and public morality and virtue; and that to secure well-assorted marriages there must exist the utmost freedom of choice." *White v. Equitable Nuptial Benefit Union*, 76 Ala., 251, 6 R. C., 367.

C. J., observed : " There cannot be a duty of greater importance to society [than matrimony], because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society depend upon protecting and encouraging it." In English and American cases, a distinction has been drawn between an agreement in general restraint of marriage and one in partial restraint. But this distinction is not supported by the language of the Indian Contract Act.¹ As to agreements to procure marriages for reward, which English courts do not uphold,² opinion seems to be divided in India. The Calcutta³ and Madras⁴ courts have pronounced in favour of the validity of such agreements in the case of Hindus ; especially where the marriage was in the *Asura* form. The Bombay court⁵ maintains the contrary view. The question has been elaborately and learnedly discussed quite recently by Mookerjee, J., in the important case of *Bukshi Das v. Nadu Das*.⁶ His Lordship pointed out that what is opposed to public policy in England is not necessarily opposed to public policy in India, because the social circumstances of the two countries are widely different, and he held that an agreement to remunerate or reward a third person, in consideration of negotiating a marriage, is contrary to public policy, but not so an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal, unless the parents or guardian do not seek the welfare of the bride or bridegroom but, in consideration of a benefit secured to themselves, give her or him a consort otherwise ineligible.

Similarly, an agreement which places upon a person desiring to exercise any lawful profession, trade or business, a restraint which is not reasonable in reference to the interest both of the parties concerned and of the public

I. C. A.,
s. 26.
Marriage.

Restraint of
trade.

¹ Which is borrowed from the Draft Civil Code of New York, s 836.

² *Hermann v. Charlesworth* [1905] 2 K. B., 123. *Story, Eq.*, s. 260. *Duval v. Wellman* [1891] 124 N. Y., 156, H. & W., 402.

³ *Lallun Manee Dossee v. Nobi Mohun Singh*, [1876] 25 W. R., 32; *Juggesur v. Panchcowree* [1870] 14 W. R., 154; *Ram Chand Sen v. Audaita*

Sen [1884] 10 Cal., 1054.

⁴ *Visvanathan v. Saminathan* [1889] 13 Mad., 83. Distinguish *Vaithyanathan v. Gangurazu* [1893] 17 Mad., 9.

⁵ *Dulari v. Vallabh Das* [1884] 12 Bom., 126; *Pitambar v. Jagjivan* [1884] *ibid.*, 131; *Dholi Das v. Fulchand* [1897] 22 Bom., 658.

⁶ [1905] 1 C. L. J., 261.

is not encouraged.¹ At one time "all interference with individual liberty of action in trading and all restraints of trade of themselves" were considered opposed to public policy and void.² But as a learned American judge has observed: "Steam and electricity have for the purpose of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition has greatly enlarged the field of human enterprise and created a vast number of new industries which give scope to ingenuity and employment for capital and labour. The laws no longer favour the granting of exclusive privileges."³ It has accordingly been said in England that no hard and fast rule can be laid down.⁴ The Indian Contract Act, however, following its "evil genius,"⁵ the New York Draft Code, lays down rigorously: "Every agreement by which any one is restrained from exercising a lawful profession, trade, or business, of any kind, is to that extent void,"⁶ and has been literally interpreted,⁷ one learned judge having gone so far as to suggest, "trade in India is in its infancy, and the legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained."⁸ The section talks not of limits of space or time or of partial or general

I. C. A.,
s. 27.

¹ *Nordenfellt v. Maxim-Nordenfellt Guns & Co.* [1894] A. C., 535, 565, 6 R. C., 413. *Easter v. Russ* [1914] 1 Ch. 468.

² *Hilton v. Eckerstey* [1856] 6 E. & B., 60, 74: "prima facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it (trade) on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion." See history of the law considered in *Goldsohl v. Goldman* [1914] 84 L. J., Q. B., 63.

³ *Per Andrews, J., Diamond Match Co. v. Roeber* [1887] 106 N. Y., 473, H. & W., 365 (agreement not to manufacture matches for 99 years in the U. S., except Nevada and Montana, upheld)

⁴ *Rousillon v. Rousillon* [1880] 14 Ch. D., 351. See *Mitchell v. Reynolds* [1711] 1 Sm. L. C., 12th. ed. 458. and notes. As between master and servant, the latter may use his subjective knowledge in competition with the former, *Dason v. Provident clothing Co.* [1913] A. C., 724.

⁵ *Pollock, I. C. A.*, 3rd ed. 167.

⁶ *I. C. A.*, s. 27.

⁷ *Madhub Chunder v. Raj Coomar Dass* [1874] 14 B. L. R., 76, 85. (Couch, C. J., said, "we have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear"); *Oakes & Co. v. Jackson* [1876] 1 Mad., 134; *Brahmaputra Tea Co. Ltd. v. Scarth*, [1885] 11 Cal., 545; *Cohen v. Wilkie* [1912] 16 C. W. N., 534.

⁸ *Per Kindersley, J., Oakes v. Jackson, supra.*

restraint. Some judges, however, have thought that agreements in partial restraint of trade are not within the purview of that section, and have professed to test them on grounds of public policy,¹ but the attempt has not been happy.²

Section 27, however does not seem to be directed against contracts by which a person, in the exercise of his profession, trade or business, enters into ordinary agreements with persons dealing with him. An agreement, therefore, to sell all the salt manufactured by the defendant, during a certain period to the plaintiff, at a certain price, is not in restraint of trade.³ An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund, and to divide the business and profits in certain proportions, has been held to be good by the Bombay High Court,⁴ and upon a similar principle, may be justified an agreement among rival bidders at a court sale not to bid against each other.⁵ An agreement, however, the object of which is to create a monopoly, is clearly opposed to public policy, and even a Municipal Board will not be allowed to stretch the language of the enactment creating it, for the purpose of covering attempts made, under colour of legislative provisions, to interfere in any way with the exercise of the ordinary rights of citizens.⁶

Trade agreements.

An agreement for personal service for a fixed period is clearly not one in restraint of trade. "In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling, and such an agreement does not restrain him from doing so. To hold otherwise would,

Agreement for personal service.

¹ *Nur Ali Dubash v. Abdul Ali* [1892] 19 Cal. 765; *Haribhai v. Sharafali* [1897] 22 Bom., 861, 873, *per* Candy, J. See also, S. R. A., s. 57, *ill.* (c).

² *Cf.* Pollock, I. C. A., 3rd ed. 171.

³ *Mackenzie v. Striramiah* [1890] 13 Mad., 472; *Sadagopa v. Mackenzie* [1891] 15 Mad., 79; *Carlises Nephews & Co. v. Ricknath*, [1882] 8 Cal., 809; *Premsook v. Dhurum Chand* [1890] 17 Cal., 320.

⁴ *Fraser & Co. v. Bombay Ice Manufacturing Co.* [1904] 29 Bom., 107.

⁵ *Gobindo Chandra Jha v. Shyamal Jha* [1905] 1 C. L. J., 85. ("A combination of interests, in respect of

the property bought, is not necessarily illegal; it is the object to be accomplished which determines whether the combination is lawful or otherwise. If the object be to depress the price of the property by artifice, the purchase will be void; if it be to divide the property for the accommodation of the purchasers, it will be valid.") *Cf.* *Jyoti Prokash v. Jhowmull*, [1908] 36 Cal. 134.

⁶ *Somu Pillai v. Municipal Council, Mayavaram* [1905] 28 Mad., 520. *Cf.* *Gourmoni v. Panihati Municipality* [1910] 12 C. L. J. 75, (monopoly of fuel shops for cremation).

I think, be a contradiction in terms."¹ Such a contract is perfectly legitimate, and I shall have to say more about it presently.

Goodwill.

The Indian Legislature recognises three exceptions to the general rule formulated in section 27. Two of them relate to agreements between partners, prior to dissolution,² or during continuance of partnership,³ which are rarely absent from partnership articles. Exception (1) is the saving clause relating to the transfer of the goodwill of a business. When transferring such goodwill, the seller may agree with the buyer to refrain from carrying on a similar business within specified local limits, which the court considers reasonable, regard being had to the nature of the business. It is proper to note, however, that where the agreement has reference to the goodwill alone, unconnected with the business premises, a court of equity refuses to enforce it *in specie*. For, what is the goodwill but "the probability that the old customers will resort to the old place,"⁴ and how can any court insure this? Where, however, the "goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill,"⁵ the contract may be enforced.

Wager.

Agreements by way of wager are also declared by statute to be void in India.⁶ It is in the interest of the public that gambling should be put down. The essence of gambling or wagering, I may explain, is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature.⁷ The parties must, however, contemplate the determination of the uncertain event on which the risk depends as the sole condition of their contract.⁸ As an illustration, I may refer to the so-called *badni* transactions, which are common in various parts of this country, where the parties enter into an ostensible agreement for the sale and

¹ *Per* Farran, C. J., *Charlesworth v. MacDonald* [1898] 23 Bom., 103, 112.

² I. C. A., 27, exc. 2.

³ *Ibid.*, exc. 3.

⁴ *Per* Eldon, L. C., *Cruttwell v. Lye* [1810] 17 Ves., 335, 346, 2 Stroud, 827.

⁵ *Kindersley, V. C. Darbey v. Whittaker* [1857] 4 Drew., 134, 140, 62 E.R., 54. Contracts for the sale of an attorney's business have been specifi-

cally enforced, *Whittaker v. Howe* [1841] 3 Beav., 383; *Aubin v. Holt* [1855] 2 K. & J., 66. But see *Fry, s. 93, p. 39*. Cf. *May v. Thomson* [1882] 20 Ch., 705 (doctor's business).

⁶ I. C. A., s. 30.

⁷ *Thacker v. Hardy* [1878] 4 Q. B. D., 685, 695.

⁸ *Anson, Con.*, 230.

purchase of stock or other articles of merchandise, but do not contemplate delivery. In order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences,¹ and such intention may be proved by oral evidence.²

The English courts, however, unlike the American courts,³ have held that agreements by way of wager are void, but not absolutely illegal.⁴ The Indian courts have adopted the same doctrine,⁵ and have accordingly ruled that money lent for gambling purposes,⁶ or to enable the defendant to pay off a gambling debt,⁷ is recoverable. Agreements collateral to wagering contracts have also been enforced.⁸ The law in the Bombay Presidency, however, is different, by virtue of the provisions of a local Act (No. III of 1856), which is very similar to a later English statute, the Gambling Act of 1892.⁹ And in one of the Burma courts a distinction has recently been taken between gambling that is prohibited by law and gambling that is not illegal.¹⁰ It is for the legislature to consider whether provisions similar to those of the Bombay Act should not be enacted for the whole of British India.¹¹

Gambling
not wholly
illegal.

I have now run through the various heads of public policy. It remains to note that the doctrine is not to be extended. Lord Davey said, "public policy is always an unsafe and treacherous ground for legal decision,"¹² and Lord Halsbury declared: "No court can invent a new head of public policy."¹³

Public
policy
doctrine
not to be
extended.

¹ *Perosha v. Mauckji* [1898] 22 Bom., 899, 903; *Doshi Talakshi v. Ujamsi Velsi* [1899] 24 Bom., 227; *Tod v. Lakhmidas* [1892] 16 Bom., 441; *Re Gieve* [1899] 1 Q. B., 794; *Kong Ye Lone & Co. v. Lowjee Nanjee* [1901] 29 Cal., 461 P. C.; *Ajudhia Prasad v. Lalman* [1902] 25 All., 38; *Sassoon v. Tokersey* [1904] 28 Bom., 616. Cf. *Kahn v. Walton* [1889] 46 Ohio, 195, 3 Keener, 859; *Peters v. Grim*, 149, Pa. St., 163 (stock speculation).

² *Kong Ye Lone & Co. v. Lowjee Nanjee*, *supra*; *Beni Madhub Das v. Sadusook* [1905] 32 Cal., 437, F. B.; *Motilal v. Gobindram* [1905] 7 Bom. L. R., 388.

³ *Irwin v. Williar*, 110 U. S., 499, 510; *Mohr v. Miesen* [1891] 47 Minn., 228, H. & W., 330. Pollock, *Con. (W. W.)*, 406 n.

⁴ *Thacker v. Hardy*, *supra*.

⁵ *Juggernath Shewbux v. Ram Dayal* [1888] 9 Cal., 791, 796.

⁶ *Subbaraya v. Devandra* [1884] 7 Mad., 301.

⁷ *Beni Madho Das v. Kaunsal Kishor*, [1900] 22 All., 452; *Pringle v. Jafar Khan* [1883] 5 All., 443.

⁸ *Shibho Mal v. Lachman Das* [1901] 23 All., 165; *Bholanath v. Mulchand* [1903] 25 All., 639. Cf. *Read v. Anderson* [1887] 13 Q. B. D., 779.

⁹ 55 Viet., c. 9.

¹⁰ *Maung Tha Dun v. Maung Su Va* [1905] U. B. R., 7.

¹¹ Pollock, *l. c.* A., 3rd ed., 193.

¹² *Janson v. Driefontein Consolidated Mines* 1902 A.C., 484, 500; see also *per Lord Lindley*, at 507.

¹³ *Ibid*, 491.

in a similar spirit in our own country, Mookerjee, J., refused to accept the argument that a judge has an almost unlimited right of deciding cases according to his own view of public policy for the time being.¹ Decisions, therefore, like *Shiam Lal v. Chhaki Lal*² and *Sheo Narain v. Mata Prasad*³ are to be deplored. In these cases, it was held that by reason of certain rules, which have not the force of law,⁴ and which prescribe that a *patwari* or a *kanungo*⁵ renders himself liable to dismissal, if he purchases land within his circle, all contracts of purchase of such land on the part of a *patwari* or *kanungo* were unlawful and contrary to public policy. No grounds of public policy were, however, specified, and what rendered the decision more extraordinary was the feature common to both the cases that neither of the suits was brought to enforce the contract of sale against the vendor, but that proper conveyances had been obtained by the real purchasers in favour of certain *benamidars* and the title had legally passed from the vendors, but these *benamidars* or trustees having subsequently turned dishonest, the assistance was sought of a court of equity to compel them to restore the property, so held by them in trust, to the real or beneficial owners.⁶ It is not easy to see how the court got over section 82 of the Trusts Act.⁷ Dereliction of duty on the part of a contracting party, who happens to be a public servant, is not *per se* a thing contrary to law or something having the force of law.⁸

Equitable
considerations.

I have now disposed of agreements which are unenforceable both at law and in equity. But there are other agreements which

¹ *Bakshi Das v. Nadu Das* [1905] 1 C. L. J., 261. So in America: "The power to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, it should be exercised only in cases free from doubt," *Richmond v. Dubuque, etc. R. Co.*, 26 Iowa, 191; *Waterman*, 276-7; 1 Page, *Con.*, s. 326.

² [1900] 22 All., 220.

³ [1904] 27 All., 73, 1 A. L. J. R., 412.

⁴ *Shiam Lal v. Chhaki Lal*, *supra*, 221.

⁵ Very subordinate revenue officials in the U. P.

⁶ In *Sheo Narain v. Mata Prasad*, further, the dispute was between the

representatives of the parties to the original *benami* transaction, that is, of the *benamidar* and the real purchaser. Therefore, even if the original object were unlawful (which is doubtful), the actual plaintiffs would not be affected by it; *Lewin, Trusts* 117; *Muckleston v. Brown* [1891] 6 Ves., 52, 68-9, 31 E. R. 934; *Godefroi, Trusts*, 214.

⁷ Cf. *Powell v. Knowler* [1741] 2 Atk., 224; Fry, ss. 483-4, p. 215. The Madras High Court took the correct view in *Lobo v. Brito* [1897] 21 Mad., 231 Cf. *Dagdu v. Buhant* [1897] 22 Bom., 520; *Husain Khan v. Jahan* [1913] P. R., No. 58.

⁸ *Gillepsie and Co. v. Maung* [1910] 8 I. C., 441.

courts of law recognise as creating valid rights *in personam*. Consequently, if such contracts are broken, the party aggrieved may maintain an action for compensation for the breach. But, upon certain equitable considerations, courts do not always deem it proper to enforce them *in specie*. I will now discuss some of the grounds upon which courts decline the equitable jurisdiction of specific performance in the case of contracts that are perfectly lawful.

The first such ground which the Indian legislature, following English precedents, has recognised is that compensation in money is an adequate relief for the non-performance of the contracts.¹ The justification for this rule, as we have seen, is to be found in certain historical conditions which never existed in India, but under which the jurisdiction of the courts of equity in England was defined. The rule, however, is so well established now that we may take it for granted that, where a payment of money would, in effect, amount to a substantial performance of the contract, a promisee must content himself with it. In such a case, pecuniary compensation is an "equally efficacious relief"² with specific performance. There is nothing to be gained by specific performance which cannot be got by damages.³ The stock illustration of this proposition is a case relating to the sale of stock, public consols or Government promissory notes, as we call them in India.⁴ The facts of the leading case of *Cuddee v. Rutter*⁵ were: The defendant agreed with the plaintiff to transfer to him £1,000 South Sea stock upon the 20th November next following, at the rate of 104 per cent., and gave a promissory note and received two guineas in part payment of the consideration. But the stock having in the meantime risen considerably in value, the defendant did not deliver the stock as promised, but a few days after offered to pay the difference. The Master of the Rolls (Sir Joseph Jekyll) thought this was a fair and reasonable agreement,

Money
compensation
adequate.

Cuddee
v.
Rutter.

¹ S. R. A., s. 21 (a).

² Cf. S. R. A. s. 56 (i).

³ Kelleher, 49.

⁴ See S. R. A., s. 21, *ill.* (1) of cl. (a):

"A contracts to sell and B contracts to buy a lakh of rupees in the four

per cent. loan of the Government of India."

⁵ [1720] Vin. Abr., 538, pl. 21, 2 Wh. & T., 8th. ed. 422 6 R. C., 640; *sub nom.* *Cuddee v. Rutter*, 1 P. Wms., 570. See *ante*, 118.

and decreed specific performance. But, upon appeal, Parker, L. C. (afterwards Lord Macclesfield) took the contrary view, and held that the payment of the difference fully answered the intention of the parties. He said: "The party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person and be no more money out of pocket than if the stock were delivered to him according to the agreement; this differs very much from the case of a contract for lands, some lands being more valuable than others, at least more convenient than others, to the purchaser, but there is no difference in stock, one man's stock is of equal benefit and conveniency as another's."¹ His Lordship also gave two other reasons: (i) "This court will not decree a specific performance of a contract when the party has not the thing to deliver,² and the defendant had not the stock when the contract was made;" (ii) "In contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution; the decree might be beneficial to the plaintiff one day, and to his prejudice the next."³ It is now perfectly settled, therefore, that a court of equity will not enforce the specific performance of an agreement for a transfer of stock, and the reason of the rule, which is generally applicable in the case of agreements for the sale of all ordinary chattels,⁵ apparently is that the actual carrying out of the agreement, as distinguished from compensation in money for the breach, cannot be of importance to the plaintiff.⁶

¹ Ibid, 540, 2 Wh. & T., 424.

² Cf. *Columbine v. Chichester* [1847] 2 Phil., 27. But in *Hibblewhite v. M' Morin* [1839] 5 M. & W., 462, it was held that an agreement for the sale of personal property not at the time in the seller's possession was valid and might be enforced. See also art. by Williston, 19 Harv. L. R., 557.

³ Vin. Abr., 540, 2 Wh. & T., 422.

⁴ Per Eldon, L. C., *Nutbrown v. Thornton* (1804) 10 Ves., 159, 161. *Eckstein v. Downing*, 10 Am. St. R., 404 (agreement to exchange yacht for stock).

⁵ Cf. S. R. A., s. 21, ill. (2) to cl. (a): "A contracts to sell and B contracts

to buy, 40 chests of indigo at Rs. 1,000 per chest." *Fothergill v. Rowland* [1873] 17 Eq., 132, 1 Ames, 111 (agreement to supply coal); *Heathcote v. North Staffordshire Ry. Co.* [1850] 2 Mac. & G. 100, 112 (per Lord Cottenham, "if A contract with B to deliver goods at a certain time and place, will equity interfere to prevent A from doing anything which may or can prevent him from so delivering the goods?") *Paddock v. Davenport* [1890] 107 N. C., 710, 2 Keener, 47 (agreement for purchase of trees, with a view to their severance from the soil).

⁶ 6 R. C., 640.

Lord Hardwicke said, adopting the third reason given above by Lord Macclesfield, "to be sure, in general, this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, etc., for, as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage."¹

Upon the same ground has a contract to lend money not been specifically enforced, even though some security may have been specified.² As Romilly, M. R., explained, since the Statute of Frauds does not apply to such a case, if the court has jurisdiction, "any conversation may be the subject of specific performance: thus, if two friends are walking together, and one says, 'will you lend me £100 at £5 per cent. for a year upon good security?' and the other says, 'I will,' that conversation might be made the subject of a suit for specific performance in this court, if on the next day one friend should say, 'I do not want the money,' or the other should say, 'I will not lend it.' Nothing would be more difficult and more dangerous than the task which this court would have to perform, if it were to investigate cases of that description. The court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said, that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, 'I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me.' This is a mere matter of calculation, and a jury would easily assess the amount of damage which the plaintiff has sustained."³ A contract, therefore, to

Loans.

¹ *Buxton v. Lister* [1746] 3 Atk., 383, 1 Ames, 48. But see *Pomeroy, S. P.*, p. 8.

² *Larios v. Gurety* [1873] 5 P. C. 346; *Sichel v. Mosenthal* [1862] 30 Beav., 371; *South African Territories Ltd. v. Wallington* [1898] A. C., 309, affg. [1897] 1 Q. B., 692 (contract to

lend money to company, payable by instalments, upon security of debentures of the company); *Ramanand v. Nakched* [1904] 8 O. C., 5; *Hukum v. Khunni* [1911] 8 A. L. J. R., 1282.

³ *Rogers v. Challis* [1859] 27 Beav., 175, 1 Ames, 62. In *Reed v. Reed*, 68 S.W., 385, contract to apply payments,

borrow¹ or pay money² is not enforced *in specie*, nor where the rights of the plaintiff may be fully satisfied by an account of profits and a payment of the sum found due thereunder.³ "With contracts that result in a mere debt, or money claim," says Leake, "specific performance by payment of the money is substantially the same thing as damages for detention of the money, the latter being merely the sum detained; and the ordinary remedy by action for the debt is sufficient both in law and in equity."⁴ It is upon this principle apparently that the third illustration to clause (a) to section 21 is based. "In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000 and to honour A's drafts to that amount." This contract, says the Legislature, "cannot be specifically enforced, for A would be reimbursed by compensation in money." It would perhaps be more correct to say that compensation in money is the only practicable remedy, for it is quite conceivable that A might sustain serious damage by a dishonour of his drafts, and, if he is a trader, his business might be ruined by his banker failing him.⁵ Where a banker, therefore, holding funds of a customer, refuses to cash his cheque, substantial damages may be given to the customer for loss of credit,⁶ and even where no actual damage has been sustained, nominal damages may always be recovered.⁷

Damages for
dishonour of
draft.

Maya Ram
v. Prag Dat.

In a case which came before the Allahabad Court, it appeared that the defendant had obtained a loan from the plaintiff, and executed a mortgage in his favour. The defendant, who had delivered the deed to the plaintiff, induced him to hand it back on the pretence of getting it registered, but afterwards refused to do so. The plaintiff sued to have a fresh hypothecation-bond executed and registered by the defendant. The court held that the plaintiff's proper remedy was by a suit simply and directly

made by a debtor, on an overdue note, was not enforced.

¹ *Rogers v. Challis*, *supra*.

² *Crompton v. Varna Ry. Co.* [1872] 7 Ch., 562; *Clark v. Lord Rivers* [1868] 5 Eq., 91; *Brough v. Oddy* [1829] 1 Rus. & M., 55.

³ *Ord v. Johnston* [1855] 1 Jur. N. S., 1063; *McKewan v. Sanderson*

[1875] 20 Eq., 65.

⁴ *Con.*, 795.

⁵ *Cl. Collett*, 148.

⁶ *Robin v. Steward* [1854] 14 C. B., 595.

⁷ *Marzetti v. Williams* [1830] 1 B. & A., 415; 5 Cyc., 535; 1 *Laws of Eng.*, 608; *Hart, Banking*, 340-1.

for the recovery of the money claimed, and that clauses (a) and (c) of section 21 precluded him from getting the relief he had asked for.¹ The soundness of this ruling is, however, open to question. This was a case not merely of a contract to transfer immoveable property, but of an actual conveyance on consideration paid, and the statute law of India recognises the right of the transferee in such a case to have his title-deed registered.² The creditor, in any case, could not be compelled to recall an investment. Section 12 of the Specific Relief Act, therefore, seems more in point. And even where there was no lien or charge upon real property, but the maker of a promissory note got it back from the holder under promise to return it or execute another note of the same tenour and amount, and subsequently destroyed the note, an American court at the suit of the holder compelled the maker to execute and deliver a new note.³ In the case of a sale-deed where, after execution, the vendor fraudulently kept it back and did not register it, the Calcutta High Court held that the purchaser could sue for return of the deed and registration.⁴ Where an unregistered sale-deed for over Rs. 100 was stolen from the purchaser within the time allowed for registration, the Madras High Court held that he could bring a suit against the vendor to compel the execution and registration of a fresh deed.⁵

It is important to note that, in determining the question whether monetary compensation is a sufficient remedy, the court does not proceed upon the circumstances of each particular case.⁶ Professor Pomeroy has discussed this matter with great ability; and I will quote only two passages from his excellent work: "A particular contract, the subject of judicial action, is not treated as a single isolated case, and the inquiry is not, whether from

Class of contract considered, not individual case.

¹ *Maya Ram v. Prag Dat* [1882] 5 All., 44. In this case, however, the terms of the lost deed were not satisfactorily proved, and the actual decision was probably right. See 2 Story, *Eq.*, s. 753.

² Act—XVI of 1908, ss. 35.—71-7. Cf. *Abdullah Khan v. Janki* [1894] 16 All., 303.

³ *McMullen v. Vanzant*, 73 Ill., 190. *Waterman*, 22.

⁴ *Shumshare Ali v. Lutafut Kureem*

[1872] 18 W. R., 504. But, where vendor made over the unregistered deed to vendee and latter allowed period of registration to expire, held he could not get fresh sale-deed executed and registered, *Subba v. Visvanatha* [1914] 22 I. C., 941.

⁵ *Nallappa Reddi v. Ramalingachi Reddi* [1897] 20 Mad., 250.

⁶ Cf. *Richmond v. Dubuque Railroad* [1871] 33 Iowa, 428, 481.

its special provisions or from the peculiar situation of its parties, the remedy of damages would be adequate or inadequate; it is rather treated as one of a class, and the inquiry is whether in agreements generally of that kind, the terms or the relations of the parties are such that the legal remedy of damages is adequate or inadequate....In administering the equitable remedy of specific performance, and so far as it depends upon the adequacy or inadequacy of legal damages, the courts are guided by considerations which have respect to classes of contracts having the same or similar qualities and incidents connected with their subject-matter, terms or parties, and rules are established with greater or less certainty, precision, and comprehensiveness for each class separately."¹

Inability to
render
decree.

Another ground upon which specific relief is refused by a court is "inability to render or enforce its decree." Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instrumentalities, the court is unable, while pursuing its ordinary modes for administering justice, either to render a decree or to enforce the decree when made, then, says Mr. Pomeroy, "the remedy will be refused."² Logically, the first question in every case is—can equity enforce a specific reparation of the breach of the contract or other obligation? "If a contract consists in giving (*dando*)," answers Langdell, "equity can enforce a specific reparation for a breach of it; if it consists in doing (*faciendo*), it cannot." In the former case, a distinction must be taken, as we have seen, "between those contracts which consist in giving something which is specified and identified by the contract, and those which consist in giving something of the kind, quality, or description specified in the contract."

As an illustration of a case where the court cannot render a decree, may be mentioned an agreement for the sale or transfer of a good-will, apart from the business and premises, already referred to.⁴ Equity could not direct the way in which the

¹ S. P., ss. 26, 27.

² 4 Pomeroy, *Eq., J.*, s. 757. *Per* Kindersley, V. C., "This court will never make a decree that it cannot see its way to enforce," *Darbey v.*

Whitaker [1857] 4 Drew, 134, 140, 2 Keener, 132.

³ Langdell, *Eq. J.*, 47-8.

⁴ Pomeroy, *S.P.*, s. 306.

defendant should proceed to turn the custom of those who had dealt with him, to the plaintiff.¹ Similarly, Lord Chancellors have declared their inability to enforce an agreement concerning manufacture and sale of secret medicines or other secret commodities where the contract recognised the secret as not to be disclosed, for if the matter is secret, how can the court tell if the secret has been infringed or not?² The court acts only where it can perform the very thing in the terms specifically agreed upon,³ and not where the subject-matter of the contract is something which the court cannot ascertain by judicial proof, or cannot lay hold of, so as to define and establish the rights concerning it.⁴

Secret medicines.

The class of cases where the court cannot enforce its decree is more numerous. A contract, for instance, may be dependent on the personal qualifications or volition of the parties. All agreements for personal service are of this character, for the relation is of so personal and confidential a description that the enforced performance of the contract would probably be worse than its non-performance.⁵ The old adage that "a bird that can sing and will not sing, must be made to sing"⁶ is answered by the other old adage that "although you can lead a horse to the water you cannot make him drink."⁷ The court now⁸ holds, therefore, that it is not for the interest of society that persons who are not desirous of maintaining continuous personal relations with one another should be compelled to do so.⁹ Besides, as Knowlton, C. J., observed in a recent case: "The right to dispose of one's labour as he will, and to have the benefit of one's lawful contract, is incident to

Contracts dependent on personal qualification or volition.

Personal service.

¹ 3 Parsons, Con., 335.

² *Newbery v. James* [1817] 2 Mer., 446; *Williams v. Williams* [1817] 3 Mer., 157. But see *Peabody v. Norfolk* [1868] 98 Mass., 452, 2 Keener, 241.

³ *Wolverhampton R. Co. v. L. N. W. R. Co.* [1873] 16 Eq., 439.

⁴ *Pomeroy, S. P.*, s. 304, p. 392.

⁵ *Fry*, 46.

⁶ *De Rivafuli v. Corsetti* [1833] 4 Paige, Ch., 264, 2 Scott, 87.

⁷ 6 R. C., 666.

⁸ *Ball v. Coggs* [1710] 1 Bro. P. C., 140, and *East India Co. v. Vincent* [1740] 2 Atk., 83, are old decisions to the contrary.

⁹ *De Francesco v. Barnum* [1890] 45 Ch. D., 430; *Johnson v. Shrewsbury & Birmingham Ry. Co.* [1853] 3 DeG M. & G., 914 (*Per Knight Bruce, L. J.*: "We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done.")

the freedom of the individual which lies at the foundation of the government of all countries that maintain the principles of civil liberty."¹ Similarly, Van Fleet, V. C., remarked: "To many persons the right to labour is the most important and the most valuable right they possess; it is their fortune, constituting the only means they have to obtain food, raiment, and shelter and to acquire property. To such persons a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right, or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice."² We shall find subsequently that some agreements for personal service have, in exceptional cases, been indirectly enforced by means of an injunction. But as to the general rule adopted by courts of equity, there can be no doubt that neither affirmative nor negative covenants in an agreement between an employer and an employee will be ordinarily enforced at the instance of either.³ "No court of justice," said Jessel, M. R., "can interfere, so long as there is no property the right to which is taken away from the person complaining."⁴

Contract by
author or
artist.

A contract by an author with a publisher to complete a literary work,⁵ or by an artist to paint a picture for a sitter for valuable consideration⁶ cannot be enforced at the instance of

¹ *Berry v. Donovan* [1905] 188 Mass., 353, 355.

² *Sternberg v. O'Brien*, [1891] 48 N. J., Eq., 370, 1 Ames, 127.

³ *Pickering v. Bishop of Ely* [1843] 2 Y. & C. Ch. 249, 63 E. R., 109 (confidential servant); *Baldwin v. Society for Diffusion of Useful Knowledge* [1838] 9 Sim., 393 (map-maker); *Webb v. England* [1860] 29 Beav., 44 (apprentice); *Stocker v. Brockelbank* 3 Mac. & G. 250 (manager); *Ogden v. Fossick* [1862] 4 DeG. F. & J., 426 (ditto); *Chinnock v. Sainsbury*, [1861] 30 L. J. Ch. 409 (agent); *Bainbridge v. Smith* [1889] 41 Ch. D., 462 (managing director); and American cases cited in 1 Ames, 87, n. 2. *Distinguish Fortescue v. Lostwithiel etc. Ry. Co.* [1894] 3 Ch., 639. See also *ills* (1) and (2) of

cl. (b) s. 21, S. R. A.; *Nusserwanji v. Gordon*, [1881] 6 Bom., 266. *Per Selborne, L. C.* "It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders, and a general superintendence which could not conveniently be undertaken by any court of justice; and therefore contracts of that sort have been ordinarily left to their operation at law." *Wolverhampton, &c., Ry. Co. v. London &c. Ry. Co.* [1873] 16 Eq., 433, 438.

⁴ *Rigby v. Connol* [1880] 14 Ch. D., 482, 487.

⁵ S. R. A., s. 21, *ill* (3) to cl. (b).

⁶ *Ibid*, *ill* (8).

the promisee. Here also is a contract for personal services, but the services are such as require the exercise of peculiar talent or skill, of intellectual ability and judgment, and no court will order one to perform such services, "because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not."¹

Upon the volition of the parties also depends a contract by *A* to marry *B*, and it cannot obviously be specifically enforced.² Nor will specific performance be granted of a Hindu parent's or guardian's contract to give a child in marriage,³ and for the breach of a contract of betrothal among Hindus, the only remedy is by an action for damages.⁴

Contract of marriage or betrothal.

Similarly, an agreement by *A* with *B* to supply the latter with all the goods which he may require, depends on the volition of the promisor, and cannot be enforced *in specie*.⁵ An affirmative contract to carry on a trade will not be enforced,⁶ but a negative contract not to carry on a trade, on leased premises, for instance, may be enforced by injunction.⁷

Contract to supply goods or to trade.

Some contracts, similarly, depend for performance on the consent of a third party. We have already seen that where such a party is not legally bound to consent, the agreement cannot be enforced *in specie*.⁸ It may be noted now that an

Submission to arbitration.

¹ *Per* Devens, J., *Adams v. Messenger* [1888] 147 Mass., 185, 1 Ames, 51. "Although usually a contract, relating to personal services, will not be specifically enforced," says Waterman, "but the party aggrieved will be left to his remedy at law, yet there is an exception to the rule, when by the contract, something is to be done, on a party's own land, of such a nature that the opposite party will be deprived of the benefit of labour and materials bestowed thereon, unless the contract is carried out, and the owner of the land is attempting thus to deprive him. Within this principle, a contract between a water-power company and a city, that the former should construct certain extensive water-works of a capacity to supply the city with a specified quantity of water, the works having been constructed, was enforced against the city. *Columbia Water-Power Co. v.*

Columbia, 5 S. C., 225." *Sp. Perf.*, 72 n.

² S.R.A., s. 21, *ill* (12) to cl. (b).

³ *Re Gunput Narain Singh* [1875] 1 Cal., 74.

⁴ *Umed v. Nagindas*, 7 Bom., H. C., O. C., 122; *Nowbut v. Lad Kooer* [1873] 5 N. W. P., 102; *Mayne, H. L.*, s. 95.

⁵ S.R.A., s. 21, *ill* (10) to cl. (b). Cf. *Mackenzie v. Striramiah* [1890] 13 Mad., 472. See Lect. VI, *infra*.

⁶ *Hooper v. Brodrick* [1840] 11 Sim., 47.

⁷ *Hobson v. Tulloch* [1898] 1 Ch., 424; *Leake, Con.*, 793; *Fawcett, L. & T.*, 357 sqq.

⁸ Ante, 159. In *Manby v. Gresham Life Assurance Society* [1861] 29 Beav., 439, a contract to reduce a premium was not enforced, as it was for the society, and not the court, to be satisfied that the cause for charging an extra premium did not exist or had been removed.

Reference
to valuers.

agreement to submit a matter to arbitration or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitrators to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties.¹ Following the case of *Vickers v. Vickers*,² the Indian legislature has framed illustration (4): "A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer, but before the valuation is made, A instructs his valuer not to proceed."³ There is no *constat* of the price, the contract is not a complete contract, said Wood, V. C., and there is nothing on which the court can act.⁴ The same result would follow even if the contract be treated as complete. For, the agreement, upon that view, may be regarded as one of sale, subject to the condition precedent that the price shall be fixed in a particular way, and it is clear that the agreement will not be enforceable so long as the condition is unfulfilled and the price remains uncertain.⁵ As was said by Leach, V. C., "A man who agreed to sell at a price to be named by A, B and C, could not be compelled by a court of equity to sell at any other price."⁶ Therefore, so long as the price is not reduced to a certainty, the court will not, as a rule, provide other means of fixing the price; for that would be holding the parties bound by a contract different from that which they made.⁷ The court will not appoint other valuers or arbitrators.⁸ The court specifically enforces a contract, it does not complete and perfect one, so that it may afterwards be enforced by the party whom it

¹ 2 Pomeroy, *Eq. R.*, s. 758; *Milnes v. Gery* [1807] 14 Ves., 100, 6 R. C., 684; *Agar v. Macklew* [1825] 2 Sim. & St., 418, 1 Ames, 67.

² [1867] 4 Eq., 529, 2 Keener, 132.

³ The same result follows where a valuer refuses to proceed of his own accord, *Darbey v. Whitaker* [1857] 4 Drew, 134, 2 Keener, 129; or dies, *Fith v. Midland Ry. Co.* [1875] 20 Eq. 100.

⁴ *Vickers v. Vickers*, *supra*. Cf. Fry., ss. 353-367, pp. 150-156; Pomeroy S. P., s. 150, p. 212.

⁵ 2 Williams, V. & P., 913, 989, n. 3; also 1 *ibid.*, 50.

⁶ *Morse v. Merest* [1821] 6 Madd., 26, 2 Keener, 127.

⁷ 1 Williams, *op. cit.*, 51; *Milnes v. Gery*, *supra*, *Blundell v. Brettargh* [1810] 17 Ves., 232.

⁸ *Cooth v. Jackson* [1801] 6 Ves., 12, 34. Distinguish *Hall v. Warren* [1804] 9 Ves., 605. A court of equity cannot change a contract and then enforce it. See Waterman, 191, n. 4, and cases there cited.

suits.¹ Where, however, the court finds that the stipulation as to the mode of ascertaining the price is not essential, but rather something by way of suggestion, and that the real agreement is to sell at the fair value, it will direct a reference to find the value.² And the court has generally taken this view where the main contract was to buy land at a fixed price, but there was a subsidiary agreement to purchase fixtures at a valuation.³ Where the vendor refused to allow a valuer to enter into his house for the purpose of making a valuation, the court made a mandatory order to compel the vendor to allow him to enter, and to enable the valuation to proceed.⁴

Contract running into numerous or minute details.

A court of equity does not also deem it expedient to make a decree for specific performance of a contract which runs into minute or numerous details.⁵ A contract by a tenant, for instance, that he will cultivate the land leased in a particular manner,⁶ or by an agriculturist that he will grow particular crops on his land and deliver them when cut and ready to a creditor of his,⁷ will not be enforced *in specie*. "How can a master," asked Lord Northington, "judge of repairs in husbandry?"⁸ So where, by a charter party entered into in Calcutta, between the owner of a ship and the charterer, it is agreed that the ship shall proceed to Rangoon and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London, a court can scarcely carry out its judgment for specific performance in this case, and must leave the party to seek his remedy in damages.⁹ In such cases, the court refuses to interfere, not because the court cannot formulate a decree which shall order everything necessary for a complete performance or which shall not be *absolutely* incapable of compulsory execution,

¹ Pomeroy, S.P., 218.

² *Milnes v. Gery*, *supra*, 407; *Gourlay v. Duke of Somerset* [1815] 19 Ves., 429, 431; *Meynell v. Surtees* [1854] 3 Sm. & Gif., 101, 113 Pomeroy, S. P., s. 151, p. 213.

³ *Jackson v. Jackson* [1853] 1 Sm. & Gif., 184. Cf. *Darby v. Whitaker* [1857] 4 Drew, 134; *Richardson v. Smith* [1870] 5 Ch., 648, 652, 654. See also, S.R.A., s. 14, *ill. (b)*, where parties could not agree as to valuation

of furniture.

⁴ *Smith v. Peters* [1875] 20 Eq., 511. Cf. *Morse v. Merest*, *supra*.

⁵ S.R.A., s. 21, *cl. (b)*.

⁶ *Ibid.*, *ill. (6)*.

⁷ *Ibid.*, *ill. (7)*; *Starens v. Newsome*, 1 Tenn. Ch., 239.

⁸ *Rayner v. Stone* [1762] 2 Eden. 128. But see Pomeroy, S.P., 393. Cf. *Phipps v. Jackson* [1887] 56 L. J. Ch., 550.

⁹ S. R. A., s. 21, *cl. (b)*, *ill. (5)*.

but because (to quote Pomeroy) "the enforcement of the decree would unreasonably tax the time, attention, and resources of the court, and thereby interfere too much with its public duties to other suitors, and in the general administration of justice."¹

Contract to
execute
works court
cannot
superintend.

Upon the same principle a court will often abstain from enforcing *in specie* a contract to execute certain works which the court cannot superintend.² The Indian Legislature, however, does not supply us with any test whereby the limit of the court's capacity for superintendence may be determined. Clause (b) of section 21 is beautifully vague: "A contract which runs into such minute or numerous details, . . . or *otherwise from its nature is such*, that the court cannot enforce specific performance of its material terms."³ As we have seen, at one time courts of equity refused to enforce specifically a contract to build. Kenyon, M.R., remarked, so long back as 1788, "There is no case of a specific performance decreed of an agreement to build a house, because if *A* will not do it *B* may. A specific performance is only decreed where the party wants the thing *in specie* and cannot have it any other way."⁴ But in 1901 the then Master of the Rolls (A. L. Smith) observed that he had never seen the force of the objection that the court could not superintend building-works.⁵ Where, however, the court makes such a decree and the judgment-debtor does not obey it, it may be inconvenient to enforce the decree by the process, say, of attachment for contempt;⁶ for numerous questions will probably arise as to whether there has been substantial performance, whether defective performance may be excused, what compensation should be made for the deficiency, and the like.⁷

Contract to
build or
repair.

¹ Pomeroy, *S. P.*, s. 307, p. 398.

² *Ibid.*, ill. (9).

³ Cf. Collett, 154-5.

⁴ *Errington v. Ayresly* [1788] 2 Bro. Ch., 341. See *ante*, 182 sqq.

⁵ *Mayor, &c., of Wolverhampton v. Emmons* [1901] 1 K. B., 515, 1 Ames, 77.

⁶ Cf. C. P. C., or. 21, r. 32.

⁷ 2 Pomeroy, *Eq. R.*, s. 760, p. 1277. The authorities were reviewed in *Beck v. Allison* (1874) 56 N. Y., 366, 1 Ames, 70 (lessor's covenant to repair), where Grover, J., said: "The Court must first adjudge what repairs are

to be made and the time within which they are to be done. When this is accomplished, more serious difficulties remain. The idea that the court can appoint a Receiver to take possession of the property and cause the work to be done with money furnished by the defendant, would be, in the language of Lord Northington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when, and how, and then to enforce performance by attachment as for contempt in case of alleged disobedience. Then

It has accordingly been laid down in a number of cases that, as a general rule, contracts for building and construction and to make repairs will not be enforced *in specie*.¹ A suit to enforce a contract to build a railway has, for instance, been dismissed,² and it has been doubted if one in respect of an agreement to erect and maintain telephonic apparatus will lie.³ A contract to remove a specified building⁴ or a covenant to make good a gravel-pit⁵ will not be specifically enforced. But a number of exceptions have been grafted upon this general rule, the nature of which I have tried to indicate in my last lecture.⁶ The court may also sometimes find it not in the public interest to decree specific performance in a particular case.⁷ In *Kendall v. Frey*,⁸ the common council of a City in America had agreed to erect a City hall on land conveyed to it by the plaintiff, but ultimately did not do so. The court refused to interfere with the discretion of the defendant council, and said, "How and where a public building shall be erected is necessarily a question of public policy, and involves a variety of considerations. The common council is vested by law with full authority to decide them. The court cannot wisely review their action on such a subject."

will arise not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury."

¹ *Lucas v. Comerford* [1790] 1 Ves., 235; *Kay v. Johnson* [1864] 2 H. & M., 118; but see 38 L. J., Ch., 143. *Wheatley v. Westminster B. C. Co.* [1869] 9 Eq., 538 *Brace v. Wehnert* [1858] 25 Beav., 348.

² *South Wales Ry. Co. v. Wythes* [1854] 5 DeG. M. & G., 880; *Greenhill v. Isle of Wight Co.* [1871] 23 L. T., 887; *Ross v. Union Pacific Ry. Co.* [1863] 1 Woolw., 26, 2 Keener, 145.

³ *Keith v. National Telephone Co.*,

[1894] 2 Ch. 147, 153, 2 Keener, 188.

⁴ *Armour v. Connolly*, 49 Atl. 1117.

⁵ *Flint v. Brandon* [1803] 8 Ves., 159, 1 Ames, 69 (*Per Grant, M. R.*, "The matter in controversy is nothing more than the sum it will cost to put the ground in the condition, in which by the covenant it ought to be.")

⁶ *Ante*, 132 sqq.

⁷ *Chicago R. I. & P. Ry. Co. v. Union Pacific Ry. Co.*, 47 Fed. R. 15 (construction of parallel railway lines disallowed; *per Brewer, J.*, "Such an expenditure of money places an additional burden upon the public. Every unnecessary mile of rail-road track or of bridge that is built adds to the cost of transportation, and surely the public is interested in seeing that that cost be as light as possible"). But see *Pomeroy, S. P.*, 31n., "this is undoubtedly sound political economy, but it may be questioned whether it is not a novel ground for the interposition of a court of equity, with its remedy of specific performance."

⁸ 74 Wis., 26.

Continuous
contract.

A contract for construction will often be found to involve the necessity of the performance of duties continued over a long period of time. Now, a court of equity will not decree specific performance of a contract, the execution of which would require more or less permanent supervision by the court, if the work could not be concluded within a definite and reasonable time.¹ "A court," said Mellish, L. J., "can only order the doing of something which has to be done once for all, so that the court can see to its being done."² A contract, consequently, by *A* to let for twenty-one years to *B* the right to use such part of a railway made by *A* as was upon *B*'s land, and that *B* should have a right for running carriages over the whole line on certain terms, and might require *A* to supply the necessary engine-power, and that *A* should during the term keep the whole railway in good repair, will not be enforced.³ Accordingly, contracts for the working of quarries⁴ and coal-mines,⁵ or to maintain an inn,⁶ to manage and operate a rail-road,⁷ to keep a farm well-stocked with horses and cattle,⁸ or to secure to the tenants of an apartment-house continuously the services of a resident porter charged with the performance of a great variety of duties,⁹ have not been specifically enforced. So the court has refused to interfere in favour of a continuing covenant not to sell the water from a well to the injury of certain water-works, on the ground that it would be necessary to enquire on every occasion of

¹ *Adams v. Messinger*, *supra*, 1 Ames., 52; *Ryan v. Mutual Tontine etc.*, Assn. [1893] 1 Ch., 116, 125, 2 Keener, 179; *Phipps v. Jackson* [1887] 56 L. J., Ch. 550.

² *Powell & Co. Coal Co. v. Taff Vale Ry. Co.* [1874] 9 Ch. 331.

³ S. R. A. s. 21, cl. (g), ill.; *Blackett v. Bates* [1865] 1 Ch., 117, 2 Keener, 154 (converse case; *per* Cranworth, L. C., "the court has no means of enforcing the performance of these duties; all it can do is to punish the plaintiff by imprisonment or fine, if he does not perform them").

⁴ *Booth v. Pollard* [1840] 4 Y. & C., Ex., 61; *Rutland Marble Co., v. Ripley* [1870] 10 Wall. 339 (perpetual supply of marble from quarry). In this case, the Court said:—"If performance be decreed, the case must remain in Court for ever, and the Court to the end of time may be

called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Meanwhile the parties may be constantly changing" (p. 358).

⁵ *Pollard v. Clayton* [1855] 1 K. & J., 462; *Wheatley v. Westminster Co.*, *supra*.

⁶ *Hooper v. Brodrick* [1840], 11 Sim. 47.

⁷ *Powell, Duffryn Coal Co. v. Taff Vale Ry. Co.*, [1874] 9 Ch., 331, 1 Ames., 79 *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544.

⁸ *Phipps v. Jackson*, [1887]. 56 L. J. Ch. 550.

⁹ *Ryan v. Mutual Tontine, etc.*, Assn., *supra*.

selling, whether it was done with or without injury.¹ Similarly, American courts have refused to enforce specifically a contract to support a person as a member of one's household² or to furnish news to a publishing company for a number of years.³ For, if the court were to make what purported to be a final order for specific performance in such cases, such order would not be the end of litigation, but, on the contrary, its fruitful and continuous source.⁴ The Indian legislature has fixed an arbitrary limit of three years,⁵ though it may be doubted if a hard and fast rule in a matter like this can advance the purpose of a court of equity. The test should be one of reasonableness and practicability, and we find that in England specific performance of a contract to erect telephonic apparatus upon the plaintiff's premises and maintain it even for *three years*, has been held to be impracticable.⁶

Another ground upon which a court deems it expedient to refuse specific relief is that the decree, if made, would be nugatory.⁷ Where a contract is in its nature revocable,⁸ the performance of the contract would be useless,⁹ for the defendant would be entitled immediately to terminate the agreement, and thus undo what the court had done, and evade its decree. A contract, accordingly, between two persons to become partners.

Contract
revocable,
decree
nugatory.

¹ *Collins v. Plumb* [1810] 16 Ves. 454. *Pomeroy, S. P. s. 308, p. 394.*

² *Chadwick v. Chadwick*, 120 Ala. 580.

³ *Iron Age Publishing Co. v. Telegraph Co.* [1887] 83 Ala. 498.

⁴ *Port Clinton Co. v. Cleveland Co.*, supra, 556 ("Even if the contract was sufficiently specific, so that the party, when ordered to operate the rail-road, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution not once, as in the case of the archway, the erection of which was ordered in *Storer v. G. W. Ry.* (supra), but in instances innumerable, and for an indefinite time.") Cf. *Collins v. Plumb*, supra; also cases collected in *Waterman*, 70, n. 2; *Pomeroy, S. P.*, 397-8, n.

⁵ *S. R. A.*, s. 21, cl. (g).

⁶ *Keith, Prowse & Co. v. National*

Telephone Co., supra, (in this case there was strictly no question of erecting or maintaining the wire and apparatus, but these being already there, *Kekewich, J.*, held that they should be kept open to the use of the plaintiff, and the wires should not be cut off) *Mr. Pomeroy, Jr.*, conjectures that the rule really rests upon a deeper reason of public policy than inconvenience to the Court, viz., a feeling that the daily and hourly ordering of the affairs of an individual or a group of individuals for an indefinite term of years, in obedience to the terms of a Chancery decree and with its personal sanction for disobedience, is, in effect, such an impairment of personal freedom as is hostile to the whole spirit of English and American institutions, 2 *Eq. R.*, p. 1280 n.

⁷ *Ibid.*, s. 755, p. 1272; *Pomeroy S. P.*, ss. 288-9, pp. 381-2.

⁸ *S. R. A.*, s. 21, cl. (d).

⁹ *Fry, s. 94, p. 40.*

in a certain business, where the duration of the proposed partnership is not specified, will not be enforced *in specie*, because such partnership is dissoluble at any time at the will of either party.¹ The court will not undertake to compel unwilling parties to act in the relation of partners.² There is, however, a distinction to be drawn between a partnership and a company, a share-holder not being at liberty to withdraw without procuring another to take his shares; he may therefore be compelled to take the shares allotted to him.³ But a contract to take a certain number of shares where, by the rules of the company, a share-holder might cease to be a partner within fourteen days after becoming such, was not specifically enforced.⁴ And upon a similar principle, Grant, M. R., refused specific performance of a contract for a lease which was to contain a proviso for re-entry on breach of a covenant which the plaintiff had already broken.⁵ The court will not go through the idle ceremony of directing the execution of a lease after the expiry of its term, unless the execution is still necessary to secure some right to the plaintiff.⁶

Questions have sometimes arisen as to the enforcement of foreign contracts. Now, the general principle of international law is that the plaintiff should seek the defendant and sue in his *forum*.⁷ Where, therefore, the defendant is a person over whom the tribunals of this country have no jurisdiction, for instance, a foreign

¹ *Hervey v. Birch* [1804] 9 Ves., 357; *Scott v. Rayment* [1869] 7 Eq., 112; S.R.A. s. 21, cl. (d), *ill.* but equity will secure to a partner the interests in property to which by the partnership agreement he is entitled. *Somerby v. Buntin* [1875] 118 Mass., 279, 2 Keener, 78. Right of pre-emption was accordingly enforced in *Homfray v. Foithergill* [1866] 1 Eq., 567, 2 Keener, 26. Where the party seeking relief has altered his position in reliance upon the contract, so that he will be prejudiced greatly if the partnership is not formed, and he will receive substantial relief if the partnership is formed, even if it is immediately ended, there is some American authority for decreeing specific performance, 3 Page, *Con.*, 2476. A contract for a partnership for a definite period

may be enforced and one of the partners may be enjoined from carrying on business under partnership style with other persons and from publishing notice of dissolution, *England v. Curling* [1844] 8 Beav., 129, 2 Keener, 68. *Waterman, s. 34.* *Lindley, Part.*, bk. III, ch. 10, s. 4.

² *Per Bates, C.*, *Satterthwaite v. Marshall* [1872] 4 Del., Ch. 337, 353, 2 Scott, 31n.

³ *New Brunswick Ry. v. Muggeridge* [1859] 4 Drew., 686.

⁴ *Sheffield Gas Consumers Co. v. Harrison* [1853] 17 Beav., 294.

⁵ *Jones v. Jones* [1806] 12 Ves., 188. Cf. *Gregory v. Wilson* [1852] 9 Ha., 683; *Lewis v. Bond* [1853] 18 Beav., 85, 2 Scott, 29.

⁶ *Nesbitt v. Neyer* [1818] 1 Sw., 223.

⁷ *Fry*, 54.

government¹ or the domiciled subject of a native State,² British Indian courts have no jurisdiction. Nor has a court of equity necessarily jurisdiction over a subject of ordinary equity cognizance simply because the parties are within the *forum*. A court in America has accordingly declined to order a defendant to sell land situate in a foreign jurisdiction, when the case was otherwise within its power, upon the ground that a court of equity cannot give full relief where the *locus in quo* is not within its absolute jurisdiction and where the contract sought to be enforced is not capable of being fulfilled by the *lex loci rei sitæ*.³ But the English Courts of Chancery acting upon the maxim, *æquitas agit in personam*, directed specific performance of a contract to set out a boundary between two States in America, according to a line agreed upon.⁴ As the operation of the judgment on the immoveable estate abroad is not direct but indirect, and only through the medium of the person affected by the judgment,⁵ the decree is to be enforced by personal process, commitment, and sequestration, in case of disobedience.⁶ Where the contract relates to moveables, the case of *Hart v. Herwig*⁷ is an authority in favour of the jurisdiction. James, L. J., ruled, "Where the contract, as in this case, though made abroad, is to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, then the court here, in the exercise of its discretion, will see that the thing to be delivered in this country, does not leave this country, so as to defeat the right of the plaintiff to have it so delivered." Our Civil Procedure Code, however, does not seem to recognise any such jurisdiction, and it has been doubted if British Indian courts can act *in personam*.⁸ But the jurisdiction has recently been

¹ Cf. *Smith v. Weguelin* [1869] 8 Eq., 198. C. P. C., ss. 84-7.

² *Gurdial Singh v. Raja of Faridkote* [1894] 22 Cal., 222, P. C. Cf. *Muhammad Yusufuddin v. Q. E.* [1897] 25 Cal., 20, P. C.

³ Story, *Conflict of Laws*, s. 544. Not only must the parties be within jurisdiction, but no obstacle should exist to the due execution of the decree, 2 Swanst., §23n. See H. A. Smith, *Equity*, 17; 1 Pomeroy, *Eq. J.*, 708-13.

⁴ *Penn v. Baltimore* [1750] 1 Ves., Sr. 444, 1 Wh. & T., 8th, ed. 800, and notes.

⁵ Fry, s. 127, p. 52; *British South Africa Co v. Companhia de Mocambique* [1893] A. C., 602, 626.

⁶ *Lord Portarlington v. Soulby* [1834] 3 M. & K., 104, 108; Waterman, s. 48, pp. 65-6.

⁷ [1873] 8 Ch., 860; see upon this case Fry, s. 130, p. 53.

⁸ Collett, 112; Nelson, 119. *Sreenath Roy v. Cally Doss Ghose* [1879] 5 Cal., 82.

affirmed in Bombay, in respect of the original side of the High Court,¹ and surely it is not right to treat a suit for specific performance of a simple executory contract as an action *in rem* to secure realty or its possession.² In the case of mufussil courts, too, the proviso to section 16, Civil Procedure Code, seems to contemplate such suits.³ It should be noted, however, that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country where it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced.⁴ Where the land is within jurisdiction, the mere fact that the vendor is not, will not stand in the way of the court decreeing specific performance of a contract for sale and directing title to vest.⁵

Contract
not enforce-
able in en-
tirety.

Another ground upon which courts of equity do not entertain jurisdiction in respect of contracts, is that the contract as a whole cannot be specifically enforced.⁶ Lord Romilly said : "This court cannot specifically perform the contract piecemeal, but it must be performed in its entirety, if performed at all."⁷ So Lord Hardwicke had said, with reference to a marriage settlement comprising a variety of terms : "There is no instance of decreeing a partial performance of articles, the court must decree all or none ; and where some parts have appeared very unreasonable, the courts have said, we will not do that, and, therefore, as we must decree all or none, the bill has been dismissed."⁸ Where the contract is one and indivisible, the performance of some only of its terms cannot be performance of the contract itself.⁹ And, as a general rule, a court

¹ *Hunsraj Morarjee v. Runchordas Dharsey* [1905] 7 Bom., L. R., 319. Cf. *Vaghoji v. Camaji Bomanji* [1904] 29 Bom., 249.

² *Cf. Bruce v. Tilson* [1862] 25 N. Y., 194, 1 Ames., 348.

³ 1 Stokes, A.-I. Codes, 933, n. 4.

⁴ *Hope v. Hope* [1857] 8 DeG. M. & G., 731, 743; *Potter v. Brown* [1804] 6 East, 131. Cf. *Subraya Pillai v. Subraya Mudali* [1887] 4 Mad. H. C. R. 14; *Hamlyn & Co. v. Talisker Distillery*

[1894] A. C., 202; *Kaufman v. Gerson* [1904] 1 K. B., 599; *Diecy, Conf. of Laws*, 540, 572. Cf. *Moulis v. Owen* [1907] 1 K. B., 746.

⁵ C.P.C., s. 16; Cf. *Rourke v. MacLoughlin*, 38 Calif., 196.

⁶ *Cf. Virdachala v. Ramaswami* [1862] 1 Mad. H. C. R., 341.

⁷ *Merchants Trading Co. v. Banner* [1871] 12 Eq., 18, 23.

⁸ *Goring v. Nash* [1744] 3 Atk. 186, 190.
⁹ *Kelleher*, 79.

of equity has no power to change the terms of a contract. The court therefore may refuse specific performance of a contract in a truncated form. A defendant ordinarily cannot be compelled to take less, or give more, for instance, than the amount fixed by the contract.¹ So, where the land contracted to be sold lies in a locality different from that which the vendee was led to suppose, there will be no specific performance, since "the peculiar locality, soil, vicinage, advantage of markets, and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value."² The substantial inducement to the purchase will fail in such a case. But the doctrine of equity is not forfeiture, but compensation,³ and a distinction has always been taken between terms which are of the essence of the contract and those which are not. "Lord Thurlow," said Lord Eldon, "used to refer this doctrine of specific performance to this:—that it is scarcely possible that there may not be some small mistake or inaccuracy; as, that a leasehold interest, represented to be for twentyone years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract."⁴ It has accordingly been said that equity, having regard to the substance rather than to the form of contracts, will not allow the impossibility of a literal fulfilment to prevail as a defence, when the agreement can be substantially carried out so as to effectuate the intentions of the parties, and do entire justice between them.⁵ Of the two alternatives of enforcing the contract without any regard to partial failure and of enforcing it so far as practicable and awarding compensation for the balance, equity generally favours the latter, and so endeavours to preserve the rights of both the contracting parties.⁶ Compensation, as a part of the decree for specific performance, is to be distinguished from damages sometimes separately awarded.

Compensation,
not
forfeiture.

¹ *Waterman*, s. 501, p. 704.

² *Best v. Stow*, 2 Sandf. Ch. 298; *Waterman*, 700, n. 2.

³ *Page v. Broom* [1827] 4 Russ., 6. *Pomeroy*, S.P., s. 297, p. 388.

⁴ *Mortlock v. Buller* [1804] 10 Ves., 292, 305, 306.

⁵ *Shaw v. Livermore* (Iowa), 2 Green, 338; *Waterman*, s. 128, p. 165. Cf. *Carey v. Stafford* [1725] 3 Sw., 427, n.; *Errington v. Aynesly* [1788] 2 Bro. Ch., 341; *Frederick v. Colwell* [1830] 3 Y. & J., 514.

⁶ *Pomeroy*, S.P., s. 434.

It should be regarded "rather as a condition," says Pomeroy, "upon which the relief of specific performance is granted at all, or as a modification of that relief, so that it may be adapted to the circumstances of the case and the equities of the parties."¹

Partial
perform-
ance.

We, therefore, find that the Indian Legislature, having adopted the general rule in section 17, Specific Relief Act, recognises certain exceptions to that rule in the three earlier sections. The collective effect of these sections (not very logically arranged) may be stated thus: A decree for specific performance of a part of an agreement will not ordinarily be granted², unless the part left unperformed bears only a small proportion to the whole in value and admits of compensation in money,³ or the plaintiff relinquishes all claim to further performance and all right to compensation as against the party in default.⁴ Of course, the rule has no application where the agreement is divisible,⁵ or where there are separate agreements, some of which an equity court will enforce and others it will not. Taking the ordinary case of a sale of immoveable property (a contract which ordinarily a court of equity will enforce *in specie*), the test is whether the purchaser gets the thing which is the principal object of the contract.⁶ If his main object is not affected, there may be partial performance with proportionate abatement in the price.⁷ But where he would be getting something constitutionally different from that for which he contracted, the contract does not lie in compensation.⁸ The vendor's inability to complete performance may be due to a deficiency in the quantity of the *res* or a defect in its quality. He may have contracted, for instance, to sell one hundred *bighas* of land

Defect in
quantity or
quality.

¹ Pomeroy, *S. P.*, s 436.

² *S. R. A.*, s. 17. By corporation, *Mathuramohan v. Ram Kumar* [1916] 20 C. W. N., 371.

³ *Ibid.*, s. 14.

⁴ *Ibid.*, s. 15.

⁵ *Ibid.*, s. 16; Pomeroy, *S. P.*, 534.

⁶ *Drewe v. Hanson* [1802] 6 Ves., 675, 679.

⁷ "The principle is, that, if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value," *Dyer v. Hargrave* [1805] 10 Ves., 505, 1 Ames., 245. "Where the buyer gets

sustantially all for which he contracted, he ought not to be permitted to refuse to go on and perform the contract on account of a slight deficiency, when full compensation can be made in money, and when the deficiency is occasioned by no bad faith on the part of the vendor," *Towner v. Ticknor*, 112 Ill., 217, 254; 2 Pomeroy, *Eq. R.*, 1364; *King v. Bardeau* [1822] 6 John, Ch. 38, 2 Keener, 1123 (auction sale).

⁸ *Halsey v. Grant* [1806] 13 Ves., 73, 79, 2 Scott, 382.

where he owned only ninety-eight¹ or fifty,² or he may have contracted to sell as meadow-land³ or timber land⁴ property which did not answer that description, or as free-hold what was only leasehold,⁵ or he may have agreed to sell premises as in repairs when they were not,⁶ or as unencumbered when there was a subsisting mortgage upon them.⁷ Where the defect is material, it is held not to admit of compensation in money, for it is clear that a rough estimate or an educated guess will not serve, where the interests of both the vendor and the purchaser have to be taken into account. The compensation must be both fair and reasonable.⁸ Where, therefore, a house was sold with a long strip of land between it and the road, to which there was no title, so that the people in passing could look in at the window, Romilly, M. R., held that the case was not one for compensation.⁹ So, where a park was sold, but the frontage was less by nearly eleven feet than that described, and the difference affected the access of barges, specific performance was refused.¹⁰ So, where the vendor cannot make title to a large portion of the estate,¹¹ or to a portion which is essential to the beneficial enjoyment of the premises sold,¹² or the tenure is different,¹³ specific performance with abatement to the vendee will not be enforced.¹⁴ As a general rule, where the defect extends to and affects the entire estate, there can be no such performance

¹ S.R.A., s. 14, ill. (a); Cf. *M'Queen v. Farquhar* [1805] 11 Ves., 467, 8 R. R. 212.

² S. R. A., s. 15, ill. (a). Cf. *Jacobs v. Revell* [1900] 2 Ch., 858.

³ *Scott v. Hanson* [1826] 1 Rus. & M., 128.

⁴ *Stewart v. Conyngham*, 1 Ir. Ch. R., 534.

⁵ *Fordyce v. Ford* [1794] 4 Bro. Ch. 494; *Drewe v. Corp* [1804] 9 Ves., 368, Scott, 374.

⁶ *Grant v. Hunt* [1815] Coop., 173, 35 E. R. 510; *Towner v. Ticknor*, supra.

⁷ *Wood v. Bernal* [1812] 19 Ves., 220, 221; *Halsey v. Grant*, supra.

⁸ *W. Webster* in 3 L.Q.R., 57.

⁹ *Perkins v. Ede* [1852] 16 Beav., 193, 1 Ames, 248.

¹⁰ *Re Deptford Creek Bridge Co. v. Bevan*, 28 Sol. Jour., 327. Cf. *Peers v. Lambert* [1844] 7 Beav., 546.

¹¹ *Roffey v. Shallcross* [1819] 4

Madd., 227; *Dalby v. Pullen* [1829] 3 Sim., 29.

¹² *Peers v. Lambert*, supra; *Howland v. Norris* [1784] 1 Cox., 58, 2 Scott, 373; *Dobell v. Hutchinson* [1835] 3 A. & E., 355; *Arnold v. Arnold* [1880] 14 Ch. D. 270, 2 Keener, 1129.

¹³ *Fordyce v. Ford*, supra; *Murray v. Nickerson*, 90 Minn., 197 (vendor's interest was limited by interest of co-tenant).

¹⁴ "Mr. Waterman states the exceptions thus: "The part with reference to which the defect exists is (i) a considerable portion of the entire subject-matter, or is (ii) in its nature material to the enjoyment of the part in which there is no defect, or (iii) property is contracted for which has for the purchaser a peculiar value not capable of pecuniary compensation." S. P., s. 502, p. 705.

against an unwilling vendee.¹ On the other hand, if it is out of the vendor's power, from any cause not involving bad faith, to convey all that he had contracted to sell, and it appears that the part which cannot be conveyed is of small importance or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, the vendor may insist on partial performance, with compensation to the purchaser, or an abatement from the agreed price proportionate to the quantity which falls short of the representation.² Thus, deficiency of six acres from a large tract of land,³ or a misdescription as to two acres out of fourteen,⁴ or of two acres out of one hundred and eighty-six,⁵ or the existence of a slight encumbrance,⁶ or tithe-charge,⁷ or even the burden of an easement of a foot-path across a meadow,⁸ has not been considered material. Where land is sold not by the quantity, but by metes and bounds or other description, and the vendee gets the identical plot contracted to be sold, there is no real ground for complaint, though there is some deficiency in the quantity supposed or stated, unless this deficiency be so great as to defeat the purpose for which the contract was entered into by the vendee. Where, however, land is sold by the quantity, but the description is qualified by phrases like "of or about," or "thereabouts," or "more or less," and the vendee subsequently discovers a deficiency, which is neither very small nor trifling, the vendee may require compensation for such deficiency.⁹ In some old English cases, a distinction was suggested between executory and executed contracts, and abatement of price was refused to the purchaser after conveyance.¹⁰ But it cannot be

Executory
and execut-
ed contr-
acts.

¹ *Drewe v. Corp* [1804] 9 Ves., 368; *Pomeroy, S. P.*, s. 451, p. 532.

² *Waterman*, s. 502, p. 704. Cf. *Carless v. Sparling*, 1 R., 9 Eq., 595 (deficiency of about one-half in acreage of mountain land sold, which was a waste heath of trifling value).

³ *M'Queen v. Farquhar*, supra.

⁴ *Scott v. Hanson*, supra.

⁵ *Calcraft v. Roebuck* [1790] 1 Ves., 221.

⁶ *Hughes v. Jones* [1861] 3 DeG. F. & J., 307; *Halsey v. Grant*, supra.

⁷ *Drewe v. Hanson*, supra; *Binks v. Lord Rokeby* [1818] 2 Sw., 222.

⁸ *Oldfield v. Round* [1800] 5 Ves.,

508, 1 Ames., 361. But see *Ellard v. Llandaff* [1810] 1 Ba. & Be., 241, 1 Ames., 364 ("I believe the bar was not very well satisfied with the decision"). Cf. *Dykes v. Blake* [1826] 4 Bing N. C., 463; *Shackleton v. Sutcliffe* [1847] 1 DeG. & Sm., 609.

⁹ *Sugden, V. & P.*, 324; *Kerr, Fraud*, 4th. ed. 12-3; *Pomeroy, S. P.*, s. 454; *Hill v. Buckley* [1811] 17 Ves., 394; *Portman v. Mill* [1826] 2 Russ 570; *Harrell v. Hill* [1857] 19 Ark., 102, 2 Scott, 396; *Aberaman Iron Works v. Wickens* [1868] 4 Ch., 101.

¹⁰ *Anon.* [1700] 2 Freem., 137; *Twyford v. Warecup* [1677] Rep. Finch,

maintained upon principle that where a mistake is admitted or proved, the fact that the title has passed and the purchase-money has been paid or secured, precludes the court, on the mistake being discovered, from granting relief.¹ In the above cases it is presupposed that the vendor has not been guilty of any inequitable conduct.² Fraud or misrepresentation will, however, disentitle the vendor to enforce partial performance with compensation.³ Nor will such performance be enforced where there exist no data from which the amount of compensation can be fairly estimated.⁴ For instance, where house-property was sold, but before completion of the contract, ornamental trees situated in the compound of the house were cut down by the vendor, the Irish court held that the damage in the value of the property as a residence could not be estimated, and the vendee was released.⁵ So, where timber in a wood was sold, but the subject-matter fell short of the description, as the number of trees was not specified nor the quantity of timber expressed, Wood, V.C., held there were no data for calculation and no compensation could be awarded.⁶ So, it has been said to be almost impossible to assess compensation for restrictive covenants.⁷ But English courts have in some cases expressed a reluctance to consider a difficulty of this kind insuperable,⁸ and they will not apply this rule, except in cases of real necessity.⁹

Relief
refused.

There is no principle of equity so artificial as that which goes to determine whether the part to which no title can be made is material,¹⁰ and eminent judges have, from time to time, expressed a disinclination towards the *cy pres* execution of the contract which is given in these cases, as that is, in fact, the

Principle
artificial,
not to be
extended.

310; *Townshend v. Stangroom* [1801] 6 Ves., 328.

¹ *Paine v. Upton* [1882] 87 N. Y., 327, 2 Scott, 592.

² *Winch v. Winchester* [1812] 1 V. & B., 375; *King v. Knapp*, 59 N. Y., 462.

³ *Clermont v. Tasburgh* [1819] 1 J. & W., 119, 120; *Dimmock v. Hallett* [1867] 2 Ch., 21; Fry, s. 1252, p. 536; *Pomeroy, S.P.*, s. 455, p. 536. *Distinguish Powell v. Elliott* [1875] 10 Ch. 424.

⁴ *Cox v. Coventon* [1862] 31 Beav., 378.

⁵ *Magennis v. Fallon* [1828-29] 2 Moll., 561.

⁶ *Lord Brooke v. Rounthwaite* [1846] 5 Hare, 298.

⁷ *Cato v. Thompson* [1882] 9 Q. B. D., 616, 618; *Westmacott v. Robins* [1862] 4 DeG. F. & J., 390, 397; *Rudd v. Lascelles* [1900] 1 C. h., 815, 1 Ames., 256.

⁸ Fry, s. 1276.

⁹ *Pomeroy, S.P.*, s. 448.

¹⁰ *Waterman*, s. 504, p. 709.

execution of a new contract, which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price.¹ Lord Erskine said, "Without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain."² Plumer, V.C., said, "There is great difficulty in applying the doctrine of compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives of purchasing real property are very different in different persons. Tastes, opinions, and ages, create different views. Some particularity, some whim, may have induced him to purchase. What is desirable to one is not so to another. One wants a wood for game, another desires it only as a beautiful object; one looks only to agriculture, another dislikes tithes. It, therefore, seems a little arbitrary to insist on a party taking compensation."³ Jessel, M.R., accordingly, thought that the cases of specific performance with compensation ought not to be extended,⁴ and Farwell, J., has ruled, "The court should confine this relief to cases where the actual subject-matter is substantially the same as that stated in the contract, and should not extend it to cases where the subject-matter is substantially different."⁵

Vendor
and
vendee.

I have so far been specially dealing with suits brought by vendors. A vendee has rights in no way more restricted, but, as a matter of fact, more extensive. "If," said Lord Eldon, "a man, having partial interest in an estate chooses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can, he has a right to

¹ Per Lord Langdale, *Thomas v. Dering* [1837] 1 Keen, 729, 746, 44 R.R. 158.

² *Halsey v. Grant* [1806] 13 Ves., 73., 76.

³ *Knatchbull v. Grueber* [1851] 1

Madd., 153, 167, 6 R. C. 676. Cf. *Arnold v. Arnold* [1880] 14 Ch. D., 270, 282-4.

⁴ *Cato v. Thompson*, supra.

⁵ *Rudd v. Lascelles*, supra.

that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole."¹ "An inability in a vendor to make a good title," remarks Dean Langdell, "is a legal (not a physical) inability to perform the contract; and therefore it is no excuse in the mouth of the vendor for not doing all the physical acts necessary for the performance of the contract."² The principle is that the party who is not in fault shall be entitled to a specific performance of as much of the contract as the other can perform.³ "There is nothing in this general rule," observed another American Judge, "of which a vendor can complain. It is his own fault, if he has assumed an obligation which he cannot fulfil. It cannot be inequitable to require him to perform, as far as it is in his power, and being in a court of equity, a decree that he makes compensation for all that he fails to perform, is but completing what the court has begun, and preventing a multiplicity of suits. In no just sense can it be said that thus a new contract is made for the parties. The vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets according to the rate established by the agreement."⁴ But under the English and American authorities, it would appear that the purchaser would not be entitled to an abatement where the defect was patent and an object of sense,—as for instance, whether a farm was within a ring-fence,⁵—nor where he had a full knowledge of the law and facts.⁶ In such a case the purchaser may be deemed to agree to buy only what the vendor has and is able to convey; his knowledge or notice of the facts enters into the contract, and prevents him from asserting a right to an exact fulfilment of

Vendee's
right to
partial
perform-
ance.

¹ *Mortlock v. Buller* [1804] 10 Ves., 292, 315. Cf. *Dyas v. Cruise* [1845] 2 Jon., & Lat., 460, 487, 69 R.R. 348; *Barnes v. Wood* [1869] 8 Eq., 424, 2 Keener, 1228; *Hooper v. Smart* [1874] 18 Eq., 683; *Horrocks v. Rigby* [1878] 9 Ch. D., 180; *Rudd v. Lascelles*, supra and other cases collected in 1 Ames, 251, n. 1; 2 Story, Eq., s. 779. *Kedar v. Manu* [1912] 16 C.W.N. 247.

² *Eq. J.*, 54.

³ *Per* Learned, P. J., *Lawrence v. Saratoga Lake R. Co.* [1885] 36 Hun., 467, 475.

⁴ *Erwin v. Myers*, 10 Wright, 96; *Pomeroy, S.P.*, 518-9 n.

⁵ *Dyer v. Hargrave*, supra.

⁶ *Emery v. Wase* [1801] 5 Ves., 846; *Castle v. Wilkinson* [1870] 5 Ch., 534, 1 Ames, 252. But see *Barker v. Cox* [1877] 4 Ch. D., 464. "Even if the purchaser has from the first been aware of the state of the title, that circumstance will not necessarily exclude him from the benefit of the principle under consideration," Fry, s. 1266, p. 540, sqq.

its terms, for he knew from the very beginning that this would be impracticable.¹ Thus, where a husband had only an estate *pur autre vie* in property, the remainder being vested in his wife, but the husband contracted to sell the fee-simple to a person who was ignorant of the state of the title, and the wife did no act by which she was bound to ratify the contract, James, V.C., held that the vendor must convey all the interest that he had, together with compensation in respect of the wife's interest which he was unable to convey or bind.² But, where a husband and his wife in 1863 signed a contract for the sale of the wife's fee-simple estate to the plaintiff, and the vendee was aware of the true state of the title, the Court of Appeal held that the purchaser was not entitled to a conveyance of the husband's, partial interest only with an abatement of the purchase-money.³ "It is the vendee's knowledge," says Pomeroy, "and not any notion of making a new contract for the parties, which prevents the purchaser from obtaining compensation."⁴ Negligence may therefore defeat an equitable right.⁵ It has also been held that the principle will not be applied to the prejudice of a right to rescind reserved by the vendor,⁶ or to the prejudice of the intervening rights of third parties.⁷ A case that has frequently arisen in England and America is where the vendor has contracted to convey the fee-simple, without reference to the inchoate dower interest in the land of his wife. There has been considerable conflict of opinion as to whether the husband will be obliged to convey his interest and make compensation or give indemnity in respect of the value of the wife's interest. In England, compensation or indemnity is generally enforced,⁸ in America as generally

Rights of
third
parties.

¹ Pomeroy, S. P., 521 n.

² *Barnes v. Wood*, supra, Cf. *Nelthorpe v. Holgate* [1844] 1 Coll., 203.

³ *Castle v. Wilkinson*, supra.

⁴ S. P., s. 461, p. 541. As to constructive notice, see *James v. Lichfield* [1869] 9 Eq., 51, and *Caballero v. Henty* [1874] 9 Ch., 447; *Kerr, Fraud*, 4th ed. 62-3.

⁵ *Edwards-Wood v. Marjoribanks* [1858] 3 DeG. & J., 329, 332. In this case, Turner, L. J., expressed a doubt if the doctrine of compensation could be applied to cases where, if the

purchaser did not resell, he could sustain no loss from the defect in the title or the subject-matter.

⁶ *Re Terry and White* [1886] 32 Ch. D., 14.

⁷ *Thomas v. Dering*, supra. *Govinda v. Apathshaya* [1912] 22 M. L. J. 257.

⁸ E.g., in *Wilson v. Williams* [1857] 3 Jur. N. S., 810, 2 Scott, 393, Page Wood, V. C., said: "Here the vendor, having a good title, except as to this right of dower, assured the purchaser at the time of the contract that that right would be released. He gets the

not.¹ Upon principle it is probably difficult to justify the husband-vendor in evading his just obligations to an innocent vendee. But the question is hardly one that is likely to arise frequently in India, unless perhaps in the somewhat analogous case of an agreement to sell by a Hindu widow, or a Hindu father, governed by the Mitakshara, who has sons.² But the equities are likely to be different. Besides, unless an indemnity is part of the contract between the parties, a purchaser can neither be compelled to take an indemnity for a defect nor insist on the vendor giving one.³

The obligation to which a vendor is subject to make out a good title, is intended for the benefit of the purchaser only.⁴ Accordingly, even where the defect is material, it is the option of the vendee to refuse specific perform-

contract upon that footing. Can it be said that there is any hardship on the contractor in calling upon him, if he cannot literally make good his assurance, at all events to make it good as far as he can? In considering the propriety of enforcing the contract, it is not immaterial to see whether there is an easy way of getting an indemnity." His Honour accordingly directed a sufficient portion of the purchase-money to be set aside, allowing the vendor to receive the interest during the joint lives of himself and his wife, and the principal upon her decease.

¹ *E.g.*, in *Rieszs' Appeal* [1873] 73 Pa., 485, 1 Ames, 254, it was held that specific performance of an agreement to sell real estate would not be decreed against a vendor who was a married man, and whose wife refused to join in the conveyance so as to bar her dower, unless the vendee was willing to pay the full purchase-money, and accept the deed of the vendor without his wife joining. Sharswood, J., said, "The wife is not to be wrought upon by her love for her husband, and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means to procure her assent." (But as to this decision, see *Pomeroy*, S. P., ss. 460-1; also *Waterman*, 722 n.). In *Hawralty v. Warren* [1866] 90 Am. Dec., 613, 2 Scott, 142, the New Jersey court stated the rule

thus: "The court will not order (the defendant) to procure his wife's conveyance of dower interest, nor require him to furnish indemnity against her right of dower, unless in cases of clear fraud." Accordingly in *Young v. Paul*, [1855] 64 Am. Dec., 456, 2 Keener, 1219, where the wife's refusal to release her dower was induced by the connivance or procurement of her husband, the latter was compelled to convey with an indemnity. Cf. *Peeler v. Levy* [1875] 26 N. J. Eq., 330, 2 Keener, 1236.

² Cf. *Gurusami v. Ganapathia* [1882] 5 Mad., 337. Even an undivided father may under certain circumstances dispose of joint property *Srinivasu v. Sivarama* 32 Mad., 320, and so may a managing member, *Krishna v. Shamanna* [1912] 23 M. L. J. R., 610. Where guardians of minors agreed to sell their own and their wards' interests for purposes not binding on the minors, purchaser was held entitled to conveyance of the interests of the major vendors on payment of full consideration stipulated without abatement or compensation, *Ponaka v. Vadumati* [1910] 33 Mad., 359. But see *Jadu v. Adal* [1912] 11 I. C., 892; in appeal *Abdul v. Jadu* [1913] 18 C. L. J., 344; *Jaturi v. Ariparala* [1912] 15 I. C., 623.

³ *Balmanno v. Lumley* [1813] 1 V. & B., 224, 225. Fry, ss. 1225, 1281-2.

⁴ *Bennett v. Fowler*, [1840] 2 Beav., 302.

Indian Law
S.R.A.,
s. 15.

ance¹ or to compel partial performance with compensation or abatement.² But where the deficiency is so great as practically to make compensation or damages the main object of the suit, the vendee has sometimes been denied specific performance with compensation.³ In other cases, again, this consideration seems not to have been given effect to,⁴ and the Indian Legislature has sought to cut the Gordian knot by providing that where the deficiency is considerable or does not admit of compensation in money, the party in default may be directed to perform specifically so much of his part of the contract as he can perform, provided that the other party (plaintiff) relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.⁵ Whenever the seller is unable to convey all that he agreed to, the buyer is entitled, as a matter of right, in all cases, if he will pay the full contract price, to specific performance of whatever interest the seller has,⁶ and this irrespective of any question as to the state of his knowledge regarding the nature of the seller's title at the time of the bargain.⁷ But the purchaser may forfeit this right if, in the matter of procuring the contract, he has been guilty of misrepresentation or *mala fides*.⁸

The effect of the Indian rule is probably to restrict the vendee's rights to a larger extent than English decisions allow;⁹ but section 15 is to be taken along with section 22, and, in view of the fact that justice in this country has not unoften to

¹ *Scott v. Alvarez* [1895] 2 Ch. D., 732.

² *Dale v. Lister*, 16 Ves., 7 (cited).

³ 2 Pomeroy, *Eq. R. s.* 833, p. 1368, citing *Earl of Durham v. Legard* [1865] 34 Beav., 611, *Chicago Mil. & St. Paul R. R. v. Durant*, 44 Minn., 361. See also *Wheatley v. Slade* [1830] 4 Sim., 126 (but cf. *Fry*, s. 1281, p. 539; *Sugden*, V. & P., 317).

⁴ *Jones v. Evans* [1848] 17 L. J. Ch., 469 (seller had only $\frac{2}{3}$ of the res); *Oceanic Co. v. Sutherbury* [1881] 16 Ch. D., 236, 246 ($\frac{1}{3}$ of the res); *Burrow v. Scammel* [1882] 19 Ch. D., 175, 183 (undivided moiety); *Leslie v. Crommelin*, 11 I.R., 2 Eq., 134; *Fry*, s. 1262 sqq.

⁵ S. R. A., s. 15. Cf. *Maw v. Topham*

[1854] 19 Beav., 576, and see as to it *Sugden*, V. & P., 257.

⁶ *Harding v. Parshall*, 56 Ill., 219; 2 Pomeroy, *Eq. R.*, 1368, n.

⁷ *Western v. Russell*, [1814] 3 V. & B., 187; *Neale v. Mackenzie* [1837] 1 Keen, 474; *Bennett v. Fowler* [1840] 2 Beav., 302; and other cases cited in 1 Ames, 254 n.

⁸ *Clermont v. Tasburgh* [1819] 1 J. & W., 112; *Phillips v. Homfray* [1871] 6 Ch., 770.

⁹ Stokes thinks that the only case in which purchaser or lessee can claim specific performance with abatement or compensation is that contemplated by s. 14, S. R. A., 1 A.-I. Codes, 932.

be administered by officers without any previous legal training, even a rule of thumb is not without its advantages.

It remains to note that there may sometimes be a condition entered in the written instrument, which embodies the contract between the parties, expressly providing for or against compensation, in the event of defect or deficiency.¹ Where the condition is in favour of giving compensation, the tendency of the courts is to put a liberal and comprehensive construction upon it,² and, in the absence of a stipulation to the contrary, it will be enforced even where the error or deficiency has been discovered after completion of the contract.³ A purchaser's right to compensation under the condition is, to adopt Sir E. Fry's words, "generally cumulative" to his ordinary right to it, according to the general principles already discussed.⁴ Where, on the other hand, the condition is one restricting or denying the right to compensation, the courts construe it strictly, and may even limit it "to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements."⁵ But in every case the condition must be read as a whole and so given effect to that the different clauses of it, where they exist, may be harmonised and not nullified. In the absence of fraud or misrepresentation, full effect should be given to a plain and express stipulation as to all matters which, it may be reasonably supposed, were intended to be embraced within its restrictive terms.⁶

Condition
for or
against
compen-
sation.

¹ Cf. S.R.A., s. 28., cl.(c).

² Fry, s. 1289.

³ Ibid, ss. 1286, 1288; *Cann v. Cann* [1830] 3 Sim., 447; *Bos v. Helsham* [1866] 2 Ex., 72; *Re Turner and Skelton* [1879] 13 Ch. D., 130; *Palmer v. Johnson* [1884] 13 Q.B.D., 351.

⁴ Fry, s. 1287, p. 548.

⁵ *Per Malins, v. C., Whitmore v.*

Whitmore [1869] 8 Eq., 603. But see *Re Terry and White* [1886] 32 Ch. D., 14.

⁶ *Cordingley v. Cheeseborough* [1862] 4 DeG. F. & J., 379; *Nicoll v. Chambers* [1852] 11 C.B., 996; *Jacobs v. Revell* [1900] 2 Ch. 858; *Pomeroy, S.P.*, s. 445, p. 525; 1 *Dart, V. & P.* 680-1.

LECTURE V.

DEFENCES TO ACTION FOR SPECIFIC PERFORMANCE.

Defences :
Legal,
Equitable.

I have in my last two lectures endeavoured to define some of the general grounds upon which our courts regulate their jurisdiction in the matter of the specific performance of contracts. I will now proceed to examine some of the pleas which may be urged against the exercise of such jurisdiction by the defendant, pleas which may be classified as legal and equitable, and which, if sustained, would generally be found to disentitle the plaintiff to the specific relief sought. Possibly, a more logical consideration of the subject-matter is that indicated by Pomeroy, who has discussed the features and incidents of an enforceable contract under four heads, *viz.*, (1) those which pertain to the external form of the agreement and the manner of expressing its various terms, and which relate to the very existence of a binding contract; (2) those which do not primarily involve the validity of the contract, but which directly affect the right to the equitable remedy; (3) those connected with or growing out of the conduct—generally preliminary—of the parties, which involve the validity of the contract and may render it voidable; and (4) those which relate to or are connected with the actual enforcement of a decree and may affect the practicability of specific performance.¹ But the practical lawyer has long been familiar with Sir E. Fry's arrangement, and I have substantially followed it, with some modifications suggested by Mr. Cyprian Williams' treatment of the subject.²

Right to
damages
absolute, not
to specific
relief.

But, before I discuss any of these special pleas, it is proper that I should make it quite clear to you that the courts do not, as a matter of practice, recognise any absolute right to specific relief. When a contract is broken and a promisor fails or omits to carry out his promise, the promisee may come into

¹ S.P., Ch. II, s. 51, p. 75.

² 2 V. & P., 989, sqq.

court and ask for compensation. The damages which the promisee gets in such a suit, may be nominal or substantial or even exemplary, but some damages he is in any event entitled to get. But the doctrine of courts of equity has never been represented to be "to carry into specific execution every contract in all cases, where that is found to be the legal intention and effect of the contract between the parties."¹ It has, therefore, been said, "the right to specific execution is not absolute, and a decree therefor does not necessarily follow, though the contract may be plain and certain in its terms, and may be obligatory on both parties. Its enforcement rests on the sound discretion of the court, a judicial discretion, to be exercised according to the established principles of equity. An agreement may be valid at law, and there may not be sufficient grounds for its cancellation in equity; and yet, upon a fair and just consideration of the attendant and collateral circumstances, and sometimes of subsequent events, the court will abstain from its enforcement."²

Discretion.

But when we speak of the jurisdiction of the court to decree specific performance as discretionary, we by no means mean that it is open to a judge in one case to execute a contract *in specie* and in another case refuse to do so, because such is his pleasure, because that is what the humour or the caprice of the hour suggests. "Discretion loses all title to the name when it descends to mere caprice, or in fact becomes indiscretion."³ It is to be regretted that in India judges are prone to act in an arbitrary fashion, and say they are administering a discretionary relief. Verily, at the hands of untrained men, equity is a roguish thing and apt to vary with the length of the foot of each Chancellor.⁴ But Selden was a maligner, and generations of judges and text-writers have repeated that "the

¹ 2 Story, *Eq.*, s. 750. *McCabe v. Matthews* [1895] 155 U. S., 550, 553, 2 Keener, 1201.

² *Per* Clopton, J., *Byars v. Stubbs* [1887] 85 Ala., 256, 1 Ames, 371. Cf. S. R. A., s 22.

³ Kelleher, 46. See also *ante*, 39-41; *Encyc. Laws Eng.*, 609-610.

⁴ * Table talk. Cf. 3 Blackstone, *Com.*, 33. "The discretion of a judge is

the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution and passion. In the best it is often, at times, capricious; in the worst it is every vice, folly and madness to which human nature is liable." *Ex parte Chase*, 43 Ala., 303, 310, cited 14 *Oyc.*, 383n.

Misleading
use of term.

discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles.”¹ The principles are general rules, and where they do “not furnish any exact measure of justice between the parties,” the court “withholds or grants relief according to the circumstances of each particular case.”² “Courts of equity do not sit, any more than courts of law,” observes Pomeroy, who has examined the subject in a particularly illuminating manner, “to distribute favours or acts of grace to their suitors; their judicial function consists in the protection of rights and the enforcement of duties by means of the remedies which they administer.”³ The use of the term ‘discretion’ in this connection is misleading, and perhaps even inaccurate.⁴ Specific relief, like other equitable relief, is administered *with*, and not *at*, discretion⁵ (if the term must be retained), and this means that “the right to this particular remedy, being equitable, involves a variety of circumstances, incidents, and relations which may promote, modify, impede or prevent its use, and one of the most important of these circumstances consists in the fact that a denial of the relief does not, in general, leave a party without his legal remedy.”⁶ In fact, these conditions, incidents and elements equity regards as essential to the administration of all its peculiar modes of relief.⁷ But “where all the proper conditions are present, the remedial right is as perfect, certain, and absolute as the nature of the remedy itself will permit.”⁸ In

¹ *Goring v. Nash* [1744] 3 Atk. 186; *White v. Damon* [1802] 7 Ves., 30, 35; *Buckle v. Mitchell* [1812] 18 Ves., 100, 111; *Burgess v. Wheate* [1759] 1 W. Bl., 128 (“judicial or equitable discretion does in no case contradict or overturn the grounds and principles of the law”); and other cases cited in 1 Stroud, *Judl. Dict.* 542.

² *In re Martin* [1882] 20 Ch. D. 365, 369; *Macdonald v. Foster* [1877] 6 Ch. D. 193, 195.

³ Pomeroy, *S.P.*, s. 46, p. 69. In the following discussion I have closely followed this learned writer and adopted his language, wherever practicable.

⁴ *Ibid.*, 4 *Eq. J.*, s. 1404, n. 2.

⁵ *Hennessey v. Carmany* [1892] 50 N. J. Eq., 616, 1 Ames, 582.

⁶ Pomeroy, *supra*, S. P. ss. 37, 38. “These elements, conditions, and incidents, as collected from the cases, are the following:—The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and, finally, it must be capable of specific execution through a decree of the court.” 4 Pomeroy, *Eq. J.* s. 1404, n. 2.

⁷ 4 Pomeroy, *Eq. J.*, *supra*.

⁸ Pomeroy, *S. P.*, s. 46; Maitland, *Eq.*, 244.

the words of an American judge, "The relief lies in the discretion of the court only so far as it must necessarily judge whether under the circumstances of the case the contract is or is not an inequitable one. That being determined, judicial discretion ceases."¹ The preliminary questions to be determined will generally be questions of fact, for instance, is the contract fair, equal and reasonable? Will it be just to enforce it against the defendant? Has the plaintiff's conduct been conscientious? And so on. When the facts have been established, the principles of equity come into operation, and there is no further uncertainty about the matter. Now, the conditions upon which the right to equitable relief has to be founded are, so far as they do not relate to the existence of valid and binding contracts, only expressions and applications of the fundamental principles—*He who seeks equity, must do equity* and *He who comes into equity, must come with clean hands*.² The first maxim means that a party seeking to obtain an equitable remedy must stand in conscientious relations towards his adversary, and that the transaction from which his claim arises must be fair and just in its terms, and that the relief itself must not be oppressive or hard upon the defendant, and must be so modified and shaped as to recognise, protect, and enforce the latter's rights arising from the same subject-matter, as well as those inhering in the plaintiff.³ The second maxim implies that the plaintiff must show not only that he has a legal claim but that he has a meritorious case.⁴ We cannot, therefore, overlook or ignore the principles which, in the first instance, owed their origin to the wisdom and experience of eminent judges and practical lawyers, and which in the course of ages have crystallised into settled precepts for the guidance of all administrators of justice.⁵ These, it may not be possible to state in the form of inflexible rules, as they are precepts which have to be taken with the special facts of each individual case, and

Application
of two
maxims of
equity.

¹ *Godwin v. Collins*, 4 Houst (Del.), 28. Cf. *Gajkumar v. Lachman* [1911] 14 C. L. L., 627.

² 4 Pomeroy, *supra*; S. P., s. 43.

³ Pomeroy, S. P., s. 40, p. 63.

⁴ Pollock, F. M. M., 125.

⁵ *Re Hallett's Estate*, *Knatchbull v. Hallett* [1885] 13 Ch. D., 710; *Re Scott and Alvarez's contract* [1895] 2 Ch., 615; *Walters v. Morgan* [1861] 3 DeG. F. & J., 721.

Appeal.

have to be applied with due regard to the complicated transactions of the parties and the ever-changing habits of society.¹ But as to the fundamental maxims, upon which the whole doctrine rests, there can be no doubt. A court of equity, therefore, must not, like a court of law, confine its consideration to the contract, but it must look at the conduct of the plaintiff, and at circumstances *dehors*, and try to administer justice between man and man.² The discretion of the court is further capable of correction by a court of appeal,³ and it has been held that even a court of second appeal in India, the jurisdiction of which is strictly limited by the terms of section 100 of the Code of Civil Procedure, is competent to determine whether the lower appellate court has properly exercised its discretion in granting or withholding specific relief.⁴ An appellate court, however, will not be disposed to interfere except in a strong case, *e.g.*, where the first court has declined to exercise any discretion, or has manifestly proceeded on a wrong ground, or principle or on an erroneous opinion on a point of law.⁵

Legal
defences.

Of the possible defences to the action some may be called legal, the others equitable. By this I mean that some defences are such as may be also set up in bar of an action upon the contract for damages, and that others are available only in equity courts, when these are invited to exercise their jurisdiction to grant specific performance. Since equity follows the law, the pleas in defence which may be raised in an action for damages for breach of a contract (which had to be instituted in the

¹ 2 Story, *supra* Per Field, J.: "No positive rule can be laid down by which the action of the court can be determined in all cases. In general, it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties." *Willard v. Tayloe* [1869] 8 Wallace, 557, 1 Ames, 406. "There is, perhaps, hardly any requirement laid down as absolutely necessary for such a decree, the want of which may not be supplied; and it may be even more strongly said that

no circumstances, and no facts or claims would lead a court of equity to grant such a decree, if upon the whole case it would certainly work injustice," 3 Parsons, Con., 317.

² Fry, s. 44, p. 17; *Waterman*, s. 6, pp. 7, 8; *Clowes v. Higginson* [1813] 1 V. & B., 527; *Haywood v. Cope* [1858] 25 Beav., 140; *Lamare v. Dixon* [1813] 6 H. L., 414; *Quinn v. Roath*, 37 Conn., 16.

³ S. R. A., s. 22. Cf. *Gardner v. Jay* [1885] 29 Ch. D., 50, 58.

⁴ *Ram Bahadur Pal v. Ram Shankar Prasad Pal* [1905] 27 All., 688, F. B.

⁵ *In re Martin* [1882] 20 Ch. D., 365, 369; *Macdonald v. Foster* [1877] 6 Ch. D., 193, 195.

Common Law Courts) are also available to a defendant, when the action is instituted in a court of equity for specific relief. It will be convenient to take these legal defences first.

(a) *Denial of formation of an agreement.*

(a) No actual agreement.

A plaintiff who institutes a suit for specific performance of a contract must start by showing that there is a contract. The first plea open to a defendant, therefore, in such an action is a denial of the formation of the contract; the defendant may plead that no contract was ever concluded, as alleged.¹ It needs no argument to show that if the parties never agreed to create a *vinculum juris* between them, there is nothing to enforce. "A contract includes a concurrence of intention in two parties," says Pothier, "one of whom promises something to the other, who, on his part, accepts such promise. . . . Now, as I cannot by the mere act of my own mind transfer to another a right in my goods without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right."² A proposal must be accepted to be converted into a "promise," in the language of the Indian Contract Act.³ The question, therefore, which a court has to determine, when the defendant joins issue with the plaintiff as to the conclusion of the contract, is—whether, at the time of the alleged agreement, the minds of the parties had come together in actual assent.⁴ If what passed between the parties was but treaty or negotiation, or an expectation of contract, or an arrangement of an honorary nature, no contract can be said to have been actually concluded.⁵ Letters may have passed, for instance, between the parties which the court is called upon to construe, and if it holds that they were intended only as a preliminary negotiation, no specific performance can be had.⁶ Where a contract of sale was embodied in

Negotiation.

¹ 2 Williams, V. & P., 989; [1910] A. C. 537.

² 1 *Obligations*, pt. I, Ch. I, s. 1, art. 1, s. 2, pp. 4-5.

³ I. C. A., s. 2(a), (b).

⁴ Waterman, s. 133, p. 171. Cf. I. C. A., s. 13.

⁵ Fry, s. 277, p. 118.

⁶ *Lyman v. Robinson*, 14 Allen, 254. (Per Foster, J., "The question in such

a document which was to be executed by three intending vendors, but only one of them actually executed it, and he did so upon the understanding that the other two would join in the execution, but they never did, it was held that the document constituted merely a proposed agreement which had never been perfected.¹

Represent-
ation.

So, again, a representation may be made regarding something past, present, or future. As to facts existing or past, the representation may really be a misrepresentation, and the party making it will be held bound on the principle of preventing fraud or on that of equitable estoppel.² Where the representation, however, relates to the future, it may either be a mere expression of intention of what the party representing may probably do, or it may amount to a distinct and absolute promise made for a special purpose, on the faith and in consequence of which another person acts. In the former case, the representation does not bind, for it leaves the matter open for further consideration and change of purpose.³ In the latter case, the representation is binding, and may be enforced.⁴ "There is no middle term," said Lord Cranworth, "no *tertium quid* between a representation so made to be effective for such a purpose, and a contract; they are identical."⁵ Such representations in England are frequently made at the time of a treaty for a marriage, and where marriage has followed on the faith of such representations, the courts have naturally felt inclined to attach

cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound?" Cf. *Huddleston v. Briscoe* [1805] 11 Ves., 583, 591; *Stratford v. Bosworth* [1813] 2 V. & B., 341; *Skelton v. Cole* [1857] 1 DeG. & J., 587; *Moulton v. Kershaw* [1884] 59 Wis., 316, H. & W., 67.

¹ *Marha Singh v. Md. Umar* [1910] 7 I. C. 393; *Sivasami v. Sivugan* [1901] 25 Mad. 389.

² *Neville v. Wilkinson* [1782] 1 Bro. C. C., 543; *Bold v. Hutchinson* [1855] 20 Beav., 250, affd. 5 DeG., M. & G., 558; *Montefiori v. Montefiori* [1762] 1 W.

Bl, 363, Finch, 482, and other cases cited in Fry, p. 132, n.3.

³ *Waterman*, s. 140, p. 182; *Randall v. Morgan* [1805] 12 Ves., 67; *Morehouse v. Colvin* [1851] 15 Beav., 341. Cf. *Maddison v. Alderson* [1883] 8 A. C., 467, 1 Ames, 295; *Whitechurch v. Oavanagh* [1902] A. C., 117, 130; *Prescott v. Jones* [1898] 69 N. H., 305, 1 Williston, 145.

⁴ *Saunders v. Cramer* [1842] 3 Dr. & W., 187; *De Biel v. Thompson* [1841] 3 Beav., 469, affd. 12 Cl. & F., 61 n.; *Montgomery v. Reilly* [1827] 1 Bligh. N. S., 364; *Synge v. Synge* [1894] 1 Q. B., 469.

⁵ *Maunsell v. White* [1854] 4 H. L. C., 1039, 1056; *Money v. Jordan* [1852] 2 DeG. M. & G., 318, 332.

more than ordinary weight to the language used.¹ Lord Romilly remarked, "It is of great importance that all persons should understand that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this court will not permit him afterwards to forego his own words, and say he was not bound by what he then promised. It is upon these principles that the court has acted in all such cases; it exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words by compelling him to perform what he has undertaken."²

Honorary
engagement.

Where the engagement is of a merely honorary character, no legal obligation is created. A good illustration is furnished by the case of *Money v. Jordan*, which gave rise to not a little difference of opinion. The facts briefly were that the plaintiff had given a bond to the defendant for the payment of a sum of money; afterwards, being about to marry, the plaintiff approached his creditor, who said that she should never distress him about the bond, that she had given it up, and should never enforce it. The plaintiff asked her to give up the bond, but she declined to do so, saying that she would be trusted, and that the debtor might rely on her word. The plaintiff married. Subsequently, the defendant put the bond in suit, whereupon the plaintiff sought the interference of the court by an injunction. The representations were at first held binding by Romilly, M.R., and Knight Bruce, L.J. In the House of Lords, Lord St. Leonards took the same view, but the majority (Lords Cranworth and Brougham) ruled that no representation of intention could work an estoppel or otherwise bind.³

¹ *Maunsell v. White*, [1844] 1 Jon. & Lat., 563; Fry, s. 324, p 137.

² *Laver v. Fielder* [1862] 32 Beav., 1, 12. Cf. *Hammersley v. De Biel* [1845] 12 Cl. and F., 45, 78. Distinguish in re *Fickus*, *Farina v. Fickus* [1900] 1 Ch., 331.

³ 15 Beav., 372, affd. [1852] 2 DeG. M.

& G., 318, revd. [1854] 5 H. L. C., 185, sub nom., *Jorden v. Money*; *Chadwick v. Manning* [1896] A. C., 231; *Whitechurch v. Cavanagh* [1902] A. C., 117, 130; *Montacute v. Maxwell* [1720] 1 P. Wms., 618, 1 Ames, 274. See as to the doctrine of making representations good, Pollock, *Con.* (W. W.), Ap. K.

Offer to be
absolutely
accepted.

A memorandum of offer or proposal differs from that of an agreement, in so far that the former is the act of one party only, whereas the latter is of both.¹ The offer must be accepted before an agreement can result, and the acceptance to be effective must be absolute and unqualified and expressed in some usual and reasonable manner.² There should be no variance of any sort between the offer and the acceptance, and the latter should be expressed in an unambiguous and unequivocal manner.³ For instance, if A offers to the promoters of a railway a way-leave for the purpose of their railway, which was for mineral traffic only, and the promoters accept it for the purpose of constructing a public railway for general traffic, there is no contract.⁴ The question that arises in such cases is really one of construction. Is a particular communication to be understood as a real and absolute acceptance, or as introducing a condition or qualification which makes it only a stage in a course of negotiation capable of leading, but not necessarily leading, to a concluded contract?⁵ An acceptance with a qualification or condition is really a counter-proposal which requires the assent of the original proposer.⁶ What the law requires is a clear accession on both sides to one and the same set of terms.⁷ Where there is a reference to unspecified terms "to be arranged" in future,⁸ or the agreement

Qualified
acceptance.

915, sqq. Cf. *Piggott v. Stratton* [1859] 1 DeG. F. & J. 33; Ewart, *Estoppel*, ch. vi; Bigelow, *Estoppel*, 6th ed. 637.

¹ *Per* Kindersley, V. C.: "In the case of an offer, no doubt, the party signing it may at any time before acceptance retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure; but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties." *Warner v. Wellington*, [1857] 3 Drew., 523, 531, 61 E.R., 1005.

² I. C. A., s. 7. Cf. *Kennedy v. Lee*, [1817] 3 Mer., 441; *Oriental Inland Steam Navigation Co., Ltd. v. Briggs* [1861] 4 DeG. F. & J., 191.

³ "An ambiguous answer might be susceptible of different interpretations, and require explanation, thereby leaving the negotiation open, instead of terminating it." *Waterman*, 174. *Gaskarth v. Lord Lowther* [1805] 12 Ves., 107.

⁴ *Meynell v. Surtees* [1854] 3 Sm. & Gif., 301, affd. [1855] 1 Jur. N. S., 737.

⁵ *Pollock, I.C.A.*, 37.

⁶ *Haji Mahomed v. Spinner* [1900] 24 Bom. 510, 523.

⁷ *Thomas v. Blackman* [1844] 1 Coll. C.C., 301, 312, 63 E. R., 429, 434. Cf. *Bhawan v. Sadula* [1913] 20 I. C., 282.

⁸ *Honeyman v. Marryat*, [1857] 6 H. L. C., 112; *Stanley v. Dowdeswell* [1874] 10 C. P., 102.

is made "subject to the preparation and execution of a formal contract,"¹ there is no binding contract. In the case of an agreement for a lease especially, this may imply that more shall be put into the lease than what the lawyer treats as 'usual' covenants; the qualified acceptance therefore does not conclude the contract.² Where *A* wrote to *B*, "The value of your house has been fixed through the broker at Rs. 13,125. Agreeing to that value, I write this letter. Please come over to the office of my attorney between 3 and 4 this day with the title-deeds of the house and receive the earnest," and *B* replied, "You, having agreed to purchase our house for Rs. 13,125, have sent a letter through the broker, and we are agreeable to it, and we will be present between 3 and 4 this day at your attorney's, and receive the earnest," and then both *A* and *B* met at the attorney's office, but the attorney being absent, no inspection of the title-deeds or payment of the earnest-money took place, the Calcutta Court held there was no binding contract which *B* could enforce.³ Two important matters were left to be settled at the attorney's office, *viz*, inspection of title-deeds⁴ and payment of the earnest-money.⁵

But if the variation introduced by the acceptance is of a nugatory character, this would not prevent the conclusion of the

Nugatory
variation.

¹ *Winn v. Bull* [1877] 7 Ch. D., 29, Finch, 81. *Per* Jessel, M. R.: "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce." *Crossley v. Maycock* [1874] 18 Eq., 180. *Cf. Chinnock v. Marchioness of Ely* [1865] 4 D. J. S., 638, 646; *Brien v. Swainson*, 1 L.R. Ir. Ch. D., 135. *Bromet v. Neville*, [1909] 53 Sol. J., 321.

² *Foa, L. & T.*, 5th ed.; *Hawkesworth v. Chaffey*, [1886] 55 L. J. Ch., 335; *Lloyd v. Nowell*, [1895] 2 Ch., 744. *Cf. Watson v. McAllum* [1902] 87

L. T., 547 (qualified offer followed by absolute acceptance).

³ *Koylash Chunder v. Tariney Churn* [1884] 10 Cal., 588.

⁴ But see *Pollock, I.C.A.*, 3rd. ed. 45, (m), and *cf. Cohen v. Sutherland* [1890] 17 Cal., 919 (where a provision in an agreement for sale of a house that "on approval of title by the purchaser's solicitor the purchase money should be paid" was held not to affect the completeness of the contract).

⁵ *Per* Garth, C. J., "As regards the earnest money, it must be observed that both parties treat that as an element in the bargain. Suppose the meeting had taken place, and the parties had been unable to agree as to the amount of the earnest-money, how could it possibly have been said that they had arrived at any binding agreement?" 10 Cal. 595. But see *Pollock, I.C.A.*, 3rd. ed. 45, (n).

contract.¹ A hope may, for instance, be expressed that possession will be given by a certain day,² or a desire that the contract will be carried into execution by the preparation of a formal instrument.³ Where a proposal for sale was accepted, "subject to the title being approved by our solicitor," Lord Cairns thought that the words meant "nothing more than a guard against its being supposed that the title was to be accepted without investigation," that they meant, "in fact, the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser."⁴ The Court of Appeal had taken a different view,⁵ and Wilson, J., followed the same in Calcutta.⁶

Communica-
tion of
acceptance.

The acceptance to be binding, however, must be made within a reasonable time,⁷ but it need not actually come to the knowledge of the promisor.⁸ There must be some overt act, however; a mere mental intention to accept does not create a contract.⁹ Acceptance may have to be made in the manner prescribed by the proposer,¹⁰ e.g., if he requires goods to be delivered at a particular place, he is not bound to accept delivery elsewhere.¹¹ And "where the circumstances are such that it must have been within the contemplation of the parties

¹ *Lucas v. James* [1849] 7 Hare, 410, 424; *Proprietors etc. of Eng. & For. Credit Co. v. Arduin* [1870] 5 H. L., 64, 81-2.

² *Clive v. Beaumont* [1847-8] 1 DeG. & Sm., 397, 63 E. R., 1121; *Simpson v. Hughes* [1897] 66 L. J. Ch., 324. Ch. *Fitzlugh v. Jones*, 6 Munt., 83 (boundary line to be located.)

³ *Bonnewell v. Jenkins* [1878] 8 Ch. D., 70; *Rossiter v. Miller* [1878] 3 A. C., 1124; *Ridgway v. Wharton*, [1856-7] 6 H. L.C., 238, 264, 268; *Whymper v. Buckle*, [1879] 3 All, 469; *Fovle v. Freeman* [1804] 9 Ves., 351. See also *Hyam v. Gubbay*, [1915] 20 C. W. N. 66, (contract for sale and purchase of immovable property at a certain price, earnest money paid but terms to be subsequently reduced to writing.)

⁴ *Hussey v. Horne-Payne*, [1879] 4 A. C., 311, 322.

⁵ [1878] 8 Ch. D., 670.

⁶ *Sreegopal v. Ramchurn*, [1882] 8 Cal., 856. See also Fry, s. 290, p. 124.

⁷ I. C. A., s. 6, cl. 2: "A proposal is revoked, if no time is so prescribed, by the lapse of a reasonable time, without communication of the accept-

ance." Cf. *Ramsgate Victoria Hotel Co. v. Montefiore* [1866] 1 Ex. 109; *Williams v. Williams*, [1853] 17 Beav., 213; *Meynell v. Surtees*, [1855] 1 Jur. N. S., 737.

⁸ I. C. A., s. 4. A distinction is here made between the communication of an acceptance being complete (1) as against the proposer and (2) as against the acceptor, with the result that if the communication is lost in transit the proposer will continue bound whereas the acceptor will be free. *Anson, Con.*, 38; *Pollock, I.C.A.*, 3rd, ed. 31-32. "The better opinion of jurists is that as soon as an offer by letter is accepted the contract is complete, although the acceptance had not been communicated to the party by whom the offer was made, provided the party making the offer was alive when the offer was accepted," 2 Kent, *Com.*, 477 n.

⁹ *Frith v. Lawrence*, 1 Paige, 434.

¹⁰ I.C.A., s. 7, cl. 2.

¹¹ *Eliason v. Henshaw*, [1819] 4 Wheat 225, Finch, 56. Cf. *Felthouse v. Bindley*, [1862] 11 C. B. N. S., 869, Finch, 51.

that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.”¹ But there can be no acceptance after a refusal.² It should be added that a proposal may be revoked or withdrawn at any time before the communication of its acceptance is complete as against the proposer,³ i.e., before that communication has been put in a course of transmission to him,⁴ but the general rule is that notice of revocation should be communicated to the other party.⁵ Acceptance may be by acts as well as words,⁶ and no writing is ordinarily necessary. The case of *Carlill v. Carbolic Smoke Ball Co.*⁷ is a good illustration of this doctrine. The defendant company had advertised that they would pay £1000 to any person who used their preparation called the “carbolic smoke ball” in a particular manner and yet contracted influenza. The plaintiff purchased the medicine, used it in the manner directed, and contracted influenza while using it. The court held that there was an offer which had been accepted by being acted upon, that the defendants had not stipulated for any communication of the acceptance,⁸ and the plaintiff was entitled to recover £1000 as on a contract by the company.

Elements of
contract.

The elements of a contract have been placed by some jurists in three classes, viz., (1) those things which are of the essence, without which the contract cannot subsist; (2) those things which are only of the nature but not of the essence of the contract, being implied in it, unless expressly excluded, without subverting the contract; and (3) other things which are merely accidental.⁹ Where essential terms are lacking, there is no complete contract capable of enforcement.¹⁰ *E.g.*,

Terms
absent.

¹ *Per* Lord Herschell, *Henthorn v. Fraser* [1892] 2 Ch., 27, 33, Finch, 148. Cf. *Household Fire Insurance Co. v. Grant* [1879] 4 Ex. D., 216, Finch, 133.

² *Hyde v. Wrench* [1840] 3 Beav., 334.

³ I.C.A., s. 5. An undertaking to keep an offer open for a certain time is generally without consideration, and so unenforceable, *Offord v. Davies* [1862] 12 C. B. N. S., 748, Finch, 87. Cf. *Routledge v. Grant* [1828] 4 Bing., 653, 29 R. R., 672.

⁴ I. C. A., s. 4.

⁵ I. C. A., s. 6. Cf. *Byrne v. Van Tien-*

hoven [1880] 5 C. P. D., 344, Finch, 104. Distinguish *Dickinson v. Dodds* [1876] 2 Ch. D., 463, Finch, 93.

⁶ I. C. A., s. 8. Cf. *Parker v. Serjeant* [1674] Rep. Fin., 146; 23 E. R., 80 (no answer given to a young man's proposals, but he was admitted as suitor, and marriage followed).

⁷ [1893] 1 Q. B., 256, Finch, 25.

⁸ *Ibid.*, 269, *per* Bowen, L. J.

⁹ Pothier, *Oblig.*, pt. 1, ch., 1, s. 1, art. 1, § 3.

¹⁰ *Sri Krishna v. Punjab N. Bank* [1913] 149 P.L.R.

Extrinsic
evidence.

the identity of the subject-matter of the agreement may not be disclosed with sufficient certainty. Suppose *A* agrees to sell to *B* "a hundred tons of oil;" there is nothing whatever to show what kind of oil was intended, the agreement is void for uncertainty.¹ So unless the contracting parties are sufficiently indicated either by name or by description or by reference, their identity being uncertain, the agreement is incomplete.² And if the agreement is one for sale, price is an essential ingredient, and where it cannot be ascertained for certain, the agreement fails.³ But the maxim upon which courts act is—*id certum est quod certum reddi potest*.⁴ Extrinsic evidence, therefore, may be admitted with the object of fixing the meaning of or giving certainty to expressions that are not clear or free from ambiguity. Where, for instance, a dealer in cocoanut oil agrees to sell "one hundred tons of oil," the nature of the seller's trade will afford an indication of the meaning of the words, and this may be corroborated by extrinsic evidence.⁵ The description may be sufficient to preclude any fair dispute as to the identity,⁶ and the court will carry into effect a contract framed in general terms, wherever the law will supply the details, but if any details are to be supplied in modes which cannot be adopted by the court, there is then no concluded contract capable of being enforced.⁷ Where, therefore, *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*," the price is capable of being made certain, and the

¹ I.C.A., s. 29, ill. (a). Cf. *Price V. Griffith* [1851] 1 DeG. M. & G., 80.

² *Warner v. Wellington*, supra; *Squire v. Whitton* [1848] 1 H.L.C., 333; *Potter v. Duffield* [1874] 18 Eq., 4. "Vendor" (*Jurrett v. Hunter* [1886] 34 Ch. D., 182), "landlord" (*Ooombs v. Wilks* [1891] 3 Ch., 77) and "proposing lender" (*Pattle v. Anstruther* [1893] 69 L.T., 175) have been held to be insufficient description.

³ Fry, s. 353, p. 150. Cf. Lect. IV, ante.

⁴ Per Lord Cairns, "The question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*?" *Rositer v. Miller* [1878] 3 A. C., 1124, 1140. *Gaj Kumar v. Lachman* [1911] 14 C.L.J., 627.

⁵ I.C.A., s. 29, ill. (c). Cf. also

ill (d).

⁶ *Potter v. Duffield*, supra. Where the contract stated the sale to be by direction of the "proprietor," held sufficient description, *Sale v. Lambert* [1874] 18 Eq., 1. See also *Pearce v. Gardner* [1897] 1 Q. B., 688; *Re Holland, Gregg v. Holland* [1902] 2 Ch., 374, 384. "The description is a sufficient designation of the subject of the alleged contract, if it furnish the means of making the application and identification," *Romans v. Lungevin*, 34 Minn., 312; *Pomeroy*, S. P. 222.

⁷ Fry, s. 368, p. 157, citing *South Wales Ry. Co. v. Wythes* [1854] 5 DeG. M. & G., 880, 888; *Ridgway v. Wharton* [1857] 6 H.L.C., 238, 285; *Rummens v. Robins* [1865] 3 DeG. J. & S., 88.

agreement cannot be treated as void.¹ But extrinsic evidence, it should be noted, can be admitted to explain only a latent ambiguity, and not a patent ambiguity or a clear omission.² It has been well said, "parol evidence cannot show the intent of the parties if it cannot be found in the contract."³ To take a concrete instance, it can only be used to "fit the description to the land."⁴ Equity cannot therefore give specific performance of an agreement, *e.g.*, to take milk from the plaintiff, where neither price, amount, time nor place of delivery is specified in the memorandum of agreement.⁵

Other conditions that are not essential may be supplied by law.⁶ *E.g.*, in every contract for the sale of land, there is an implied condition for a good title⁷ and for the delivery up of title-deeds.⁸ Where property is sold and nothing more is said about it, law implies that the sale is of an absolute interest or fee simple.⁹ In fact, if an instrument of contract simply said, "I sell my house to B," all the rights and liabilities of vendor and purchaser that are set forth in section 55 of the Transfer of Property Act will be read into that contract as a matter of law. So in the case of a simple agreement of lease. A contract to renew a lease may be presumed to be for the same term as the preceding lease,¹⁰ and a contract for an underlease to be subject to the covenants in the superior lease.¹¹ In a contract to sublet for an unspecified period, where the

Conditions
supplied
by law.

¹ I.C.A., s. 29, ill. (d). Cf. *Pomeroy*, S.P., s. 148, p. 217.

² I. Ev. Act, ss. 93, 95, 97. Cf. *Bank of New Zealand v. Simpson* [1900] A.C., 182, 189; *Shore v. Wilson* [1842] 9 Cl. & F., 355. 4 *Wigmore, Ev.*, ss. 2472-3; 2 *Taylor, Ev.*, ss. 1206 *et seq.*

³ 2 *Pomeroy, Eq. R.*, s. 766, p. 1288. Cf. I. Ev. A., s. 92; *Balkishen v. Legge* [1899] 22 All., 149, P.C.; 4 *Wigmore, Ev.*, s. 2471; 2 *Taylor, Ev.*, ss. 1201-2.

⁴ *Halsell v. Renfrow* (Okla), 78 Pac., 118.

⁵ *Giles v. Dunbar*, 181 Mass., 22.

⁶ "The silence of an agreement as to terms which may be implied by legal presumption does not render it incomplete," *Waterman*, s. 150, p. 195. Cf. *Oriental Steamship Co. v. Taylor* [1893] 2 Q.B. 518, 527.

⁷ 1 *Williams, V. & P.*, 27; *Doe Gray v. Stanion* [1836] 1 M. & W., 695, 701;

Ogilvie v. Foljambe [1817] 3 Mer., 53, 64; *Ellis v. Rogers* [1882] 29 Ch. D., 661, 670. In the last case, Cotton, L. J., referring to the other cases cited, suggested a query as to whether the right to a good title is an implied term in the contract or a collateral right given by the law. The former seems to be the more correct view. *Sugden, V. & P.*, 16; T. P. A., s. 55.

⁸ 1 *Williams, V. & P.*, 29; *Re Duttry and Jesson's Contract* [1898] 1 Ch., 419. Where title deeds lost, satisfactory secondary evidence may be given, *Re Halifax Comm. Bank & Wood* [1899] 79 L. T., 536.

⁹ *Hughes v. Parker* [1841] 8 M. & W., 244.

¹⁰ *Price v. Assheton* [1835] 1 Y. & C. Ex., 82.

¹¹ *Cosser v. Collinge* [1832] 3 My. & K., 283.

sub-lessee entered into possession and spent money in improving the premises, he was held entitled to an under-lease for the whole of the residue of the term, less one day, should he live so long.¹ It has, however, been doubted in England if there is an implication in executory contracts in favour of the insertion in the executed contract of all such stipulations as are customarily inserted in such contracts.² But there is apparently no difficulty in enforcing a contract to accept a lease "to contain all usual covenants and provisions,"³ and evidence has been admitted to ascertain the terms of "the usual public-house contract."⁴ Where, however, a material term cannot be supplied by expression, construction or inference,⁵ or where such implication is excluded by the terms of the contract or any special conditions thereof,⁶ or by notice which communicates knowledge,⁷ the agreement must be treated as incomplete and unenforceable. Thus an agreement for the grant of a lease cannot be enforced in *specie*, if the date of the commencement of the lease does not appear either by expression or reference;⁸ otherwise, if it can be gathered from the agreement read as a whole.⁹ Where price has already been paid, the mere fact that nothing is said about it in the written agreement does not render the contract incomplete.¹⁰

Incomplete
through
defendant's
default.

An alleged agreement, when incomplete in one of its material terms, does not fully represent the intention of the parties, and is therefore not enforced in *specie*. But where a court of equity finds that the incompleteness is due to the default

¹ *Kusel v. Watson* [1879] 11 Ch. D., 129. (Here there was part performance by plaintiff which benefited defendant, and plaintiff would have been without redress, if specific performance had not been decreed.)

² *Rickets v. Bell*. [1847] 1 DeG. & Sm., 335, 63 E. R., 1093; Fry, s. 376, p. 161.

³ *Hampshire v. Wickens* [1878] 7 Ch. D., 555, and other cases cited, Fry, 157, n.1. As to 'usual covenants,' see Foa, *L. & T.*, 5th. ed. 375 sqq.; Fawcett, *L. & T.*, 154 sqq.

⁴ *Lucas v. Hall* [1899] W. N., 92.

⁵ Fry, s. 378, p. 162; *Hersey v. Giblett* [1854] 18 Beav., 174; *Marshall v. Berridge* [1881] 19 Ch., 233; *Humphery v. Conybeare* [1899] 80 L. T., 40.

⁶ *Freme v. Wright* [1819] 4 Madd., 364 (title limited to vendor's interest). Cf. *Hume v. Bentley* [1852] 5 DeG. & Sm., 520.

⁷ *Ogilvie v. Foljambe*, supra; *Re Gloag and Miller's Contract* [1883] 23 Ch. D., 320; 1 Williams, *V. & P.*, 164-5.

⁸ *Blore v. Sutton* [1817] 3 Mer., 237; *Nesham v. Selbey* [1872] 13 Eq., 191, 7 Ch., 406. Cf. *Ormond v. Anderson* [1813] 2 Ball. & B., 363, 12 R. R., 103. For other illustrations, see Fry, s. 369, pp. 167-8.

⁹ *In re Lander and Bagley's contract* [1892] 3 Ch., 48; Cf. *Phelan v. Tedcastle* [1884] 15 L. R. (Ir.), 169.

¹⁰ *Pomeroy, S. P.*, 221.

of the defendant, and the objection is not insuperable, it will stretch a point, if need be, to assist the plaintiff. Thus where there was an agreement to grant an annuity for three lives to be named, and consideration had passed, but the defendant refused to name the lives, the plaintiff was allowed to name three lives in being at the time of the agreement.¹

It may not be superfluous to add that the mere fact that a document has been executed does not prove that the contract has been concluded. Parol evidence, which will be admissible,² may go to show that a condition precedent to the attaching of any obligation under the intended contract has not been fulfilled. An agreement for a lease, signed by both parties, was handed by the lessor to his solicitor with instructions not to part with it unless the lessee got two responsible persons to join in the lease. The effect of this transaction was held to be that the lessor had not contracted on the terms of the written agreement, but had made a counter-proposal, which not having been accepted by the lessee, specific performance was refused to the latter.³ Where parties are at issue on a vital question of fact, the safe principle is to consider which story fits in with the admitted circumstances.⁴

(b) *Denial of Validity of Agreement.*

The next defence to the plaintiff's suit may be that the agreement alleged is not valid. An agreement may be invalid because void or because voidable. I have before this considered the circumstances which render an agreement void. Where, for instance, the parties or one of them is incompetent to contract, there can be no agreement which the law will recognise. Incapacity to contract may be absolute or relative. A minor or a lunatic in British India cannot contract at all.⁵ Consequently

(b) No valid agreement.

Absolute incapacity to contract.⁷

¹ *Pritchard v. Ovey* [1820] 1 J. & W., 396; *Lord Kensington v. Phillips* [1817] 5 Dow. 61. Cf. also *Soames v. Edge* [1860] Johns, 669 (agreement to build house in consideration of lease, old house pulled down in pursuance of agreement).

² 1. Ev. A., s. 92, prov. (3); *Ramjiwan v. Oghur* [1897] 2 C. W. N., 188; 2 Taylor, Ev., 814-5; 4 Wigmore, Ev.,

ss. 2408-10.

³ *Pattle v. Hornibrook* [1897] 1 Ch., 25.

⁴ *Davis v. Maung Shwe* [1911] 38 Cal., 805, P. C.

⁵ 1. C. A., s. 11. *Mohori v. Dhurmodas* [1903] 30 Cal., 539, P. C., *Manilal v. Kavasji* [1911] 9 I. C., 124. See *Cunningham and Shephard's com.*, 48 sqq. Sale in favour of minor is

Relative incapacity.

if he is a party to any agreement, there is in the eye of the law no contract, and consequently no right to specific performance at the instance either of the promisor or the promisee.¹ But a lunatic may contract during a lucid interval,² and so may a drunken person when not so much beside himself as to be unable to form a rational judgment as to the effect of the agreement on his interests.³ The last is an instance of relative disability. This may further be illustrated by reference to those cases where one or more of the parties to the agreement either labour under some disqualification, which is not absolute, or where the parties stand in such relation to one another that a court of justice scrutinizes all transactions between them with jealousy. If it is the duty of the courts to uphold the rights of the strong, it is also their duty to protect the weak.⁴ A Hindu widow, e.g., may inherit her husband's estate with right to full beneficial enjoyment, but her power of alienation in respect thereof is, as a rule, restricted. She may do what she likes with the income,⁵ but she cannot transfer the *corpus* except for legal necessity.⁶ So a Hindu father in a family governed by the Mitakshara law cannot bind the vested interest of his sons by a sale except for the family benefit or to pay an antecedent debt.⁷

void., *Navakotti v. Logalinga* [1909] 33 Mad., 312, *Md. Obaid v. Md. Ibrahim* [1911] 10 I. C. 906. *Ulfat v. Gouri* [1911] 33 All., 657, is doubtful law. But see *Mummi Kumar v. Madan Gopal* [1915] 38 All., 62; *Narain v. Dhanra*, [1915] 14 A. L. J. R., 65, and cases cited by Banerji, J.

¹ Pollock, I. C. A., 3rd. ed. 59. Cf. *Fatima Bibi v. Debnauth Shah* [1893] 20 Cal., 508, follg. *Flight v. Bolland* [1828] 4 Russ., 298; and *Krishnasami v. Sundarappayar* [1894] 18 Mad., 415, referring to S. R. A., s. 28. But these authorities proceed upon the now exploded view that a minor's contract is only voidable. See also *Lumley v. Ravenscroft* [1895] 1 Q. B., 634; 2 Williams V. & P., 798. There are cases supporting contract made by guardian of minor, e.g., *Pollard v. Rouse* [1910] 33 Mad., 288; *Amer v. Nathu* [1910] 7 A. L. J. R., 887; *Ohittar v. Jagannath*, [1906] 4 A. L. J. R., 24; *Meghan v. Pran* [1907] 5 A. L. J. R., 14, but the authority of these has been shaken by *Mir Sarwarjan v. Fakhrud-*

din [1911] 39 Cal., 232, P.C., in which the competence of guardian to bind minor by contract for purchase of land was denied, though it was not decided that the position and powers of a guardian were the same as those of a manager of minor's estate. See also *Lal Gopal v. Khorooriah Syndicate*, 13 I. C. 673.

² I. C. A., s. 12. Cf. *Hall v. Warren* [1804] 9 Ves., 605. As to "lucid interval," see Bucknill & Tuke, *Psychological Medicine*, ed. 3, 27; 1 Wharton & Stillé, *Med., Jur.*, Ch. XXV.

³ Cf. I. C. A., s. 12, III. (b).

⁴ *Haydock v. Haydock* [1881] 33 N. J. Eq., 494. 3 Keener, 809.

⁵ Mayne, H. L., s. 626; Bhattacharji, H. L. 514-7.

⁶ Mayne, H. L. s. 625. *Sham Sundar v. Achhan Kunwar* [1898] 21 All., 71 P. C.; *Bhagwat v. Debi* [1908] 18 M. L. J. R., 100, P. C.

⁷ Mayne, H. L. s. 348. *Nanomi Babuasin v. Modun Mohun* [1885] 13 Cal., 21, 35, P. C. *Kondopani v. Gagaru* [1913] M. W. N., 995.

Much more restricted are the powers of a manager of co-parcenary property¹ or the guardian of a minor.² No co-parcener governed by the Mitakshara, so long as the family continues joint, can predicate with regard to any portion of the joint family property that it is his particular share;³ he cannot consequently make a valid alienation of any particular share as his own.⁴ A certificated guardian in India displaces a natural guardian but has not the same powers⁵ and he cannot generally transfer or assign or encumber his ward's property without the sanction of the District Judge previously obtained.⁶ All these persons labour under a disability which is not absolute; the contract, therefore, is only voidable and not void. Under the same category will apparently have to be placed contracts by married women in England,⁷ by convicts,⁸ outlaws,⁹ alien enemies,¹⁰ and corporations.¹¹

Incapacity of a party to contract may also be due to the fact that he is a trustee, guardian, agent, or other person holding a confidential position. These cases of relative disability in equity have been grouped in three classes by a recent writer on the law of vendors and purchasers:—

Fiduciary
relationship.

“First, where there is such a confidential relation between the parties to the sale that the presumption of undue influence arises in respect of all contractual dealings between them. Here the person occupying the position of influence is under a conditional disability to take advantage of the sale. Secondly, where one of the parties stands in a fiduciary relation to the other

¹ Mayne, *H. L.*, s. 346. Ghose, *H. L.*, Ch. iv, s. 2. *Krishna v. Shamauna* [1912] 23 M. L. J. R., 610.

² *Hunoomanpersaud v. Munra*, [1856] 6 M. I. A., 393. Cf. Mayne, *op. cit.*, ss. 218-9. As for Mahomedan guardian see *Thattoli v. Kunhammad* [1910] 20 M. L. J. R., 946.

³ *Appovier v. Rama Subba*, [1866] 11 M. I. A. 75.

⁴ *Abdul Rahman v. Jadunandan* [1913] 18 C. L. J., 344; *Balgobind v. Narain* [1893] 15 All., 339, P.C.; *Sadabart v. Foolbush* [1869] 3 B. L. R., 31, F. B.; *Kali Shankar v. Nawab* [1909] 31 All., 507; *Prag v. Rameshar* [1913] 20 I. C. 921; *Janaki v. Jamini* [1914] 22 I. C., 612.

⁵ *Krishnan v. Vellaichami* [1911] 2

M. W. N. 461.

⁶ *Guardians & Wards Act* (VIII of 1890), s. 30; *Kunja Mai Gouri Sankar*, [1905] 3 A. L. J. R., 30; *Etwaria v. Chandra Nath Mukerjee*, [1906] 10 C. W. N., 763 (sanction subsequently obtained).

⁷ *Pollock, Con.*, (W. W.), 87, sqq. Cf. 2 *Williams, V. & P.*, 815 sqq. *Leake, Con.*, 6th. ed. 395 sqq. Cf. *Bank of Africa v. Cohen*, [1909] 2 Ch., 129.

⁸ *Leake, Con.*, 6th. ed. 384.

⁹ *Pollock, op. cit.*, 104; *Dicey, Parties*, 4.

¹⁰ *Leake, Con.*, 5th. ed. 383.

¹¹ *Pollock, Con.*, 126 sqq. *Leake, Con.*, 6th. ed. 419 sqq; 2 *Williams, V. & P.*, 852 sqq.

party to the sale as regards the particular property dealt with. Here also the disability is only conditional. And thirdly, where one of the parties stands, not towards the other party to the sale, but towards the beneficial owner of the land or money dealt with, in the relation of agent executing an authority to sale or purchase; in which case he is under an absolute disability to take under the contract, either directly or indirectly, in the opposite capacity of purchaser or vendor.”¹

Undue influence distinguished.

It may be necessary hereafter to touch incidentally, if not directly, upon all these cases. It is important to bear in mind that the equitable doctrine that transactions between persons in fiduciary relation are presumptively invalid, is totally distinct from the doctrine of undue influence. There may be no intentional concealment, or misrepresentation, or fraud, but equity will raise a presumption against the validity of the transaction from the very conception and existence of a fiduciary relation.² To quote Lord Chelmsford, “wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this, confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*”³

Incapacity at date of suit.

It should be noted here however, that, generally speaking, the personal incapacity which disentitles a plaintiff to specific performance is what exists at the date of the suit, and not what existed at the time of the agreement, but has since been removed.⁴ Where it is out of the power of the defendant to perform the agreement, a court may refuse to make a decree for specific performance which will be nugatory; but of this more hereafter.⁵

¹ 2 Williams v. & P., Ch., XVII, 874-5. Cf. 1 Story, Eq., s. 307 *et seq.*
² 2 Pomeroy, Eq., J., s. 957 *et seq.*

³ 2 Pomeroy, Eq. J. ss. 955-6.
⁴ Tate v. Williamson, [1866] 2 Ch. 56, 60 affg. 1 Eq., 528, 536, Finch, 588; Rhodes v. Bate, [1866] 1 Ch. 252, 257

(Turner, L. J.). Cf. also Hatch v. Hatch [1804] 9 Ves., 292; Billage v. Southee [1852] 9 Hare, 534, 540.

* Clayton v. Ashdown [1714] 9 Vin. Abr., 393.

⁵ Lect. VII. *infra*.

An agreement again may be illegal¹ and *ex dolo malo non oritur actio*.² This follows from the very constitution of courts which are instituted to administer justice in accordance with the law.³ "It must be admitted," said Lord Eldon, "that neither this court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice to do that which in the view of justice is criminal."⁴ The objection, which always sounds very ill in the mouth of the defendant, is not allowed for his sake, explained Lord Mansfield, "but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff,—by accident, if I may say so."⁵ But illegality is never presumed,⁶ consequently it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality; it must be shown to be illegal.⁷ And where the parties are not in *pari delicto*, even though *particeps criminis*, a court of equity may feel disposed to afford relief to the more innocent party.⁸ A person does not become an outlaw and lose all rights by doing an illegal act.⁹ But an equity court will

¹ The illegality may attach either to the consideration or to the stipulations of the agreement. Waterman, s. 211.

² Broom, *Legal Maxims*, 554.

³ Waterman, s. 209, p. 277.

⁴ *Wood v. Griffith* [1818] 1 Sw. 43, 55, 2 Keener, 122.

⁵ *Holman v. Johnson* [1775] Cowp., 341, 343; Finch, 617; *Atwood v. Fisk*, 101 Mass., 363, 3 Keener, 862, 1 Story, Eq., s. 298; 2 Pomeroy, Eq. J., s. 939. *Raghavelu v. Adinarayana*, [1908] 32 Mad., 323.

⁶ *Bennett v. Clough*, [1817] 1 B. & Ald., 461 19, R. R., 352.

⁷ *Per Wood, V. C., Aubin v. Holt* [1855] 2 K. & J., 66, 70. But see *Johnson v. S. B. Ry. Co.* [1853] 3 DeG. M. & G., 914; Fry, s. 482, p. 214.

⁸ *Reynell v. Sprye* [1852] 21 L. J. Ch., 633, 651. 1 Story, Eq. s. 300: "where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposi-

tion, hardship, undue influence, or great inequality of age or condition, so that his guilt may be far less in degree than that of his associate in the offence. And besides there may be, on the part of the court itself, a necessity of supporting the public interest or public policy in many cases, however, reprehensible the acts of the parties may be." Cf. 2 Pomeroy, Eq. J. ss. 941-2. *Per Wilde, J.* "In respect to offences in which is involved any moral delinquency or moral turpitude, all parties are deemed equally guilty and courts will not enquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick 24; *White v. Franklin Bank* [1839] 22 Pick, 181, Woodruff 206; *St. Louis R. Co. v. Terre Haute R. Co.*, 145 U. S. 407.
⁹ *National Bank v. Petrie* [1903] 189 U. S., 423, 2 Williston, 565.

sometimes deny relief even where the agreement may not be unenforceable at law. An American court refused specific relief in the case of a contract whereby the defendant had undertaken to furnish evidence to establish the plaintiff's claim to certain immoveable property and to manage and conduct the litigation at his own expense, though the contract was not unlawful.¹ Where the legal portion of an agreement can be separated from the illegal portion, there may be specific enforcement of the legal portion.²

Ultra Vires.

I may here refer briefly to a class of cases, which though not yet numerous in India, are still sufficiently important to require special mention. These involve agreements which are *ultra vires* and so may even be spoken of as void.³ Such are agreements made by or on behalf of a corporation or public company created for special purposes, but which are in excess of its powers.⁴ For corporations or companies are artificial bodies generally created by statute, and they can make no valid contract not within the powers conferred upon them.⁵ Thus if a company, existing for the sole purpose of making and working a railway, contract for the purchase of a piece of land for the purpose of erecting a Cotton Mill thereon, this contract is *ultra vires* and will not be specifically enforced.⁶ Nor will a court enforce a contract by which, say, a corporation created for the performance of public duties, abnegates those duties by devolving them upon others, without the consent of the legislature.⁷ An act may be *ultra vires* when its performance by a

Corpora-
tions and
companies.

¹ *Casserleigh v. Wood* 119 Fed., 308.

² *Carolan v. Brabazon*, [1846] 3 Jones & Lat., 200, 9 Ir. Eq., 224. Cf. S. R. A., s. 16; *King v. King* [1900] 63 Ohio, 363, 2 Williston, 567; L.C.A. ss. 57, 58.

³ The better opinion seems to be that such agreements are not illegal, Pollock, *Con.* (W. W.), 139 sqq., 896 sqq. (App. D.)

⁴ S.R.A., s. 21, cl. (f).

⁵ Cf. *Day v. Spiral Spring Buggy Company* (Mich.) 58 Am. Rep., 352. Per, Gray, J., "The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation as declared in the law of its organisation are, 1st

the interest of the public, that the corporation shall not transcend the powers granted. 2nd, The interest of the stock-holders, that the capital shall not be subjected to the risk of enterprises not contemplated by the Charter, and therefore not authorised by the stock-holders in subscribing for the stock. 3rd, The obligation of everyone, entering into a contract with a corporation, to take notice of the legal limits of its powers." *Pittsburgh R. Co. v. Keokuk Bridge Co.*, 131 U.S., 371; *Waterman*, 291.

⁶ S. R. A., s. 21, ill. to cl. (f).

⁷ *Chicago Gaslight Co. v. People's Gaslight Co.*, 121, Ill. 530; 10 Cyc., 1152-3.

company or corporation is not authorised under any circumstances or for any purpose. It may also be *ultra vires* in a more limited sense; for instance, with reference to the rights of certain parties, when the corporation cannot act without their consent, or with reference to a particular purpose, when it cannot right-fully perform the act for that purpose, though it may do so for some other purpose.¹ This distinction is important with reference to the rights of strangers. An act altogether *ultra vires* has no legal effect, but an act *ultra vires* in a limited sense may not fail unless it can be shown that "the party dealing with the corporation is aware of the intention to perform the act for an unauthorised purpose, or under circumstances not justifying its performance."² For instance, a public company may be authorised to take land for special purposes. Now, if it agrees to purchase more land than it requires,³ or land that is not strictly required for such purposes,⁴ the agreement will be binding in equity if the vendor acts *bona fide*, and without knowledge that the land is not so required. The contract is not wholly devoid of legal effect and property will pass.⁵

The question whether a particular agreement is *ultra vires* can be determined only upon a careful consideration of the statutes in force with regard to the class of corporations in question, the charter or act or memorandum of association of the particular corporation, and the agreement in dispute in each individual case.⁶ The *prima facie* presumption, however, is that an agreement entered into in the proper form (for instance, in writing under its corporate seal) by a corporation is valid,⁷ but this *prima*

Plea when
allowed.

¹ 1 Lindley, *Comp.* 213.

² *Per* Sawyer, C. J., *Miners' Ditch Co. v. Zellerbach*, 37 Calif., 543; *Waterman*, ss. 219, 225; *Pomeroy*. S. P., s. 56, p. 81; 10 *Cyc.*, 1148-9.

³ *Eastern Counties Ry. Co. v. Hawkes*, [1855] 5 H. L. C., 331. (Lord St. Leonards expressed here an inclination "to restrain the doctrine of *ultra vires*, to clear cases of excess of power with the knowledge of the other party, express or implied, from the nature of the corporation and of the contract entered into").

⁴ *Mayor of Norwich v. Norfolk Ry. Co.*, [1855] 4 El. & Bl., 397; *Shamnugger Jute Co. v. Ram Narain* [1886] 14 Cal.,

189.

⁵ *Ayers v. South Australian Banking Company* [1870] 3 P. C., 548.

⁶ *Fry*, s. 490, p. 219. See *Brice's Doctrine of Ultra Vires* upon this subject generally.

⁷ "Corporations have by law a power to enter into all contracts not expressly or impliedly prohibited," *per* Erle, J., *Mayor of Norwich v. Norfolk Ry. Co.* *supra*, 413. *Per* Blackburn, J., "We are entitled to consider the question to be, not whether the defendants had, by virtue of the acts of incorporation, authority to make the contract, but whether they are by those statutes

facie right does not exist in any case where the contract is one which from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making.¹ But "the executed dealings of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require."² The principle is, says Dr. Thompson, that the rule requiring the observance of good faith and fair dealing is just as applicable to corporations as to individuals, and that neither can involve others in onerous engagements, and with the consideration of the contract in their possession disavow their acts to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract.³ The defence of *ultra vires* generally concerns the corporation in its relations with the State and Government and will not be favoured unless the contract is wholly executory on both sides.⁴

It deserves to be noted here that a contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with

forbidden to make it," *Taylor v. Chichester Ry. Co.* [1867] 2 Ex. 356, 384. 10 *Cyl.*, 1155. As to the limited agency of directors, see *Fountaine v. Carmarthen Ry. Co.*, [1868] 5 Eq., 316, 322; *Royal British Bank v. Turquand*, [1856] 5 E. & B. 248, 6 *ibid.*, 237; 1 *Lindley, Companies*, 166 sqq. A distinction has to be made between powers of a trading corporation and of a municipal corporation, *Wenlock v. River Dee Co.*, [1883] 38 Ch. D., 684n. *affd.* [1885] 10 A. C. 354; 1 *Lindley, op. cit.* 216. See also *Ashbury Ry. Carriage Co. v. Riche*, [1875] 7 H. L., 653; *A.-G. v. London County Council*, [1901] 1 Ch., 781.

¹ *Per* Lord Cramworth, *Directors of Shrewsbury & B. Ry. Co. v. Directors, etc., of N. W. Ry. Co.*, [1857] 6 H. L. C., 112, 135, 136. Cf. *South Yorkshire Ry. etc. Co., v. Great Northern Ry. Co.*, [1873] 9 Ex. 84.

² *Per* Comstock, C. J., *Parish v.*

Wheeler, 22 N. Y., 494, 508; *Fishmongers Co., v. Robertson* [1842] 5 Man. & G., 131; *Waterman*, s. 226, p. 300.

³ 10 *Cyc.*, 1158, citing *Louisville R. Co. v. Flanagan*, 3 Am. St. R., 674. Strictly speaking, there can be no estoppel, *Great N. W. C. Ry. Co., v. Charlesbois*, [1899] A. C., 114; 1 *Lindley, Comp.*, 215. See *Everest & Strode, Est.*, 447; also articles, 43 *Amer. L. Rev.*, 69, 81.

⁴ *Pomeroy*, S. P., 82-3, where it is pointed out that in municipal corporations, where parts of the government, stand on a different footing, all their powers are held in trust for the public, and the rights of the latter, being paramount over all private rights, are protected by keeping these bodies within the exact limits of their powers. Cf. 10 *Cyc.*, 1164-5.

on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.¹ "Though illegal and unenforceable as contracts," says Taylor, "recovery of the consideration has generally been allowed where higher public considerations than the immediate equities between the parties were not involved."²

Clause (f) of section 21, Specific Relief Act, also speaks of a contract made by the promoters of a corporation or public company created for special purposes, which is in excess of its powers. There is a great body of English case-law upon the subject of contracts by promoters of public companies. The question has been often raised as to how far a company may be bound by a contract made at a time when it did not exist. Lord Cottenham said, in the case of a company incorporated by a special Act of Parliament, "As the company stand in the place of the projectors they cannot repudiate arrangements into which such projectors had entered: they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld."³ So Lord Jeffrey said that the fact of a party having "passed from the chrysalis to the butterfly state"⁴ creates no difficulty in the enforcement of such a contract. This doctrine has not passed unchallenged in England,⁵ and the Indian legislature seems to have acted wisely in adopting the rule in the modified form suggested by Kindersley, V. C.,—"It would be most consonant with legal principle, most just, and most for the public benefit, to hold that contracts of the promoters with landowners are not binding on the company, unless sanctioned by the Act constituting the company."⁶

Contracts
by promot-
ers.

¹ *Central Transportation Co., v. Pullman Palace Car Co.*, [1890] 139 U. S., 24, 3 Keener, 879.

² Taylor, *Private Corporations*, s. 314.

³ *Edwards v. Grand Junction Ry. Co.* [1836] 1 My. & Cr., 650.

⁴ *Caledonian & D. J. Ry. Co. v. Magistrates of Helensburgh* [1856] 2 Mac Q., 391, 394.

⁵ *Caledonian & D. J. Ry. Co. v. Magistrates of Helensburgh*, supra. (Lords Cranworth and Brougham); *Preston v. Liverpool etc. Ry. Co.*, [1856] 5 H. L. C., 605 (ditto), affg. [1853] 17 Beav., 115 (Lord Romilly.) Fry, ss. 254, 255, pp. 106, 107.

⁶ *Earl of Shrewsbury v. North Staffordshire Ry. Co.* [1865] 1 Eq., 593, 615.

Contracts
in breach
of trust.

A cognate defect, it may not be out of place here to mention, vitiates a contract made by trustees either in excess of their powers or in breach of their trust.¹ The rule of equity, said Lord Redesdale, is to require the plaintiff "to show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice."² The court is usually unwilling to enforce any transaction resulting in injury to third persons, and will be delicate of interfering against trustees.³ Where, for instance, two trustees empowered to sell trust property worth, say, a lakh of rupees, contract, it may be owing to the gross negligence of an agent, to sell it for a quarter of the value, the contract is so disadvantageous as to be a breach of trust. A court of equity will refuse to enforce it *in specie* as unfair and unlawful and calculated to render the trustees liable to prosecution, were they compelled to carry out the sale.⁴ So it has been held that a contract for a lease entered into by trustees in excess of their powers is not enforceable *in specie*.⁵ The court will not order that to be done which when done will be invalid.⁶ And to defeat an action for specific performance it is not necessary to prove an actual breach of trust. Even where a trustee has

¹ S. R.A., s. 21 cl. (e). Cf. *Sarbesb v. Hari*, [1910] 14 C.W.N. 451 (decree upon compromise agreed to by administrator in excess of his powers).

² *Harnett v. Yielding*, [1805] 2 Sch. & Lef., 549, 553.

³ Fry, ss. 411, 413, pp. 180-181. Sec. 3 of the Indian Trusts Act., 1882, defines a breach of trust, chap. III sets forth the duties of trustees, and chapter IV their powers.

⁴ *Mortlock v. Buller*, [1804] 10 Ves, 292; *Dunn v. Flood*, [1883-5] 28 Ch. D., 586, and other cases cited in 2 Dart, V. & P., 1055 n (h). Cf (English) Trustee Act, 1893, s. 14; also *Sneesby v. Thorn*, [1855] 1 Jur. N. S., 536, affd. 7 De G. M. & G., 399 (executors).

⁵ *Harnett v. Yielding*, supra; *Byrne v. Acton* [1721] 1 Bro. P.C., 186; *Bellringer v. Blagrove* [1847] 1 De G. & S., 63, (contract for renewal, *ultra vires*). *Mahomed v. Nunda* [1913] 16 I.C., 390. The principle adopted by Lord Redes-

dale in the case first cited is doubtful, see *Neale v. Mackenzie* [1837] 1 Ke., 474; *Thomas v. Dering* [1837] *ibid*, 746; *Dyas v. Cruise* [1845] 2 J. & Lat., 460, 487; and there seems no reason why if the purchaser is willing to forego the covenant so far as it is in excess of power and is separable (for instance, one for renewal of lease), he should not be allowed to compel the trustee or lessor to convey what he can. Cf. Fry, ss. 473, 476, 1257, sqq; *Sugden, V. & P.*, 307; S.R.A., ss. 14, 15; *Cleaton v. Gower* [1674] Rep. Finch, 164. But in ill. (1) to s. 21, cl. (e), the Indian Legislature seems to have adopted the decision in *Harnett v. Yielding*, supra, to its full extent. Collett, 162.

⁶ *Jadu v. Adal* [1912] 11 I. C. 892 (agreement for lease of their undivided shares by three out of four members of a Mitakshara co-parcenary).

Malfeasance
or misfeasance of
trustee.

acted in an unbusiness-like manner,¹ or failed in reasonable diligence and contracted under circumstances of haste and improvidence,² a court of equity will be slow in giving relief to the other party. Any person who stands in a fiduciary relation may be treated as a trustee.³ Consequently, where the directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders, and they contract to sell it without any such sanction, the agreement is *ultra vires*, and cannot be specifically enforced.⁴ So "a promoter is in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make a full and fair disclosure of his interest and position with respect to that party. There is no difference in this respect between a promoter and a trustee, steward or agent."⁵ Where, accordingly, the promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property, but they take no proper precautions to ascertain the value of such property and, in fact, agree to pay an extravagant price therefor, and they also stipulate that the vendors shall give them a bonus out of the purchase-money, the contract cannot be specifically enforced.⁶ But it may be noted here that, though the contract cannot be enforced against the company, the company may compel its promoters or directors to disgorge all illicit gain made in fraud of their duty as trustees.

¹ *Goodwin v. Fielding* [1853] 4 DeG. M. & G., 90.

² *Ord v. Noel* [1820] 5 Madd., 438.

³ *S.R.A.*, s. 3, def. *Sarvesh v. Hari* [1910] 14 C. W. N. 451.

⁴ *S.R.A.*, s. 21 cl. (e) ill. 2; *Daniel v. Adams* [1764] Amb., 495. Cf. *Narain Pattro v. Aukhoy Narain Mannu* [1885] 12 Cal., 152; *Gurusami v. Ganapathia* [1880-2] 5 Mad., 337, F.B.; *Bykuntla v. Shib Das* [1904] 2 C. L. J., 321. Where an agreement with the promoters or directors of a company is such that the company is not bound thereby, there can be no decree either against the company or the individuals who entered into the agreement, *Ellis v. Colman*

[1858] 25 Beav., 662.

⁵ *New Sombrero Phosphate Co. v. Erlanger* [1877] 5 Ch. D., 73, 118, affd. 3 A. C., 1218, 6 R. C., 777 (duties of promoters of a company examined at length). *Maxwell v. Port Tennant Co.* [1857] 24 Beav., 495 (specific performance not decreed by reason of taint of bad faith, even where company's articles of association provided for the contract); 1 *Lindley, Comp.*, 489-500.

⁶ *S.R.A.*, s. 21, cl. (e), ill. 4; *Emma Silver Mining Co. v. Grant* [1879] 11 Ch. D., 918; *Phosphate Sewage Co. v. Hartmont* [1877] 5 Ch. D., 394; *In re British S. P. B. Co.*, [1881] 17 Ch. D., 461.

Voluntary
agreements.

An agreement, again, for which no consideration¹ was given, is void² and not capable of enforcement *in specie*. The equitable jurisdiction is not exercised in respect of agreements that are voluntary.³ Equity permits one to withhold what he has of his own accord, and not from any benefit to himself or expectation of any benefit, volunteered to promise.⁴ "No court of justice can interfere," said Jessel, M.R., "so long as there is no property the right to which is taken away from the person complaining."⁵ But an agreement to accept shares of stock upon which nothing has ever been paid, and relieve the transferor from all liability thereon is such consideration as to justify specific performance.⁶ Any benefit conferred, received or held, may be valuable consideration under the law, and equity has given to this rule a construction and an application at once liberal and enlarged.⁷ A desire to reconcile a father to the marriage of his son has been held, *e.g.*, to be a sufficient consideration in equity for a promise to convey an estate to the son, though it is no consideration under the common law.⁸ The distinction which is drawn between consideration which is *good* and consideration which is *valuable* should be noted, especially in the case of executory contract. Money or money's worth is valuable consideration, and courts treat marriage as such.⁹ A marriage settlement, therefore, cannot be impeached on the ground of absence of consideration, and even volunteers would be allowed to benefit under it.¹⁰ Natural love and affection, on the other hand, will be good consideration, and a settlement¹¹ made out of such consideration will be supported not only against the settler,¹² but also against subsequent transferees

Want of
considera-
tion.

¹ I. C. A., s. 2.

² *Ibid*, s. 5.

³ Fry., ss. 116-7, pp. 48-9.

⁴ 3 Parsons, *Con.*, 326.

⁵ *Rigby v. Connol* [1880] 14 Ch. D., 487;

cf. Baird v. Wells [1890] 44 Ch. D., 661.

⁶ *Cheale v. Kemward* [1858] 3 DeG. &

J., 27.

⁷ *Edwards v. Grand Junction Ry. Co.* [1836] 1 Myl. & Cr., 650; 3 Parsons, *supra*; Langdell, *Bq. J.*, 52.

⁸ *Wiseman v. Roper* [1645-6] 1 Ch. Rep., 158, 21 E. R., 537.

⁹ 1 Story, *Eq.*, s. 354.

¹⁰ S.R.A., s. 23, cl.(c); *cf. Re D'*

Angibau [1880] 15 Ch. D., 228, 242.

¹¹ S. R. A., s. 3: "Settlement means any instrument (other than a will or codicil, as defined by the Indian Succession Act) whereby the distinction or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of."

¹² S.R.A., s. 25, cl.(c), also ill. (d): "A out of natural love and affection makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a

with notice.¹ The voluntary settlement, however, that is thus passively protected, is an executed one, that is, one that has been made and is in force.² Where promises have been executed wholly or substantially, and there remains something to be done to complete the title, or otherwise render the enjoyment of the thing more beneficial to the plaintiff, equity will require that thing to be done, although the promise was wholly voluntary. This is often done, as Parsons points out, by treating the party defendant as a trustee for the plaintiff.³ Good, as distinguished from valuable, consideration will also support in British India a contract when made between parties standing in a near relation to each other and expressed in writing and registered under the law for the time being in force.⁴ The expression "near relation" has not yet been judicially interpreted, but will apparently have to be construed with reference to the personal law (especially of inheritance) of the parties concerned.⁵

In order to resist an action for specific performance it is not necessary for the defendant to make out that the agreement is void. It is quite enough for his purpose that the agreement is voidable, that is, enforceable at his, and not the plaintiff's, option.⁶ If he chooses not to abide by it, the agreement fails, and there can be no execution *in specie*. Now, section 19 of the Contract Act declares:

Voidable contracts.

"When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."⁷

And section 19A affirms the same thing in respect of consent caused by undue influence.

It will, therefore, be necessary to consider the nature of each of these invalidating circumstances *seriatim*.

Coercion is defined by section 15 of the Contract Act to be "the committing, or threatening to commit, any act forbidden.

Coercion.

stranger. A cannot enforce specific performance of this contract so as to over-ride the settlement, and thus prejudice the interests of the persons claiming under it." Cf. s. 54, ill. (g).

¹ S.R.A., s. 24, cl.(d).

² Ibid. Cf. Collett, 214.

³ 3 Parsons, Con., 327; *Ellison v.*

Ellison. [1802] 6 Ves., 656.

⁴ I. C. A., s. 25, cl. (1). Cf. *Poonoo Bibee v. Fyez Buksh* [1874] 15 B. L. R., Ap., 5; *Appa Pillai v. Ranga Pillai* [1882] 6 Mad, 71.

⁵ Cf. Pollock, *I.C.A.*, 3rd. ed. 57.

⁶ I. C. A., s. 2, cl.(i).

⁷ Cf. I. C. A., s. 14.

by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.”¹ This definition is much wider than any that may be given of *duress* under the Common Law of England,² and seems to have been deliberately so framed as not to make it necessary that the person coercing or the person coerced (or even any relation of his) should be a direct party to the contract, or that the property of the latter should be affected, or that he or they should be in any way prejudiced by the contract.³ Consequently, in British India many agreements may be deemed to be the result of coercion which English courts will probably be disposed to treat as cases of undue influence. *E.g.*, where a Hindu widow of 13 was forced to give her consent to the adoption of a boy, whose relations would not allow the corpse of her husband to be removed from the house, the Madras court held that there had been coercion, and the adoption was invalid.⁴ The Allahabad court holds that fear of criminal proceedings already pending would not vitiate consent to a submission to an arbitration of the matters in dispute, where especially it was not shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused and by pressure obtained his consent.⁵ There can be no duress of property without some illegal exaction or some fraud or deception,⁶ and for a duress of person the restraint must be imminent and such as to destroy free agency in a mind of ordinary firmness without the present means of protection.⁷

¹ I.C.A., s. 15, expln.: “It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.” *Pudysarry v. Karampally* [1874] 7 Mad. H. C., 378. Cf. *Kessowji v. Hurjiwan* [1887] 11 Bom., 566; *Kaufman v. Gerson* [1904] 1 K. B., 591.

² *Pollock, Con.* (W. W.), 728. Cf. *Hackley v. Headley* [1881] 45 Mich., 569, 3 Keener, 764, where debtors' refusal to pay on demand a debt already due, though creditor was in great need of money and on verge of financial ruin, was held not to constitute duress.

³ Cf. *Pollock, I. C. A.*, 3rd. ed. 74. *Cunningham and Shephard*, 61-2.

⁴ *Ranganayakamma v. Alwar Setti* [1889] 13 Mad., 214.

⁵ *Gobardhan Das v. Joikishen Das* [1900] 22 All., 224; cf. *Jones v. Merionethshire Building Soc.*, [1892] 1 Ch., 173. See also *Banda Ali v. Banspat Singh* [1882] 4 All., 352, and *Pollock's* remarks thereupon, *op. cit.*, 74-5.

⁶ Duress has been said to be a species of fraud, 2 Cooley, *Torts*, 966; *Bank of Dayton v. Kusworm*, [1894] 88 Wis., 188, 3 Keener, 803.

⁷ *York v. Hinkle* [1891] 80 Wis.,

The topic of coercion naturally leads to that of undue influence, and so I come to section 16 of the Indian Contract Act. This in its amended form now consists of a general and a special provision, which I proceed to read :

Undue
Influence.

"1. A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress."¹

"The equitable doctrine of undue influence," said Lindley L.J., in the leading English decision on the topic now,² "has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny,³ and with the infinite varieties of fraud." The two elements which go to constitute undue influence under the law are: (1) a position to dominate another's will and (2) a use of that position to obtain an unfair advantage.⁴ The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed,⁵ to all the variety of relations, in fact, in which dominion may be exercised by one person over

624, 3 Keener, 772. Cf. *Skeate v. Beale* [1840] 11 Adol. & El., 990; *Morse v. Woodworth* [1891] 155 Mass., 233, 3 Keener, 793.

¹ The third subsection relates to the question of burden of proof, and runs thus:—Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to

dominate the will of the other. Nothing in this sub-section shall affect the provisions of sec. 111 of the Indian Evidence Act, 1872."

² *Allcard v. Skinner* [1887] 36 Ch. D., 145, 183.

³ Cf. *Sital Prasad v. Parbhu Lal* [1888] 10 All., 535; *Mannu Singh v. Umadat Pande* [1890] 12 All., 523. See also *Morley v. Loughnan* [1893] 1 Ch. 736.

⁴ *Ganesh v. Vishnu* [1907] 32 Bom., 37, 41.

⁵ Per Lord Kingsdown, *Smith v. Kay* [1859] 7 H. L. C., 750, 779.

another.¹ This is not the place to examine or explain this equitable doctrine at length.² It will suffice to point out, following the eminent Lord Justice already cited, that the cases may be divided into two groups, *viz.*, first, those where there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating or aggressive circumvention, and, secondly, those where the position, say, of the donor to the donee has been such that it has been the duty of the donee to advise the donor or even to manage his property for him.³ In both classes, the question to be determined is the same: Was such influence exerted as to interfere with the freedom of the other's will? ⁴ The acts alleged to constitute undue influence must range themselves either under fraud or coercion.⁵

Pardanashin
ladies.

Under the second class, must evidently be brought many Indian cases in which the rights and interests of *pardanashin* ladies have been found to be involved. Some judges have gone so far as to say that such ladies may be treated as persons *non compotes mentis*,⁶ and courts generally have thrown their *egis* of protection over them. It has been ruled by the highest authority, and that over and over again,⁷ that the party relying

¹ *Per* Romilly (*arguendo*), *Huguenin v. Basiley* [1807], 14 Ves., 285, 1 Wh. & T., 8th ed., 259. *Moriey v. Loughnan* [1898] 1 Ch., 736, 752, 3 Keener, 844.

² See notes in 1 Wh. & T., *supra*; 2 Pomeroy, *Eq. J.*, ss. 947-8, 951, 955-63.

³ *Alleard v. Skimer*, *supra*, 181. Cf. *Pushong v. Munia Halicani* [1868] 1 B. L. R. A. C., 95; *Harivalabdas v. Bhai Jivan i* [1902] 26 Bom., 689; *Ranguath v. Govind* [1904] 28 Bom., 639; *Wajid Khan v. Ewaz Ali*, [1891] 18 Cal., 545. Where a step-father induced his stepsons who in their minority were accustomed to obey him, and were ignorant of business affairs, to make a contract, unconscionable in character, to convey to him their real estate, an American court refused to enforce the contract, *Tucke v. Bucholz*, 43 Iowa 415; *Waterman*, 428.

⁴ 2 Williams, V. & P., 757. "In regard to acts done and contracts made by parties affecting their rights and interests, the general theory of the law is, that in all such cases there must be full and free consent, in order to make the agreement binding on them. Hence it is said,

that if consent be obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For, although the law will not inquire generally into men's acts and contracts to determine whether they are wise and prudent, yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning, or deceitful management of those who purposely mislead them." *Waterman*, 428, n. 6.

⁵ *Boyse v. Rossborough* [1857] 6 H. L. C., 2, 45; *Ganesh v. Vishnu* [1907] 32 Bom., 37, 44.

⁶ *Behari Lal v. Habiba Bibi*, [1886] 8 All., 267.

⁷ *Ashgar Ali v. Deetroos Banoo Begum* [1877] 3 Cal., 324; *Sudisht Lal v. Sheobarat Koer*, [1881] 7 Cal., 245; *Amarnath v. Achan Kuar* [1892] 14 All., 420, 426; *Annoda Mohan v. Bhuban Mohini* [1901] 28 Cal., 546; *Shambati Koeri v. Jago Bibi* [1902] 29 Cal., 749, *Sajad Husain v. Wazir Ali* [1912] 34 Mad., 455 (all Privy Council cases).

upon a deed or document executed by a *pardanashin* lady must prove affirmatively that the executant was a free agent and duly informed of what she was about.¹ There is a general presumption, it seems to have been thought, that Indian ladies, whether Hindu or Mahomedan, who live in the seclusion of the *parda*, have no capacity for business and, without independent advice, fall an easy prey to undue influence.² Now, there can be no doubt that our courts in thus offering assistance to the *pardanashin* ladies have been actuated by the best of motives. Nor, do I think, is there much room for doubt that the Indian woman, not unlike possibly many of her sisters elsewhere, is very often swayed by affection and emotion, and does many an act out of love, of which a more masculine intellect, rejoicing in the dry light of reason, may disapprove. But I do not think that there is any room for doubt that the Indian woman is furnished by nature with quite a respectable fund of (it may be untaught) intelligence and common sense, of keenness of sensibility and of perception, and it is but seldom that she enters into a business transaction otherwise than as a free agent. We need not go to Ranis or large heiresses in India to find women at once clever, strong-minded and capable even as administrators. All of us, I believe, could instance cases of any number of *parda* ladies from the middle class ranks, who do carry a head upon their shoulders and can give points to their male (or female) advisers. I therefore cannot but think that much mischief has been done by the promulgation of the doctrine of our law courts to which I have referred, and interested parties have been enabled to depart fraudulently from many a *bona fide* engagement.³ No special presumption seems to have been at all called for.⁴ In England it has been laid down generally as "a rule of public policy of great importance that, while a person is under the influence or presumed influence of another person in consequence of a confidential relation between

¹ *Greesh Chunder v. Bhuggobutty* [1870] 13 M. I. A., 419, 431.

² *Buzloor Ruheem v. Shumsoonissa Begum* [1867] 11 M. I. A., 551.

³ Cf. Sir W. Rattigan, "*Pardanashin woman and her protection by British*

Courts of Justice," *Journ. Comp. Legisl.*, Dec., 1901, 252.

⁴ Sir F. Pollock cites as an analogous case the protection afforded to "expectant heirs" by English courts of equity, *I. C. A.*, 3rd. ed. 84.

them, that other person cannot accept from him a gift of any kind, unless it is shown to have been made with competent independent advice, which I take to mean independent advice of a professional nature.”¹ And an American court said, with reference to the conjugal relation, “the greater the affection, the more submissive the dependence; the stronger the trust, the more liable is the wife to be subject to the control of the husband, and the more vigilant should the court be in protecting the weak.”² Very few Indian ladies, indeed, require any further protection. But the special rule in favour of a plea of *parda* is now firmly established, and the issues that arise when a case of undue influence is properly raised have been thus formulated by the Judicial Committee: (i) Was the transaction a thing which a right-minded person might be expected to do? (ii) Was it an improvident act? (iii) Was it a matter requiring a legal adviser? (iv) Did the intention of making the transfer originate with the lady?³ The Privy Council, however, has more recently observed that inability to prove that the lady had independent advice is not of itself fatal to the validity of the deed executed by her, and has deprecated the tendency to transmute into a legal disability the legal protection which the law gives to a *pardanashin* lady.⁴

Unconscionable bargain.

It may be useful to point out here that a bargain may be hard and unconscionable, and yet no fraud may have been perpetrated or undue influence, as ordinarily understood, exerted. “The doctrine has nothing to do with fraud,” said Jessel, M. R. “It has been laid down in case after case that the court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain, sets it aside.”⁵ A man may, *e.g.*, be in urgent need of money, and a money-lender may propose his own terms and get the borrower to agree to them. This will not be a case of undue

¹ *Liles v. Terry* [1895] 2 Q. B., 679, 685, 3 Keener, 830, *per* Kay, L. J.

² *Hull v. Otterson* [1891] 52 N. J. Eq., 522, 3 Keener, 404.

³ *Mahomed Buksh v. Hosseini Bibi* [1888] 15 Cal., 684, 698-700, *per* Lord Macnaghten.

⁴ *Kali Buksh v. Ram Gopal* [1913]

36 All., 81, P. C. *Keshub Pyne v. Radha*, [1913] 17 C. W. N. 991.

⁵ *Beynon v. Cook*, [1875] 10 Ch. Ap., 391; *Kamini v. Kali*, [1885] 12 Cal., 225, 239, P. C.; *Madho v. Kashi*, [1887] 9 All., 228; *Kirpu v. Somiuddin* [1903] 25, All., 284; *Balkishan v. Madan* [1907] 29 All., 303.

influence,¹ but if the bargain is a hard one, a court of equity will not enforce it. As a good illustration, I may refer to the recent case of *Auseri Lal v. Maneshar Baksh Singh*.² The defendant-respondent's estate was being managed by the Court of Wards, and through his improvidence he was in urgent need of money. He borrowed from the plaintiff-appellant, and gave a bond agreeing to pay 18 per cent. compound interest. "There was no fraud in the matter, and no pressure was put upon the respondent by Auseri Lal or his agents to induce him to accept the conditions offered to him." But the Judicial Committee found that the respondent was under a peculiar disability and placed in a position of helplessness and he was compelled by his circumstances to accept the terms which were offered to him by a person who had known him long and was aware of these circumstances. Their Lordships intimated that an Indian court in trying an issue of undue influence should consider the terms of the amended section 16 only, and held that the lender used his position to demand and obtained from the respondent more onerous terms than were reasonable, and the bond sued on must be set aside. The courts below had found that the charging of compound interest in the circumstances was unconscionable, and the Privy Council was not disposed to differ from this concurrent finding. Simple interest at the rate of 18 per cent. per annum was therefore allowed. In a more recent case, the Judicial Committee has pointed out that a contract may be onerous, and yet not unconscionable.³

Undue influence has been spoken of as fraud,⁴ and a consideration of the former topic naturally leads to a consideration of the latter. "The rule is universal, whatever fraud creates justice will destroy."⁵ But fraud is infinite in variety,⁶ and at

Fraud.

¹ *Ganesh v. Vishnu* [1907] 32 Bom., 37, 43; *Sundar Koer v. Sham Krishna* [1906] 34 Cal., 150, P. C.; *Hari v. Ramji*, [1904] 28 Bom., 371. Distinguish *I. C. A.*, s.16, ill. (c).

² [1906] 10 C. W. N., 849, s.n. *Dhanipal v. Maneshar*, 28 All., 570, P. C. *Chaplin & Co. v. Brammal* [1908] 1 K. B., 233.

³ *Davis v. Maung Shwe* [1911] 38

Cal., 805, P. C.

⁴ Cf. *Allcard v. Skinner* [1887] *supra*, 183.

⁵ *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq., 188. *Per Wilde, B.*, "Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches"; *Udell v. Atherton* [1861] 7 H. & N., 181.

⁶ *Per Lord Macnaghten, Reddaway v. Banham* [1896] A. C., 221.

one time the term was used as *nomen generalissimum*¹ by equity judges and text writers. According to Mr. Justice Story, "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another" may be described as fraudulent.² The definition in the Indian Contract Act, to which we are referred by section 3 of the Specific Relief Act, is neither logical nor luminous, and I will try first of all to explain to you the essentials of a fraudulent representation,³ and then enquire when and where the same may be pleaded as a bar to specific performance. The rule of law is clear that nobody can take advantage of his own wrong, and if a person makes positive statements to the intent that others should act upon them, he is bound to state only what he believes to be true.⁴ In order to constitute deceit or fraud there must, first, be a representation which is untrue. If the representation is true, *cadit questio*.⁵ A representation, be it noted, secondly, is a statement of fact which may be made either by word of mouth or in writing or by conduct. The state of a man's mind is a question of fact, consequently a statement as to intention may give rise to liability, if made fraudulently.⁶ A promise, therefore, made without any intention of performing it,⁷ e.g., a purchase of goods without the intention of paying for them,⁸ is deceitful

(a) Untrue representation.
(b) Representation of fact.

¹ Per James, L. J., *Torrance v. Bolton* [1870] 8 Ch., 118, 124.

² 1 *Eq.*, s. 187. Cf. 1 Fonblanque, *Eq.*, bk. 1, Ch. 2, s. 3; Kerr, *Fraud*, 4th ed. 2 "Fraud consists in the endeavour to alter rights by deception touching motives, or by circumvention not touching motives," Bigelow, *Fraud*, 5.

³ These elements have been tersely described as "representations, falsity, scienter, deception and injury," *Arthur v. Griswold*, 55 N. Y., 400, 410. Cf. *Southern Development Co. v. Silva* [1888] 125 U. S., 247, 250; Moncrieff, *Fraud*, 2-3.

⁴ Pollock, *Con.*, (W. W.), 647.

⁵ *Smith v. Chadwick* [1884] 20 Ch. D., 27, 9 A. C., 187.

⁶ Per Bowen, L. J., "There must be a mis-statement of an existing fact, but the state of a man's mind is as much a fact as the state of his diges-

tion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else." *Edgington v. Fitzmaurice* [1885] 29 Ch. D., 459, 480 (statement by directors of company inviting subscriptions that it was intended to apply the money to a particular purpose).

⁷ 1. C. A., s. 17 (3). The promise may imply a statement of fact, viz., the existence of a present intent to have the result transpire, or that no fact is known to prevent the result expected, 1 Story, *Eq.*, 208 (Bigelow's note).

⁸ *Load v. Green* [1846] 15 M. & W., 216; *Clough v. London & N.W.Ry. Co.* [1871] 7 Ex., 26; *Ex parte Whittaker* [1876] 10 Ch., 446; *Durell v. Haley*, 1 Paige, Ch., 492.

and may be avoided. A question of law is not generally treated as a matter of fact,¹ but a representation as to a matter of private right is a representation of fact,² and a misrepresentation as to a proposition of general law, when made in deliberate fraud, has been held enough to entitle the party deceived to relief.³ The representation may be made by express words, there may, for instance, be a positive assertion of what is false, or the suggestion, as to a fact, of that which is not true.⁴ Where, for instance, a vendor states that there is lime-stone embedded in the land sold which is capable of producing lime of first rate quality fit for the London market,⁵ or that the land sold is fit for building purposes⁶ or that the property is let to a most desirable tenant,⁷ or that a house is in good repair,⁸ or that it is not damp⁹ and the drains are in good order,¹⁰ or the cellars are dry,¹¹ and the statement is found to be untrue, the purchaser is entitled to resist specific performance, if not wholly avoid the contract. But it is worth repeating, that the assertion must be of some fact, and not be the expression of what is only the speaker's or writer's opinion or belief as to some circumstance relating to the contract.¹² A vague affirmation of the excellence of the property sold amounts to general laudation, which is permitted to the vendor¹³

¹ *Lewis v. Jones* [1825] 4 B. & C., 506, 512; *Rashdall v. Ford* [1866] 2 Eq., 750; *Fry*, s. 682. But see *Eaglesfield v. Londonderry* [1876] 4 Ch. D., 693, 702.

² *Edwards v. McLeay* [1815] Coop., 308; *Partap Chunder v. Mohendranath* [1889] 17 Cal., 291, P.C.; 2 *Williams, V. & P.*, 736, and cases cited in n. (h).

³ *Hirschfield v. London etc. Ry. Co.* [1876] 2 Q.B.D., 1, 5-6; *West London Com. Bank v. Kitson* [1884] 13 Q. B. D., 360, 362-3. Cf. *Sims v. Ferrill*, 45 Ga., 585 (misrepresentation of law by brother-in-law to sister). *Benjamin, Sale*, 444-5; 1 *Story, Eq.*, 207 (Bige-low's note).

⁴ I. C. A., s. 17 (1). "No one can evade the force of the impression which he knows another received from his words and conduct, and which he meant him to receive, by resorting to the literal meaning of his language alone," *Mizner v. Kussell*, 29 Mich., 229; *Pollock, Con. (W. W.)*, 681 n. Cf. *Richardson v. Silvester* [1874] 9 Q. B., 34 (newspaper advertisement); *Car-*

bett v. Brown [1831] 8 Bing., 33 (half-truth).

⁵ *Higgins v. Samels* [1862] 2 J. & H., 460, 2 *Keener*, 890.

⁶ *Re Puckett and Smith's Contract* [1902] 2 Ch., 258.

⁷ *Smith v. Land & House Property Corp.* [1884] 28 Ch. 7, 2 *Keener*, 913.

⁸ *Grant v. Munt* [1815] G. Coop., 173; *Dyer v. Hargrave* [1805] 10 Ves., 505.

⁹ *Strangways v. Bishop* [1857] 29 L. T., O.S., 120.

¹⁰ *De Lalsalle v. Guildford* [1901] 2 K. B., 215.

¹¹ *Lamare v. Dixon* [1873] 6 H. L. 414.

¹² *Fenton v. Browne* [1807] 14 Ves., 144; *Scott v. Hanson* [1829] 1 Sim., 13, 15; *Pollock, Con. (W. W.)*, 691; *Fry*, s. 672; *Benjamin, Sale*, 438; *Bellairs v. Tucker* [1884] 13 Q. B. D., 562; 1 *Story, Eq.*, s. 197.

¹³ *Simplex commendatio non obligat*, Dig. 4, 3, 37. *Per Holmes, J.*: "It is settled that the law does not exact good faith from a seller in those

and cannot be relied upon by the defendant. So, where a small house was described as a desirable residence for a family of distinction, the Irish court held there was no representation which affected the contract.¹ And an American court took the same view of a false statement that a farm was "full as early, if not earlier, and as well adapted to the raising of early vegetables, fruits and market produce as any other land on the west end of Long Island."² The test, it has been suggested, is whether what was undertaken or stated was in the power or knowledge of the party making the representation.³ A statement of opinion may, however, involve the statement of a fact. "If the facts are not equally known to both sides," said Bowen, L. J., "then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."⁴

Representa-
tion by
conduct.

The representation may, again, be made by conduct. There may, *e.g.*, be "the active concealment of a fact by one having knowledge or belief of the fact,"⁵ or "there may be any other act fitted to deceive,"⁶ or "any such act or omission as the law specially declares to be fraudulent."⁷ Where a seller adopts contrivances to hide the defects of goods sold,⁸ or papers or paints a wall which is cracked,⁹ or industriously conceals a wall which has to be maintained to protect the estate from the river Thames,¹⁰ there is "aggressive deceit"¹¹ against which the defendant is entitled to be relieved. And any conduct calculated to mislead, say, a purchaser with respect to some material

vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation and as to which it always has been understood the world over, that such statements are to be distrusted." *Deming v. Darling*, 148 Mass., 504; *Pollock, Con.*, (W.W.), 690, n. 4; *Kerr, Fraud*, 4th. ed. 51 sqq.; *Benjamin, Sale*, 449; 1 *Story, Eq.*, s. 201. ¹ *Magennis v. Fallon* [1828-9] 2 Moll., 561, 587.

² *Taylor v. Fleet*, 4 Barb., 95; *Waterman*, 431, n. 4.

³ *Waterman*, 429-30.

⁴ *Smith v. Lund & House Prop. Corp.* [1884] 28 Ch. D., 7, 15, 3 Keener, 613, 1 *Story, Eq.*, 206 (Bigelow's note);

2 *Pomeroy, Eq. J.*, s. 878; 2 *Cooley, Torts*, 925; *Hicks v. Stevens* [1887] 121 Ill. 186, 3 Keener, 620. Cf. *Haggarth v. Wearing* [1871] 12 Eq., 320, 327-8; *Kerr, Fraud*, 4th. ed. 50; 9 *Cyc.*, 416-8.

⁵ 1 *C. A.*, s. 17 (2).

⁶ *Ibid.*, (4).

⁷ *Ibid.*, (5).

⁸ *Benjamin, Sale*, 449.

⁹ *Sugden, V. & P.*, 333, 335.

¹⁰ *Shirley v. Stratton* [1785] 1 Bro. Ch., 440. 1 *Ames*, 362; cf. *S. R. A.*, s. 22, ill. (c). Cf. also 1 *C. A.*, s. 19, ill. (d) (purchaser taking means to conceal vein of ore on seller's estate).

¹¹ 2 *Williams V. & P.*, 687 citing *Walters v. Morgan* [1861] 3 DeG. F. & J., 718, 724, and *Couks v. Boswell* [1886] 11 A. C., 232, 235-6.

fact, or to divert him from inspection or enquiry, which would discover a defect known to the vendor, is equally fraudulent, and would entitle the former to resist specific performance of the contract of sale. Where therefore a money-lender, who had become notorious for harsh and oppressive dealing, attracted a borrower by advertising in an assumed name, the contract was held to be tainted by fraud.¹ Dealing with property as one's own is equivalent to a representation of ownership.²

Silence.

Here must be noticed the cases where the representation may be said to be of a negative character, inasmuch as it arises out of silence preserved by a party. "It is of the greatest importance," said Lord Romilly, "that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly."³ But there is no universal duty to give information,⁴ simple reticence does not amount to legal fraud, however it may be viewed by moralists.⁵ Mere silence, therefore, as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.⁶ The obligation to speak is at the root of this proposition.⁷ Sir Edward Fry has carefully analysed the cases where this obligation has been held to arise, and he has grouped them in six classes:⁸—

Obligation to speak.

(i) "Where the parties to a contract stand in some

(i) Fiduciary relationship.

¹ *Gordon v Street* [1899] 2 Q.B., 641.

² *Potter v. Taggart* [1883] 59 Wis., 1, 3 Keener, 676.

³ *Baskcomb v. Beckwith* [1869] 8 Eq., 100, 2 Keener, 968.

⁴ Pollock, *I.C.A.*, 81.

⁵ *Per Campbell, L. C., Walters v. Morgan*, *supra*, 718, 723. *Per Lord Chelmsford*: "I am not aware of any case in which an action of law has been maintained against a person for an alleged deceit, charging merely

his concealment of a material fact which he was morally but not legally bound to disclose." *Peek v. Gurney* [1873] 6 H. L., 390.

⁶ *I. C. A.*, s. 17, expln.; 1 Story, *Eq.*, s. 207; 2 Pomeroy, *Eq. J.*, s. 901; 1 Bigelow, *Fraud*, 597. Cf. *Joy v. Srinath* [1904] 1 C. L., J., 28.

⁷ Cf. *per Chitty, J., Turner v. Green* [1895] 2 Ch., 205, 1 Amos, 366.

⁸ Fry, ss. 706-712, pp. 308-313. Cf. 2 Pomeroy, *Eq. J.*, s. 902.

pre-existing relationship to one another of a fiduciary character, they can only deal after the most full disclosure."¹ Therefore, where *A* sells by auction a horse to *B*, his daughter, who has just come of age, the relation between the parties is such as to make it *A*'s duty to tell *B* if the horse is unsound.² The relations of trustee and beneficiary, guardian and ward, solicitor and client, partner and partner, principal and agent, are all of fiduciary character. But the fiduciary relation need not necessarily be pre-existent and independent of the transaction in question. Where the seller, *e.g.*, sees that the buyer is trusting him, and must trust him, and is being deceived by falsehoods which he has himself set afloat, and that if he does not remove the deception, he or those whom he represents (say, his principal, if he is an agent) can make a profit out of it, the seller is under a duty of disclosure and cannot innocently be silent.³ The transaction in its essential nature may not be fiduciary, but a trust may be expressly reposed or necessarily implied from the circumstances of the case. In such a case, there will be a duty of disclosure on the part of the person trusted.⁴

(ii) Antecedent wrong.

(ii) "Sometimes the obligation to disclose may even arise from an antecedent wrong done by the one party to the other."⁵ A good illustration of this is afforded by the case of *Fothergill v. Phillips*.⁶ The object of the bill was to compel the specific performance of an agreement by the Phillipses to convey a farm to the Tredegar Iron Co. At the time the agreement was made this colliery company had, unknown to the defendants, trespassed upon their farm below the surface and taken out upwards of 2,000 tons of coal. The proposal of the company therefore to purchase involved a buying-up of rights which the owners had acquired against it, and of which the owners were not aware. Lord Chancellor Hatherley, in sustaining a decree dismissing the bill, remarked, "If a man knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself

¹ Fry, s. 706, p. 308.

² I. C. A., s. 17, ill. (b).

³ *Keen v. James* [1885] 39 N. J. Eq., 527, 3 Keener, 594.

⁴ 2 Pomeroy, *Eq. J.*, s. 902, where

cases are collected; 9 *Cyc.*, 414-5.

⁵ Fry, s. 707, p. 308.

⁶ [1871] 6 Ch. Ap., 770, 1 Ames, 368. Distinguish *Haywood v. Cope* [1858] 25 Beav., 140.

from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case."¹

(iii) Where contracts are *uberrimæ fidei*, they, by their very nature, require a full disclosure of all material facts by one contracting party to another.² Such are contracts of insurance or for the formation of a partnership. So, as between a company and its would-be share-holders, an obligation to disclosure of all material circumstances has been held to arise,³ and in the case already quoted from, the Lord Chancellor said, "This court requires the utmost good faith between buyer and seller, and will not specifically enforce a contract which is not entirely according to good faith."⁴ A trade usage may, again, impose a duty to disclose particular defects in goods sold, or the like. In such a case, the omission to mention a defect may be tantamount to an assertion that it does not exist.⁵ But it is doubtful if the rule can be generally affirmed in respect of every contract for the sale of a chattel having a latent defect. Sir Edward Fry seems to favour this view, but the authority which he cites⁶ does not go the whole length. That was a case where a gun which had been manufactured to order turned out defective, and the maker used a contrivance to conceal the defect. Now, the maker may be under a duty to disclose latent defects known to him, when he has made an article to order. There is an implied

(iii) *Uberrimæ fidei*.

Latent defect in quality.

¹ 6 Ch. Ap. 779.

² *Brownlie v. Campbell* [1880] 5 A. C., 954. See *Pollock, Con.* (W. W.), 656, s. 99; *Joel v. Law U. C. Ins. Co.* [1908] 2 K. B., 431.

³ *Central Ry. Co. of Venezuela v. Kisch* [1867] 2 H. L., 99.

⁴ *Fothergill v. Phillips*, *supra*. Per Story, J., "It is equally promotive of sound morals, fair dealing, and public justice and policy, that a vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally in his repre-

sentations tell the truth, the whole truth and nothing but the truth." *Doggett v. Emerson*, 3 Story, 733; *Waterman*, 416, n.1. The vendor is bound to inform the purchaser of all the incidents to which the property is subject in language intelligible to the common understanding; *Sheard v. VENABLES* [1867] 36 L. J. Ch., 922. Cf. *King v. Knapp*, 59 N. Y., 462.

⁵ *Jones v. Bowden* [1873] 4 Taunt., 847, 14 R. R., 683.

⁶ *Horsfall v. Thomas* [1862] 1 H. & C., 90. This case was dissented from by Cockburn, C. J., *Smith v. Hughes* [1871] 6 Q. B., 605. See also *Benjamin, Sale*, 493. But cf. *Coaks v. Boswell*, *supra*, and cases cited in n. (2) *infra*; also, *Pollock, Torts*, 298; 2 *Williams, V. & P.*, 686 n.

warranty in such a case that the article, when made, shall be reasonably fit for the purpose for which it is ordinarily used or has been specially ordered.¹ But no warranty of quality is necessarily implied by a mere sale, and in the view of the common law courts in England nothing seems to have turned upon the fact that a defect of quality not discoverable by inspection was or was not known to the seller.²

Lord St.
Leonards'
view.

Lord St. Leonards observed, with reference to a case where the seller knew of the defect, and did not disclose it, although he also knew that the purchaser could not by any attention whatever possibly discover it,—“In such a case, no artifice need be resorted to by the seller to conceal the defect from the purchaser, and yet the man who sells such a subject with all its faults³ without disclosing the concealed one, seems only, in a moral view, on a level with him who, making a similar sale of a subject, where a defect might by diligence be discovered, resorts to artifice to prevent the purchaser from coming to the knowledge of it. The question is not of more or less of turpitude, but whether in either case a fraud has not been committed. The rule is not that the seller may use his skill to conceal, and that the purchaser is to use his to discover the defects. The distinction, therefore, is a thin one between a man who has plastered over a rent in the main wall and papered it over, and then sells, subject to all faults, knowing that the purchaser cannot discover this fatal one, which he does not point out, and a man who, knowing that the defect is thus concealed sells the estate with all its faults without disclosing this, which he knows cannot be discovered; in either case the purchaser is deceived. In the first case, no doubt, the seller by his act hides the defect, but there is no positive fraud in hiding the defect; fraud is committed, or at least consummated, when the seller, by his silence, induces the purchaser to buy without the means of

¹ Benjamin, *Sale*, 634; 2 Williams, *V. & P.*, 682, *n* (k); *Randall v. Newsom* [1877] 2 Q.B.D., 102; *Jones v. Just* [1868] 3 Q.B., 197, 203. Cf. *I.C.A.*, s. 114.

² Cf. *Parkinson v. Lee* [1802] 2 East, 314; *Bywater v. Richardson* [1834] 1 A. & E., 508; *Chanter v. Hopkins* [1838] 4 M. & W., 399. As to implied war-

ranties, see *Sale of Goods Act*, ss. 13-5. Cf. *I. C. A.*, ss. 110-6.

³ On a sale “with all faults,” about which more hereafter, see *Baglehole v. Walters* [1811] 3 Camp., 154; *Pickering v. Dowson* [1813] 4 Taunt., 779; *Ward v. Hobbs* [1878] 4 A. C., 13; Benjamin, *Sale*, 489-90; Kerr, *Fraud*, 4th. ed. 74.

knowledge. Now, in this respect the sellers in the two cases are upon a par, for each is aware that the defect is hid, and each is silent. Can it, in point of honesty, matter that the one covered the defect, and that the other only knew that it had been covered? ¹

Some equity judges have, accordingly, suggested the rule that a latent defect of quality, which is not discoverable by any inspection or inquiry that a prudent purchaser might reasonably be expected to make, and is known to and not disclosed by the vendor, is a good ground for refusing to grant specific performance at the vendor's suit.² Where the means of information are not equally accessible to both parties, one has to rely upon the other, and the doctrine of *caveat emptor* seems inapplicable; the purchaser cannot look out for what he cannot have knowledge of.³ But it is open to question if modern English authorities support the rule in its broad form. The question was much discussed by Chitty, J., in the case of *Turner v. Green*.⁴ The application there was to enforce the terms of an agreement to compromise an action which the defendant pleaded was not binding upon him, on the ground of the suppression of a material fact. It appears that at the time when this compromise was entered into and signed by the defendant, he was not aware that certain preliminary proceedings in the action had terminated in his favour, though that fact was known to the solicitor who was acting for the plaintiff. Chitty, J., held that, as there had been no overreaching by the plaintiff's solicitor and no misleading conversation, it was a case of mere silence, where there was no duty to disclose, and there was not sufficient ground for refusing specific performance. So, in the later case of *Greenhalgh v. Brindley*,⁵ specific performance was enforced at the suit of a vendor, who had sold a house with windows overlooking a stranger's land, but had deliberately omitted to mention that

Later Eng-
lish doc-
trine.

¹ Sugden, V. & P., 333-4. "Common honesty in such a case requires a man to speak out" says the Missouri Court, *Mc Adams v. Cates*, 24 Mo., 223; 2 Cooley, Torts, 909; Lawson, Con., s. 233. Cf. Benjamin, Sale, 627.

² *Lucas v. James* [1849] 7 Hare, 410, 418; *Hope v. Walter* [1899] 1 Ch., 879, 883. Cf. *Cook v. Waugh* [1860] 2 Giff.,

201, 207, 2 Keener, 867.

³ *The Clandeboye* [1895] 70 Fed., R., 636, H. & W., 783.

⁴ [1859] 2 Ch., 205, 1 Ames, 364. Kerr, *Fraud*, 4th ed. 65.

⁵ [1901] 2 Ch., 324. Costs, however, were refused to the successful plaintiff in this case.

Indian law,
S. R. A., s.
28 (b).

he only enjoyed access of light by the stranger's license under a deed. As the land was not the vendor's own, there could be no implied warranty regarding the access of light. Mr. Cyprian Williams accordingly suggests that the rule is properly subject to the qualification that the defect must be such as will materially interfere with the enjoyment *promised by the contract* or the vendor's representation, or the concealment must be fraudulent.¹ But I conceive that the drafters of the Indian Specific Relief Act were of one mind with Lord St. Leonards upon this question. The words of section 28—"specific performance of a contract cannot be enforced against a party (b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled"—are surely wide enough to cover the case put by Lord St. Leonards. Section 55 of the Transfer of Property Act, in formulating the duty of the vendor of immoveable property to disclose all material defects, does not make any reservation in favour of latent defects known to the vendor. Besides, it must be borne in mind that specific performance is a discretionary relief and may be refused upon equitable grounds of hardship or unfairness,² of which more anon.

(iv) Course
of negotia-
tion.

(iv) The obligation to disclose may arise from the course of the negotiation itself.³ Lord Blackburn said, "When a statement or representation has been made in the *bona fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he

¹ 2 Williams, V. & P., 688. In *Baker v. Cartwright* [1861] 10 C. B. N. S. 124, Cockburn, C. J., held that a promise to marry a woman, whose unchastity was not disclosed, might be avoided.

² Cf. S.R.A., s. 22; *Ellard v. Lord Llandaff* [1810] 1 Ba. & Be., 241, 1 Ames, 863.

³ Fry, s. 709, p. 809.

has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say, as at present advised.¹ And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also."²

It is important to note here that the old adage applies, *viz.*, that half the truth is a lie.³ Silence, therefore, is equivalent to misrepresentation, if the withholding of that which is not stated makes that which is stated absolutely false.⁴ *Suppressio veri* may thus amount to *suggestio falsi*. A man may be under no duty to speak, but if he does speak, he must speak out and tell the whole truth. For, a partial statement may be literally true but, unless supplemented, may be substantially untrue.⁵ Where, *e.g.*, an intending lender described a transaction to proposed sureties, the latter might understand the description as a representation that there was nothing in the transaction out of the ordinary.⁶ One party cannot be permitted to let the other party proceed on an erroneous belief to which his acts have contributed.⁷ Where, therefore, *B* says to *A*, who has a horse to sell, "If you do not deny it, I shall assume that the horse is sound," and *A* says nothing, *A*'s silence is equivalent to speech.⁸

Half the truth is a lie.

So, while each party must take care not to say or do

Mistaken impressions.

¹ Cf. 2 Pomeroy, *Eq. J.*, s. 888, p. 1584; *Truill v. Baring* [1864] 4 DeG. J. & S., 318, 329.

² *Brownlie v. Campbell* [1880] 5 A.C., 925, 950. Cf. *Keynell v. Sprye* [1852] 1 DeG. M. & G., 660, 709, 42 E.R., 729.

³ *Hadley v. Clinton Importing Co.*, 13 Ohio St., 502, 513. Cf. *Gluckstein v. Barnes* [1900] A.C., 240, 250.

⁴ *Peek v. Gurney* [1873] 6 H.L., 377, 390, 403.

⁵ *Peek v. Gurney*, *supra*; *Greenwood*

v. Leather Shod Wheel Co. [1900] A.C., 421, 434; *Tapp v. Lee* [1803] 3 Bos. & P., 367, 371; *Central Ry. Co. v. Kisch* [1867] 2 H. L., 99, 113.

⁶ *Lee v. Jones* [1863] 17 C.B., N.S., 482, 503.

⁷ *Hill v. Gray* [1816] 1 Stark., 434, expld. in *Keates v. Earl Cadogan* [1851] 10 C.B., 591, 600.

⁸ I. C. A., s. 17, ill. (c). Cf. *Andrew v. Aitken* [1882] 22 Ch. D., 218 (assumption not corrected).

anything tending to impose upon the other,¹ neither party is bound to remove mistakes to which he has not contributed.² A vendor of immoveable property, for instance, may be aware that the purchaser has got certain mistaken impressions about the quality of the property, but he is not bound to disclose his mind.³ And it does not alter the case that the purchaser believes that the vendor is warranting the quality of the thing sold.⁴ But if the vendor knows that the purchaser is labouring under this latter belief and yet takes no steps to remove it, but agrees to the contract without the intention of warranting according to the purchaser's expectation, the vendor's conduct is fraudulent and vitiates the contract.⁵ The same observation applies to a case where a party unconditionally accepts an offer, knowing there is a mistake in its terms, with the intention of taking advantage of the mistake.⁶

(v) Subsequent obligation.

(v) An obligation to disclose may be subsequent to the contract, and may arise out of it.⁷ *E.g.*, a vendor of immoveable property is bound honestly to disclose his title. But non-performance of such a duty does not affect the formation of the contract.

Latent defect in title.

I should, however, here point out that even prior to the formation of the contract, a vendor in England is bound to disclose a latent defect in the title to, as distinguished from one in the quality of, the subject-matter of the sale. The vendor's title is a matter which is exclusively within his own knowledge, and he is bound to state it fairly. His suppression of a fact material to the title may, according to the degree in which it affects the title, be a ground for resisting the specific performance of the contract or for avoiding it altogether.⁸ Where there are unusual covenants in a lease, for instance, it is essential for the purchaser to know them, and the seller cannot maintain

¹ *Laidlaw v. Organ* [1817] 2 Wheat., 178, 195, H. & W., 282.

² *Smith v. Hughes* [1871] 6 Q. B., 597, 607.

³ *Keates v. Cadogan*, supra; *Edwards-Wood v. Marjoribanks* [1860] 7 H. L. C., 806, 809.

⁴ *Smith v. Hughes*, supra.

⁵ *Ibid.* Cf. *Goodenow v. Curtis*, 18 Mich., 298.

⁶ *Tamplin v. James* [1880] 15 Ch. D., 215, 221; *Paget v. Marshall* [1884] 28 Ch. D., 225, 265.

⁷ *Fry*, s. 711, p. 310.

⁸ *Edwards v. Wickwar* [1866] 1 Eq., 68; *Re Haedicke & Lipski's Contract* [1901] 2 Ch., 666; *Carlisch v. Salt*, [1906] 1 Ch., 335; 2 *Williams, V. & P.*, 685 n.

silence as to their existence.¹ This matter, however, is the subject-matter of legislation in India, and this brings us to class.

(vi) Where the obligation to disclose arises from statute.² (vi) Statutory obligation.
Section 55 of the Indian Transfer of Property Act³ requires a seller of immoveable property to disclose to the buyer "any material defect in the property which the buyer could not with ordinary care discover," and the buyer to disclose to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest." Omission to make such disclosures is declared to be "fraudulent."⁴

Where there is no duty to speak, silence is both innocent and safe.⁵ Except under exceptional circumstances, it is the right of every man to keep his business to himself.⁶ In all ordinary transactions of sale, the maxim *Caveat emptor*⁷ applies.⁸ *Caveat emptor.*
"It is the general policy of the law," says W. W. Story, "in order to induce vigilance and caution and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts and to burden him with the consequences of his careless mistakes."⁹ Where *A* and *B* being traders, enter upon a contract, and *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract, *A* is not bound to inform *B*,¹⁰ even, it seems, though *B* expressly asks for information.¹¹ The purchaser should inspect and make his own

¹ *Brewer v. Brown* [1884] 28 Ch. D., 309.

² Fry s. 712, pp. 310-1, where the English Companies Acts of 1867 (s. 38) and 1900 (s. 10) are referred to.

³ Act IV of 1882. Cf. I. C. A., s. 109.

⁴ T. P. A., s. 55. This, along with s. 53, is an instance of "acts and omissions specially declared to be fraudulent" within the meaning of I. C. A., s. 17(5). Cf. also Indian Insolvent Debtors Act (11 & 12 Vict., s. 21), ss. 9, 24. *Manmohan Das v. Macleod* [1902] 26 Bom., 765.

⁵ *Chadwick v. Manning* [1896] A. C., 238.

⁶ *Neill v. Shamburg* [1893] 158 Pa. St., 263, 3 Keener, 606.

⁷ Broom, *Legal Maxims*, 589 sqq.

The Clandeboye [1895] 70 Fed. R., 631, H. & W., 778.

⁸ *Edwards-Wood v. Marjoribanks* [1860] 7 H. L. C., 806. Cf. I. C. A., s. 17, ill. (a): "A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A."

⁹ *Law of Contracts*, s. 644 (ap. Fry, s. 713, p. 311); *People's Bank v. Bogart* [1880] 81 N. Y., 101, 3 Keener, 581.

¹⁰ I. C. A., s. 17, ill. (d).

¹¹ *Laidlaw v. Organ*, supra (contract to sell tobacco after conclusion of peace in war of 1872, buyer knowing, and seller not, that peace had been concluded).

enquiries, and he cannot be relieved against patent defects.¹ The vendor is also expected to know all that is material about his own property.² It has, consequently, been held that mere silence on the purchaser's part as to some fact known to him alone and enhancing the value of the property sold (*e.g.*, the existence of valuable minerals) is no bar to specific performance.³ But the maxim is, *Aliud est celare, aliud tacere*.⁴ "A nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, is a fraud at law. So *a fortiori*, would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain."⁵ There are many duties that belong to the class of imperfect obligations which are binding in conscience, but which human laws do not, and cannot, undertake directly to enforce. It by no means follows, however, that when the aid of a court of equity is sought to carry into execution such a contract, the principles of ethics will not have a more extensive sway.⁶ It requires less strength of case on the side of the defendant to resist an action for specific performance than it does upon the part of the plaintiff to enforce it.⁷ We shall therefore find that a purchase made with a reservation of superior knowledge,—where, in fact, the purchaser took an undue advantage of his position and knowledge,⁸—has been not unoften deemed to be of too sharp a character to be aided

¹ *Horsfall v. Thomas*, *supra* ; *Dyer v. Hargrave*, [1805] 10 Ves., 505.

² 2 Pomeroy, *Eq.*, J., 903, p. 1615.

³ *Fox v. Mackreth*, [1788-91] 2 Bro. Ch., 400, 420, 2 Wh. & T., 8th ed. 722 ; *Walters v. Morgan* [1861] 3 DeG. F. & J., 718, 723 ; *Dolman v. Nokes* [1855] 22 Beav., 402, 3 Keener, 568 ; *Coaks v. Boswell* [1886] 11 A. C., 232, 235-6, 3 Keener, 597 ; *Percival v. Wright* [1902] 2 Ch., 421, 426.

⁴ 2 Pomeroy, *Eq.*, J., s. 901 ; *Turner*

v. Harvey [1821] Jac., 169 ; *Dambmann v. Schulting*, 75 N. Y., 55, 61.

⁵ *Per* Lord Campbell, *Walters v. Morgan* [1861] 3 DeG. F. & J., 724. Cf. *Swimm v. Bush*, 23 Mich., 99 ; *Waterman*, 412.

⁶ *Kerr, Fraud*, 4th ed. 412. Cf. *Baskomb v. Beckwith* [1869] 8 Eq., 100.

⁷ *Woollums v. Horsley* [1892] 93 Ky., 582, 3 Keener, 927.

⁸ *Byars v. Stubbs* [1887] 85 Alabama, 256, 1 Ames, 372.

and forwarded in its execution by the powers of the Court of Chancery.¹

The representation must, thirdly, be of some *material* fact, which has a relation to the proposed contract. "A man may with impunity," said North, J., "tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract."² But a fact will be deemed material if it relates to the contract and if it actually does induce the party, to whom the statement asserting it is made, to enter into the proposed contract.³ And if a person takes pains to falsify or conceal a fact, the inference is legitimate that he considers the fact material and its falsification or concealment important for securing the other party's consent.⁴

(c) Representation of material fact.

Fourthly, the representation must be made by a party to the contract or his agent. "If a third person, by representing to A that it will be highly for his benefit, and by false representations induces him, to enter into a contract with B, but B makes no false representation, and is neither party or⁵ privy to any such, then the contract is valid, and stands good in this court."⁶ If an agent makes a statement within the scope of his general authority, it binds the principal, even if the particular statement in question was not expressly authorised and might have been made fraudulently.⁷ And it is within the scope of the general

(d) Representation of party or agent.

¹ 2 Kent, *Com.*, 480; 1 Story, *Eq.*, s. 206.

² *Archer v. Stone* [1898] 78 L. T., 35. Cf. *Jennings v. Broughton* [1853] 5 De G. M. & G., 126, 130.

³ Cf. *Smith v. Kay* [1859] 7 H. L. C., 750, 759, 769, 770, 775; *Gordon v. Street*, *supra*; *Holmes, Appeal*, 77 Pa. St., 50 (contract for sale of farm, neighbourhood falsely represented to be healthful, specific performance refused.)

⁴ *Pollock, I. C. A.*, 3rd ed. 106.

⁵ *Sic.*

⁶ *Per Romilly, M.R., Duranty's Case* [1858] 26 Beav., 268, 270. His lordship added, "But the person who, by false

representations, induced the other to enter into that contract is liable, in an action, to make good to the person he has misled the damage he has sustained by acting on the representation made to him."

⁷ *I. C. A.*, s. 238. *Moncrieff, Fraud*, ch., ii. Cf. *Citizen's Life Assurance Co. v. Brown* [1904] A.C., 423, 427; *Barwick v. English Joint Stock Bank* [1867] 2 Ex., 259; *Mullens v. Miller* [1882] 22 Ch., 194; *Benjamin, Sale*, 477, sqq. "It is contrary to natural justice to permit a person to retain an advantage acquired by the false representations of his agent, although he was not a party to them," *Waterman*, 419.

authority of an agent for sale to make statements to the would-be purchasers as to the quality and value of his principal's property.¹ It may be a question whether a court of equity will decree specific performance of a contract brought about by the fraudulent act of a mere stranger, though the plaintiff was neither party nor privy to the fraud.² There is high authority in equity for the proposition that innocent parties cannot derive benefits from the fraud of others,³ and this rule will probably not be displaced unless a higher equity in the shape of purchase for value or part performance intervenes.⁴ But it has been held that an agreement, fair as between the parties, is not invalid merely because it may have been concocted and brought about by a third person with the fraudulent intention of benefiting himself.⁵

(e) Representation known to be false or not believed to be true.

Fifthly, the representation must be made, knowing it to be false or without belief in its truth. A deliberate lie is fraudulent, and so is a statement made recklessly, not caring to ascertain whether it is true or false. "If persons take upon themselves," said Lord Cairns, "to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue."⁶ So Maule, J., remarked, "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril: and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."⁷ A person who seeks the enforcement

Marsh v. Buchan [1890] 46 N. J. Eq., 595, 2 Keener, 875; Pollock, *F.M.M.*, 105.

¹ *Williams, V. & P.*, 737. As to statements regarding value of subject-matter of sale, see Sugden, *V. & P.*, 2; *Roots v. Snelling*, [1883] 48 L. T., 216.

² *Union Bank v. Munster* [1887] 37 Ch. D., 51, 54.

³ *Huguenin v. Baseley* [1807] 14 Ves., 289, 1 Wh. & T., 8th ed. 259; *Nicol's case* [1859] 3 DeG. & J., 387, 438.

⁴ *Fry, s. 728, p. 318*, "the contract, if

resting absolutely *in fieri*, could not be enforced."

⁵ *Bellamy v. Sabine* [1847] 2 Ph., 425; 2 Dart, *V. & P.*, 1063.

⁶ *Reese River Silver Mining Co. v. Smith* [1869] 4 H. L., 79. *Redgrave v. Hurd* [1881] 20 Ch. D., 1, 13, 2 Keener, 901.

⁷ *Evans v. Edmonds* [1853] 13 C. B., 777, 786. Cf. *Lehigh Zinc & Iron Co. v. Bamford*, [1893] 150 U. S., 665, 673; *Pollock, Con. (W. W.)*, 682. *Derry v. Peek* [1889] 14 A. C., 337, *Finch*, 522, has qualified in England the old

of his contract, ought not only not to know that his statements with reference to the subject-matter of it are false, but he ought to know that they are true.¹ Where a plaintiff makes a distinct representation of fact, not believing it to be false, but without seeking the further information which is within his reach and which goes to show that the statement is not true, a court of equity will not aid him to enforce performance of a contract entered into upon faith of such representation.²

Sixthly, the representation must be made as a part of the transaction ending in the formation of the contract.³ In other words, the representation must be made to the other party with a view to his acting upon it,⁴ it must be definable as *dans locum contractui*.⁵ The sole office of a prospectus, e.g., is to invite the public to take shares in the company in the first instance. Persons who subsequently become purchasers of shares in the market cannot rely upon statements made in such prospectus.⁶ A false statement may have been made to a person on a former occasion and in the course of a different transaction, but such statement cannot be held to vitiate a later and separate contract, unless this can be treated as part of a series with the previous transaction.⁷ Where the party to whom the representation was made has assigned the contract, the assignee, not having acted on the faith and credit of the original representation, cannot plead it in answer to a suit for enforcement of the contract.⁸

(f) Representation in same transaction.

doctrine of equity that there may be actual fraud by misrepresentation without any feature or incident of moral culpability (2 Pomeroy, *Eq. J.*, ss 885-8), and has been followed at Allahabad, *Abdullah v. Abdur* [1896] 18 All., 322. See Moncrieff, *Fraud*, 127, sqq.; 5 L. C. R., 410 (Pollock).

¹ *Atuslie v. Medlycott* [1803] 9 Ves., 13, 21.

² *Higgins v. Samels* [1862] 2 J. & H., 460, 466.

³ 2 Williams, V. & P., 738. 2 Pomeroy, *Eq. J.*, s. 879. *Harris v. Kemble* [1831] 1 Sim., 111, 122. Cf. *National Exch. Co. v. Drew* [1855] 2 Macq., 103.

⁴ *Pollock, Con. (W. W.)*, 703.

⁵ *Pulsford v. Richards* [1853] 17 Beav., 87, 96; *Rolt v. White* [1862] 3 De G. J. & S., 360, 365.

⁶ *Peek v. Gurney* [1873], supra. Cf. *Way v. Hearn* [1862] 13 C. B., N. S., 282; *Western Bank of Scotland v. Addie* [1867] 1 Sc. & D., 145. Distinguish *Andrews v. Mockford* [1896] 1 Q. R., 372. 1 Street, *Legal Liability*, 397.

⁷ Representations made to induce a purchase have been held operative in America as to a further purchase several months later, *Reeve v. Dennett* 145 Mass., 23; *Grever v. Taylor*, 53 Ohio St., 621; *Pollock, Con. (W. W.)*, 703.

⁸ *Smith v. Clarke* [1806] 12 Ves., 477, 484. *Secus*, where the cause of action which has accrued on account of the fraud, is assigned, 2 Pomeroy, *Eq. J.*, 1608 n.

Fraud makes a contract only voidable, and not void, the right to a remedy against it is therefore personal.¹

(g) Representation materially inducing contract.

Seventhly, the representation must have induced the contract as its proximate and necessary, and not the remote or indirect, cause.² As Lord Brougham explained: "General fraudulent conduct signifies nothing; general dishonesty of purpose signifies nothing; attempts to overreach go for nothing; an intention and design to deceive may go for nothing; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract."³ "It is essential" (to quote Pomeroy) "that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction."⁴ A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.⁵ The party must be deceived by the practiser of fraud.⁶ Where therefore *A*, by a misrepresentation, leads *B* erroneously to believe that 500 maunds of indigo are made annually at *A*'s factory, but *B* examines the accounts of the factory, which show that only 400 maunds of indigo have been made, and then buys the factory, the contract is not voidable on account of *A*'s misrepresentation.⁷

Olapham v. Shillito.

The law was very well put in the case of *Clapham v.*

¹ *Harris v. Kemble*, supra, 5 Bli., N. S., 730, 751.

² *Barry v. Croskey* [1861] 2 J. & H., 1; *Burnes v. Pennell* [1849] 2 H. L. C., 497, 531; *Flight v. Booth* [1834] 1 Bing. N. C., 370, 377. *Shepherd v. Croft* [1910] 1 Ch., 521.

³ *Attwood v. Small* [1835-8] 6 Cl. & F., 232, 447.

⁴ 2 Pomeroy, *Eq. J.*, s. 890.

⁵ I. C. A., s. 19, expl.

⁶ *Rigelow, Fraud*, p. 521; *Pennybacker v. Laidley* [1890] 33 W. Va.,

624, 3 Keener, 497.

⁷ I. C. A., s. 19, ill. (b) Cf. *Attwood v. Small*, supra; expld. in *Redgrave v. Hurd* [1881] 20 Ch. D. 1., 2 Keener, 896, *Jennings v. Broughton* [1853] 5 De G. M. & G., 126; *Lowndes v. Lane* [1789] 2 Cox., 363; *Farnsworth v. Duffner* [1891] 142 U. S., 43, 3 Keener, 621; *Turner v. Houtt* [1895] 53 N. J. Eq., 526, 3 Keener, 646. Distinguish *Higgins v. Samels* [1862] 2 J. & H., 460, 2 Keener, 890; *Harris v. Kemble* [1831] 1 Sim., 111, 5 Bli. N. S., 730.

Shillito,¹ by Lord Langdale. The Master of the Rolls said, "Cases have frequently occurred in which upon entering into contracts misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party: or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.² Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed: but if the subject is in its nature uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill, it is not easy to presume, that representations made by one would have much or any influence upon the other."

The *ratio*, consequently, of those English cases, where it has been held that the mere presence of the means of detecting the mis-statement does not prevent the deceived person from relying

Means of
discovering
truth.

¹ [1844] 7 Beav., 146, 149-50. Cf. 2 Pomeroy, *Eq. J.*, s. 892.

Slaughters Admr. v. Gerson [1871] 13 Wall., 379, 383, 2 Scott 722.

² Cf. 2 Pomeroy, *Eq. J.*, ss 893-4;

upon it,¹ is easily intelligible. A minute examination may have enabled him to make the discovery, but the other party having taken upon himself to make a representation, he is not driven to the examination.² "When once it is established," observed Lord Chelmsford, "that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper enquiry. He has a right to retort upon the objector, you at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty."³ In fact, the proposition that "no man can complain that another has too implicitly relied on the truth of what he has himself stated,"⁴ is elementary and entirely just. The Indian legislature, however, seems to have deliberately departed from this rule.⁵ The exception to section 19 of the Contract Act provides, "If such consent was caused by misrepresentation or silence, fraudulent within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused, had the means of discovering the truth with ordinary diligence." But it is apprehended that this provision is not to be literally interpreted. Where a vendor, in selling a house for immediate occupation, misrepresented the interest of a tenant who held it under a lease, the Madras court held that the purchaser was entitled to rescind the contract, though he might have ascertained the nature of the tenant's interest by independent enquiry, if he had so chosen.⁶ The vital question in each case is, did the party receiving the representation rely upon it, in concluding the agreement, or did he rely upon his own knowledge?⁷ It is not the mere opportunity to examine, as an American judge

I. C. A., s.
19, exc.

¹ *Dyer v. Hargrave*, supra, 1 Ames 247. *Shackleton v. Sutcliffe* [1847] 1 De G. & S., 609; *Redgrave v. Hurd*, supra, 2 Keener, 910.

² *Aaron's Reef v. Twiss* [1896] A. C., 273, 279.

³ *Central Ry. Co. of Venezuela v. Kisch* [1867] 2 H. L., 99, 120.

⁴ *Reynell v. Sprye* [1852] 1 De G. M. & G., 660, 710. Cf. *Cox v. Middleton* [1853] 2 Drew, 209. I. C. A., s. 19, ill. (a).

⁵ Cf. Pollock, I. C. A., 3rd ed. 103.

⁶ *Morgan v. Government of Huidarabad* [1888] 11 Mad., 419, 439.

⁷ Pomeroy, S. P., s. 224.

has remarked, which relieves the other party from the duty to disclose; for although the opportunity exist, yet if the purchaser is led to repose confidence in the vendor, and does not examine for himself, the duty to disclose defects is equally obligatory, and the vendor will be held bound for all statements and all undue concealments.¹ The doctrine of constructive notice does not apply where a representation of fact has been made, and the right of the party receiving the representation to rely upon it cannot be taken away or interfered with by inference or implication.³ It should be further remembered that where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be, it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth.⁴

It may be here explained that "ordinary diligence" may be taken to mean "such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its result."⁵ Where, *e.g.*, rice was stored up at a place to which a purchaser had an easy access, it was held that he could have discovered its quality by the use of "ordinary diligence."⁶ Where, on the other hand, the validity of a bill drawn by the secretary, treasurer and agent of a company could not be determined except by persons trained in the law and after a careful examination of legal authorities, Sargent, J., held that the exception to section 19 was not applicable.⁷

"Ordinary
diligence."

Vague and indefinite expressions, however, will not be enough.⁸ No reasonable person would allow his judgment

Vague
representa-
tions.

¹ *Per Sharkey, J. Hall v. Thompson*, 1 Sm. & Marsh, 443; *Waterman*, 414.

² *Drysdale v. Mace* [1854] 2 Sm. & G., 225, 230. 2 *Pomeroy, Eq. J.*, s. 895.

³ *Wilson v. Short* [1847] 6 Hare, 366, 377.

⁴ *Reynell v. Sprye*, *supra*; *Hicks v. Stevens* [1887] 121 Ill., 186, 3 Keener, 619. 2 *Pomeroy, Eq. J.*, s. 896.

⁵ *Pollock, J. C. A.*, 3rd ed. 109.

⁶ *Soshi Mohun Pal v. Nobo Kristo* [1878] 4 Cal., 801.

⁷ *Re Nursey Spinning & Weaving Co. Ltd.* [1880] 5 Bom., 92.

⁸ *Fenton v. Browne* [1807] 14 Ves., 144. Cf. *Scott v. Hanson* [1826] 1 Sim., 13, 1 Ames, 353. As to this decision see 2 *Williams, V. & P.*, 736, n. (o).

to be influenced by such expressions.¹ Where, *e.g.*, at an auction-sale of an advowson the printed particulars stated, "a avoidance of this preferment is likely to occur soon," and the auctioneer explained "that the living would be void on the death of a person aged eighty-two," Grant, M. R., held that the representation was so vague and indefinite that its only effect ought to have been to put the defendant upon making enquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser.² "The law does not go the romantic length," said Chancellor Kent, "of giving indemnity against the consequences of ignorance or folly or a careless indifference to the ordinary and accessible means of information."³ If there are circumstances in the case which demand further investigation, and the vendor affords every facility for this, the purchaser is bound to make such investigation.⁴

Ambiguous
representa-
tions.

Where, however, the statement is ambiguous, the party who complains of having been misled must satisfy the court that he understood and acted on it in the sense in which it is false.⁵ But if a vendor chooses to indulge in equivocation, the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement.⁶

Material
inducement.

The question whether the promisee was induced by the representation to enter into the contract is one of fact, though if the representation was material and of a kind likely to be influential on the mind, very slight evidence may induce the court to hold that it did operate upon the promisee's mind.⁷ It is not, however, necessary that the false representations should have been the sole, or even the predominant, motive; it is enough that they had material influence

¹ Cf. *Magennis v. Fallon* [1828-9] 2 Moll., 561, 587.

² *Trower v. Newcome*, [1813] 3 Mer., 704, 1 Ames, 352. But see *Pomeroy*, S. P., 314.

³ *Com.*, 484-5.

⁴ *Clarke v. Mackintosh* [1862] 4 Giff., 134. *Smith v. Colbourne* [1914] 2 Ch. 538. The plea that the title is too doubtful to be forced upon a purchaser is not to be favoured.

⁵ *Smith v. Chadwick* [1884] 9 A. C., 187, 199-201.

⁶ Per Lord St. Leonards, *Martin v. Cotter* [1846] 3 Jon. & Lat., 507; *Drysdale v. Mace* [1854] 5 DeG. M. & G., 103, 107.

⁷ *Smith v. Chadwick*, *supra*, 196. Fry, s. 670, p. 274, where *Redgrave v. Hurd* [1881] 20 Ch. D., 1, 21, is discussed. See also *Smith v. Land etc. Corporation* [1884] 28 Ch. D., 8, 16.

upon the plaintiff, although combined with other motives.¹ "When a falsehood is proved, the court does not require positive evidence that it was successful;² it rather presumes that assent would not have been given if the facts had been known.³ Those who have made false statements cannot ask the court to speculate on the exact share they may have had in inducing the transaction;⁴ or on what might have been the result if there had been a full communication of the truth;⁵ it is enough that an untrue statement has been made which was likely to induce the party to enter into the contract, and that he has done so."⁶

The last element necessary to prove to make out a case of deceit is that the person to whom the representation was made must not have known that it was false. For, if he were aware of the true facts of the case, the misrepresentation could not operate to his prejudice or induce him to contract where he otherwise would not. This therefore is a corollary following from the proposition just discussed. But defendant's right to relief will not be barred unless the plaintiff shows "very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth."⁸

(h) Representation not false to contractee's knowledge.

I have now enumerated the several elements of fraud. Fraud, as I have said, is infinite, and equity judges have never attempted to define it. They take into account all the circumstances of the case—not only the act and intention of the party, but the circumstances under which the act was done; the position of the party who is said to have been imposed upon; his being *inops consilii*; his being in a state of bodily, and therefore mental, weakness, and so on.⁹ In olden days, constructive fraud was distinguished from actual fraud, and Lord Hardwicke remarked, "the court very wisely hath never laid

Varieties of fraud.

¹ *Safford v. Grout*, 120 Mass., 20, 25. *Clarke v. Dickson*, [1858] 6 C. B. N. S., 453.

² *Williams' Case* [1869] 9 Eq., 225 n.

³ *Ex parte Kintrea* [1869] 5 Ch., 95, 101.

⁴ *Reynell v. Sprye*, *supra*, 708.

⁵ *Smith v. Kay*, *supra*, 759.

⁶ *Per Lord Denman, C. J., Watson v. Earl of Charlemont* [1848] 12 Q.B.,

856, 884.

⁷ *Pollock, Con. (W. W.)* 696-7. 2 *Pomeroy, Eq. J.*, s. 880.

⁸ *Per Knight Bruce, L. J., Price v. Macaulay* [1852] 3 DeG. M. & G., 339, 346. 2 *Pomeroy, Eq. J.*, 1600 n.

⁹ *Per Kindersley, V. C., Stewart v. Great Western Ry. Co.* [1865] 2 Dr. & Sm., 438.

down any general rule beyond which it will not go, lest other means for avoiding the equity of the court would be found out.”¹ The same eminent judge, in another celebrated judgment,² divided fraud in matters of contract into four heads, *viz.*, (1) actual fraud arising from facts and circumstances of imposition; (2) fraud arising from the intrinsic nature and subject of the bargain; (3) fraud presumed from the circumstances of the bargain; and (4) fraud inferred from the circumstances, and affecting some third person not a party to the transaction. I am dealing with the subject here only incidentally as a defence to an action for specific performance, so I will content myself with referring to one or two special cases.

Puffing at
auctions.

One special case of fraud I will refer to is the employment of a puffer at auctions. In England a distinction used to be drawn between a sale subject to a reserve and a sale without reserve, and equity courts used to justify the employment of one puffer to prevent a sale at an undervalue.³ The Indian law, however, following the common law doctrine, declares, “If at a sale by auction the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.”⁴ All puffing at auctions may therefore be deemed to be fraudulent.⁵ So, if a person prevents another from bidding, in order to obtain the property at an undervalue, his action is fraudulent as against the seller.⁶ But, as we have seen,⁷ a combination of buyers at an auction sale is not necessarily fraudulent. It is the end to be accomplished which will determine the character of the combination. If it be to depress the price of the property by artifice, the purchase is unenforceable. But if it be to obtain the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it will be valid.⁸

¹ *Lawley v. Hooper* [1745] 3 Atk., 278.

² *Chesterfield v. Janssen* [1750] 2 Ves. Sr., 125, 1 Wh. & T., 8th ed. 303. 2 Pomeroy, *Eq. J.*, s. 874.

³ *Smith v. Clarke* [1806] 12 Ves., 477, 483, 8 R. R., 359, 363. But now see Sale of Land by Auction Act, 1867 (30 & 31 Vict., c. 48).

⁴ I. C. A., s. 123.

⁵ Cf. *Mortimer v. Bell* [1865] 1 Ch.,

10 (auctioneer and puffer bid against each other and ran up price, defendant then made a real bid, but vendor was not allowed to enforce specific performance against him).

⁶ *Cocks v. Izard*, 7 Wall., 559; *Smith v. Greenlee*, 2 Dev., 126.

⁷ *Aute, Gibbs v. Smith* [1874] 115 Mass., 592, 2 Williston, 530.

⁸ *Smull v. Jones*, 1 Watts & Serg.

A Civil Court is not prevented from enforcing a contract *inter partes* which is in itself in no way illegal or fraudulent *qua* those parties, merely because some further authority or third person may have a right to refuse to give effect to that contract, as regards himself. There was an agreement between two capitalist-applicants for grant of land on the Chanab Canal that, in the event of only one succeeding, the other would share in the cultivation, and upon the former purchasing the proprietary rights, he would convey one-half to the latter. The Punjab Chief Court held that this agreement did not contravene any provision of the Government Tenants Act,¹ and that fraud to avoid a contract, which was defined in section 17 of the Contract Act, did not include the infringement of a condition requiring previous written consent of the Financial Commissioner to the transfer of a tenancy.²

Where fraud is established, it is useless to insist that the proceedings were all conducted according to the forms of law. "Some of the most atrocious frauds," said the Supreme Court of the United States, "are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."³

The distinction between fraud and misrepresentation, as known to Indian law, is to be found in the intent with which a statement is made. Misrepresentation may be innocent, whereas the specific mark of fraud is the presence of a dishonest intention on the part of him by whom the representation is made, or of recklessness equivalent to dishonesty.⁴ The definition contained in section 18 of the Contract Act,⁵ which has been substantially borrowed from Mr. Dudley Field's Draft

Misrepresentation

122, 128; Waterman, 446; *Gobindo Chandra v. Shyamlal* [1904] 1 C. L. J. R., 85; 1 Bigelow, *Fraud*, 580.

¹ Act III of 1892 Punjab.

² *Husain Khan v. Jahan Khan* [1913] P. R. no. 58.

³ *Graffam v. Burgess* [1886] 117 U. S. 180, 3 Keener, 516.

⁴ Pollock, *Con.* (W. W.), 678.

⁵ "Misrepresentation means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of

that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

Civil Code for New York, will not help us very much in understanding the nature of the object defined, and it has been very properly criticised.¹

Personal bar
to specific
relief.

For our present purposes it will be sufficient to state in the words of Prof. Harriman, "a false representation by one party in regard to a material fact made for the purpose of inducing the other party to enter into a contract, and actually inducing the latter to enter into the contract, renders the contract voidable."² The fact that the representation has been made innocently does not make any difference. Plumer, V. C., observed that whether the misrepresentation be wilful or not, or of a fact latent or patent, such representation may be used to resist a specific performance, unless the purchaser really knew how the fact was.³ In fact, the law looks rather at the relations of the statement towards the real facts and the results which naturally flow from it, than at the mental condition, temper and feelings of the person who makes it.⁴ The gist of the enquiry is, not whether the party making the statement knew it to be false, but whether the assertion uttered as true was believed by the party to whom it was made to be true, and, if false, deceived him to his injury.⁵ "The point upon which the defence turns," Pomeroy points out, "is the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead."⁶ The consequences of an innocent misrepresentation, if there can be such a thing, said Gibson, C. J., must fall on him who was the author of it, on the principle that the acts of even an innocent man shall prejudice him, rather than a stranger equally innocent.⁷ Where equitable relief is asked for, and not damages, the question of *scienter* is immaterial. A court of equity will not lend its aid to what, the representation being found to be false, will be a

¹ Pollock, *F.M.M.*, § 94 sqq; *I. O. A.*, 3rd. ed. 94; 1 Stokes, *A.-I. Codes*, 536.

² *Con.*, s. 428. Cf. Anson, *Con.*, 186 sqq. The elements of misrepresentation are analysed by Fry, s. 651, p. 286; and Pomeroy, *S. P.*, s. 211, p. 304. Cf. Bigelow, *Estoppel*, 556.

³ *Wall v. Stubbs* [1815] 1 Madd., 80, 1 Ames, 362. Cf. *Burrowes v. Lock* [1805] 10 Ves., 470; *New Brunswick Co.*

v. Muggeridge [1860] 1 Dr. & Sm., 363; *Wauton v. Coppard* [1899] 1 Ch., 92, 97.

⁴ Pomeroy, *S. P.*, 305.

⁵ *Wilson v. Carpenter's Admr.* [1895] 21 S. E. R., 243, 3 Keener, 645; Pomeroy, *S. P.*, s. 217.

⁶ 2 *Eq.*, J., s. 889; *S. P.*, s. 217.

⁷ *Tyson v. Passmore*, 2 Pa. St., 122; *Waterman*, 417.

known wrong ; for the party complained of is now at all events apprised of the untruth of his representation, and he cannot press his advantage any longer without being guilty of fraud.¹ Innocent misrepresentation, like fraud, therefore creates a personal bar² and, if of a material fact,³ specific performance of the whole contract is refused. Otherwise, if the contract could be altered *pro tanto* and executed, encouragement would be offered to fraud. The party, if not found out, would gain his object ; and, if detected, would have the benefit of the contract, in the same manner as if he had practised no deception.⁴ The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame : misrepresentation, even as to a small part only, prevents him from applying to a court of equity for relief.⁵ There he must come with clean hands ; he must, to entitle him to relief, be liable to no imputation in the transaction.⁶ Even a representation of intention as to future acts, if not made good, may be a ground for refusing specific performance, where the contract is shown to have been entered into upon faith of such representation.⁷ Where, however, the misrepresentation is innocent and relates to a part of the contract which is divisible or, being small, admits of compensation in money, there is no reason why there should not be partial enforcement upon principles explained in a previous lecture.⁸

It does not seem to be necessary that the misrepresentation should be productive of damage. It has been said that fraud without injury does not entitle a party to relief, either at law or in equity, "for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral

Damage.

¹ 1 Story, *Eq.*, 210-1 (Bigelow's note); Moncrieff, *Fraud*, 241-2. *Redgrave v. Hurd* [1881] 20 Ch. D. 1, 13.

² Cf. *Harris v. Kemble* [1831] 5 Bl. N. S., 730, 751.

³ *Mullens v. Miller* [1882] 22 Ch. D., 194, 199.

⁴ Per Plumer, M. R., *Clermont v. Tasburgh* [1819] 1 J. & W. 112, 1 Ames, 360. Pomeroy, *S. P.*, 324 n. Kerr, *Fraud*, 4th. ed. 413.

⁵ *Clermont v. Tasburgh*, *supra*.

⁶ Per Grant, M. R., *Oudman v. Horner* [1810] 18 Ves., 10, 1 Ames, 351.

⁷ *Beaumont v. Dukes* [1822] Jac., 422 ; *Lamare v. Dixon* [1873] 6 R. L., 414.

⁸ Ante, p. 217, sqq. ; 2 Pomeroy, *Eq. J.*, s. 899 ; *S. P.*, s. 228 ; Kerr, *Fraud*, 4th. ed. 417 ; *S. R. A.*, ss. 14, 16 ; *Powell v. Elliott* [1875] 10 Ch., 424.

obligations, or correcting unconscientious acts, which are followed by no loss or damage."¹ No doubt, no misrepresentation matters which is not material; its falsity should render it unconscientious in the person making it to enforce the agreement or other transaction which it has caused.² But the doctrine that damage must be shown has been repudiated in suits for specific performance. "If the misrepresentation was intentional," said Hayne, C., "and for the purpose of deceiving the vendor, and he relied upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not enforce the contract, whether it be accompanied by damage or not."³ And, in any case, it appears, injury to third persons will suffice.⁴ The same principle, apparently, will hold good in the case of an innocent misrepresentation. Indeed, the very fact that this misrepresentation was so far operative as to lead the other party to enter into a contract shows that detriment or injury resulted from it.⁵

Fraud upon
public.

Where an act will be a fraud upon the public, it may be added, a court of equity will not permit it. The defendant agreed to edit a guide-book for the plaintiff, who was to publish it with a title-page showing the name of a third person (a well known editor of such books) as the editor; the court held that the title-page was calculated to deceive the public, and refused specific performance to the plaintiff.⁶

Specific per-
formance,
with a varia-
tion.

I have already referred to section 28 of the Specific Relief Act. That section provides for the refusal of a decree for specific performance, on a ground purely personal to the defendant. The defendant is entitled to show that his assent to an otherwise proper contract was improperly obtained by conduct extraneous to the contract,⁷ and the defence goes to the whole contract. But other cases may arise where, too, there is no intrinsic defect in the contract itself, but by reason of some defect in the

¹ 1 Story, *Eq.*, s. 203; *Marsh v. Cook* [1886] 32 N. J. Eq., 262, 3 Keener, 671.

² 2 Pomeroy, *Eq. J.*, s. 898; *S.P.*, s. 227.

³ *Kelly v. Central Pacific R. R. Co.* [1888] 74 Calif., 557, 1 Ames, 356.

⁴ *Ibid.*

⁵ Cf. *Cadman v. Horner*, *supra*; *Smith v. Kay* [1859] 7 H. L. C., 750, 775.

⁶ *Post v. Marsh* [1880] 16 Ch. D., 395, 406. Cf. *Oldham v. James*, 15 Ir. Ch. R., 81.

⁷ Collett, 237.

conduct of the plaintiff in relation to that contract, a personal bar is created to his enforcing it as a whole.¹ The defence here affects only a part of the contract and is satisfied by a variation thereof. "It is quite competent for the defendant," it has been said, "to set up a variation from the written contract; and it will depend on the particular circumstances of each case, whether that is to defeat the plaintiff's title to have specific performance or whether the court will perform the contract, taking care that the subject-matter of this parol agreement is also carried into effect; so that all parties may have the benefit of what they contracted."²

Section 26 of the Specific Relief Act provides for those cases where the plaintiff cannot obtain specific performance without submitting to the variation set up by the defendant. We are here concerned with only three of these cases, *viz.* :

S. R. A., s.
26.

(a) Where by fraud the contract, of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it;³

(b) Where by fraud the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff;⁴ and

(c) Where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil.⁵

¹ *Ibid.*

² *Per Lord Cottenham, London & Birmingham Ry. v. Winter* [1840] Cr. & Ph., 62; 2 Dart, V. & P., 1047-8.

³ 2 Dart, V. & P., 1048. *Woollam v. Hearn*, [1802] 7 Ves., 211, 2 Wh. & T., 8th. ed. 517, is the leading case upon this topic. See also *Joyes v. Statham* [1746] 3 Atk., 388.

⁴ 2 Dart, V. & P., 1048, and cases cited. *Per Bell J.*, "It is enough, that though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a different purpose, not contemplated or to use it in violation of the accompanying agreement. It is as much a fraud to

obtain a paper for one purpose, and to use it for a different and unfair purpose, as to practise falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent efforts to escape from it, or, when a moral guilt cannot be imputed, a legal delinquency attaches upon an attempted abuse of the writing sufficient to subject it to the influence of the oral evidence." *Reurich v. Swineheart*, 11 Pa. St., 223; *Waterman*, 447.

⁵ 2 Dart, V. & P., 1051, and cases cited. *Cf. Rickets v. Bell* [1847] 1 DeG. & S., 335.

cl. (a) & (b).

These are all cases of enforceable contracts¹ which are in writing, but as to the specific terms of which the parties are not agreed. The defect in the first two cases is to be found embodied in the document itself, but not so in the third. The distinction between the first two cases is that in one (clause a) the terms actually embodied in the document are different from those which had been agreed to by the defendant, (clause b) the terms are literally those which were agreed upon, but in substance and actual import they are different. In the first case, it may be that some term which was part of the agreement has been omitted or altered, or a new term has been imported into the document as ultimately drawn up.² In the second case the words actually agreed to and used are ambiguous, but the defendant having agreed to their use under a misconception which, under the circumstances of the case, cannot be considered unreasonable, the document cannot be taken to represent the real agreement between the parties. Where, therefore the terms of the agreement as put in writing are ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court, upon that ground alone, may refuse to enforce it.³ But mere suspicion of the fraud is not a sufficient ground for relief.⁴ As to terms omitted, it has to be further noted that, where the party complaining has deliberately executed a written agreement, and there was no fraud or surprise, but the agreement as drawn up does not contain

¹ *Narain Pattra v. Aukhoy Narain Manna* [1885] 12 Cal., 152.

² Upon proof of fraud in the omission of material stipulations in a written contract, a court of equity will admit parole evidence to establish the agreement as it was understood and concluded between the parties, and, after reforming the contract according to the truth will proceed to enforce it. The court will withhold the exercise of its power, unless the party seeking relief will do full justice to the other party, according to the facts which are made to appear to the court. *Dwight v. Pomeroy*, 17 Mass., 303. Cf. *Nelson v. Wood*, 62 Alabama, 175. Where, therefore,

the owner of land bounded on the Hudson River, secretly intending to sell the lot as it originally existed, made the purchaser believe that he was also buying a wharf on the lot, or adjacent thereto, and the wharf was not included in the conveyance, the vendee having paid the vendor the price of the whole property, it was held that he was entitled to a decree for the conveyance of the whole. *Wisual v. Hull*, 3 Paige, Ch., 313. *Waterman*, 445-7.

³ 2 Dart, V. & P., 1048; *Neap v. Abbott* [1838] C. P. Coop, 333; 47 E. R., 581; and other cases cited there.

⁴ *Tamplin v. James* [1880] 15 Ch., D., 215, 221; 2 Dart, V. & P., 1049-50; 2 Wh. & T., 524.

stipulations he had negotiated for, that is no ground for refusing specific relief.¹ Where, again, the terms alleged to have been omitted were never actually agreed to and all that appears is that the defendant intended to propose them but did not, there is still less ground for not granting specific performance of the written contract.²

In the case contemplated by clause (c), the terms of the contract in writing do not embody the whole agreement between the parties, and, but for a misrepresentation made or an undertaking given by the plaintiff, the defendant proves he would not have consented to have the truncated agreement reduced to the form of a document. The defendant was induced to enter into the contract by reason of this engagement on the part of the plaintiff; the plaintiff must, therefore, fulfil this engagement before he can have specific performance.³ In an American case it appeared that during the negotiation for a lease of a building it was verbally agreed between the parties that only the building in its then condition was to be embraced in the lease and that the lessor was to have the right to erect a second story for his own use. Cl. (c.)

The lease as written, however, did not say anything about this, and the lessor signed it upon being assured that he would have the right agreed upon, and it would make no difference whether the right was reserved in the lease or not. An action by the lessees to recover the second story, after it had been built, was rejected and, upon a cross-complaint by the lessor, the lease was reformed and judgment rendered for him.⁴

Among variations made by parol, a distinction is to be made between those which are co-temporaneous with the written agreement alleged to have been varied, and those which are subsequent thereto. Evidence will not be admitted of a

Parol variations.

¹ *Shelburne v. Inchiquin* [1784] 1 Bro. Ch., 338, 350; *Rich v. Jackson* [1794] 4 *Ibid*, 514, 518.

² *Parker v. Taswell* [1858] 2 DeG. & J., 559.

³ *Myers v. Watson* [1851] 1 Sim. N. S., 523, *Lamare v. Dixon* [1873] 6 H. L., 414.

⁴ *Murray v. Dake*, 46 *Calif.*, 644, "His (plaintiff's) original object may have

been perfectly honest and upright. But if, to procure an unfair advantage to himself, he subsequently deny a parol qualification of the written contract, it is such a fraud as will, under the rules, operate to let in evidence of the real intent, and final conclusion of the contractors." *Renshaw v. Gans*, 7 Pa. St., 117. *Waterman*, 448.

co-temporaneous parol variation even as a defence to specific performance,¹ but a subsequent variation may be proved, and the court, upon satisfactory proof being given, may put the defendant to his election and decree specific performance of the written agreement without the variation, if he declines to elect.² Where, however, the parol variations have been so acted upon that the original contract can no longer be enforced without injury to one party, he may claim specific performance of the written agreement as verbally varied.³ Where the parol agreement amounts to a complete abandonment of the original written contract, there can be no specific performance of the latter.⁴

Effect of s.
26.

It thus appears that the effect of section 26 is that where fraud, mistake of fact, or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to.⁵ When I come to the topic of mistake it will be necessary to consider the provisions of this section further. For the present, I will only remark, that though as a general rule, parol evidence to vary or modify the terms of an agreement in writing is not admitted,⁶ yet this rule cannot shut out the proof of fraud or mistake.⁷ In a suit for specific performance, therefore, such evidence, as a matter of defence, has been frequently admitted. As Lord Redesdale explained, "It is used to rebut an equity; the defendant says, 'the agreement you seek is not the agreement I meant to enter into'; and then he is let in to prove fraud or mistake."⁸ Even at law (to quote Lord Coke), "the covin doth suffocate the right."⁹

Parol evi-
dence.

¹ *Omerod v. Hardman* [1801] 5 Ves., 722.

² *Robinson v. Page* [1826] 3 Russ., 114; *Sanderson v. Graves* [1875] 10 Ex., 234.

³ *Legal v. Miller* [1750] 2 Ves. Sr. 299; 2 Wh. & T., 8th. ed. 530.

⁴ *Price v. Dyer* [1810] 17 Ves., 356.

⁵ *Narain Pattro v. Aukhoy Narain* [1885] 12 Cal., 152.

⁶ I. Ev. Act, s 92.

⁷ *Ibid.* prov. 1.

⁸ *Clinan v. Cooke* [1802] 1 Sch. and Lef., 22. This was a case under the Statute of Frauds, which "does not say that a written agreement shall bind, but that an unwritten agreement shall not bind."

⁹ 2 Taylor, Ev., 815.

LECTURE VI.

DEFENCES TO THE ACTION.

(c) *Denial of Enforceability of Contract.*

You have already seen that in answer to an action for specific performance of a contract the defendant may plead, first of all, that there is no agreement at all. He may next admit the existence of an agreement, but plead that it is voidable at his option. Or, he may allege that it is not enforceable at law. This may be so, because either there never was a contract such as may be made the ground of an action, or the contract, once agreed upon, has ceased to be enforceable at the date of suit. It is this objection of want of enforceability that I now proceed to consider.

(c) Contract not enforceable.

In England and several of the United States, this objection is generally raised, with special reference to the Statute of Frauds.¹ Section 4 of this Statute provides :

Statute of Frauds, s. 4.

“ And be it further enacted by the authority aforesaid,—

That no action shall be brought.....(3) to charge any person upon any agreement made upon consideration of marriage ; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them ; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof ; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.”

The object of this Statute was the suppression of frauds and perjuries, the prevention of the mischief liable to arise from the reception of parol evidence to prove the existence

Object to suppress fraud and perjury.

¹ St. 29. Car. II, c. 3.

Part
perform-
ance.

and the terms of an alleged contract,¹ and equity courts in England have put such a construction upon it as in their judgment best carries out the intention of the legislature. Thus they have decided that a substantial part performance of a parol contract will take a case out of the Statute, as where the purchaser has been put into possession of the bargained premises; upon the ground that it would be a fraud in the party refusing to "execute it under such circumstances."² As another learned judge put it, "Equity lends its aid, when there has been part performance, to remove the bar of the Statute, upon the ground that it is a fraud for the vendor to insist upon the absence of a written instrument, when he has permitted the contract to be partly executed."³ The theory upon which equity proceeds in administering its specific remedy in such cases is, that the defendant having permitted the plaintiff to treat the agreement as binding, and to do positive acts based upon that assumption, it would be a fraud in him to repudiate his undertaking, and to set up the Statute as an obstacle in the way of its completion.⁴ The fraud is not antecedent, but inheres in the consequence of thus setting up the Statute. The Statute there is no attempt or design to repeal.⁵ But "fraudulent use shall not be made of that Statute," said Lord Eldon.⁶

¹ Cf. *Story, Eq.*, s. 752; *Waterman*, s. 228; *Lindsay v. Lynch* [1804] 2 Sch. & Lef., 1, 4, 5, 7; 9 R. R., 54.

² *Per Nash, C. J., Barnes v. Teague*, 1 Jones, *Eq.*, 277, 279, 1 Ames, 289, n. 2. *Per Cranworth, L.C.*, "The ground on which the court holds that part performance takes a contract out of the provisions of the Statute of Frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract—as, for instance, by taking possession of land and expending money in building, or other like acts—then it would be a fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act and expend his money." *Caton v. Caton* [1865-6] 1 Ch., 137, 147, 2 Keener, 645.

³ *Per Smith J., Seay v. Drake*

[1882] 62 N. H., 393, 1 Ames, 309.

⁴ *Pomeroy, S. P.*, s. 30; *McManus v. Cooke* [1887] 35 Ch. D., 681.

⁵ *Pomeroy, S. P.*, ss. 103-4. *Per Lord Westbury*, "The court of equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an Act of Parliament intervenes, the court of equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title (or right) under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way, the court of equity has dealt with the Statute of Frauds." *McCormick v. Grogan* [1869] 4 R. L., 82, 97.

⁶ *Mestaer v. Gillepsie*, [1805] 11 Ves., 621, 628.

In delivering judgment in the celebrated case of *Maddison v. Alderson*,¹ Lord Blackburn remarked, "I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject." But the Earl of Selborne, in his speech in the same case, gave a luminous exposition of the principle. "It has been determined at law," said the Lord Chancellor, "that the fourth section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced.²... From the law thus stated, the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the Statute to estop any court which may have to exercise jurisdiction in the matter from enquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be

Maddison v. Alderson.

¹ [1883] 8 A.C., 467, 488, 1 Ames, 301.

² His Lordship referred to *Orosby v. Wadsworth* [1885] 6 East, 602, 611, *Leroux v. Brown* [1852] 12 C.B., 824, and *Britain v. Rossiter*, [1879] 11 Q.B.D., 123. In the second case, it was said: "The Statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here." So Lord

Blackburn said in the principal case, "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable, when it is sought to enforce the contract."

done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract ; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed ; but it is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the Statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."¹

"Real contract" of Rome.

Like the "real contract" of Rome, therefore, performance on one side may be said to impose and enforce an equitable duty on the other, evidently on ethical grounds.² The court repels a defence which will make the Statute an instrument of fraud instead of a shield against it.³ The contract is enforced, not because as such it is binding upon the parties, but because its enforcement is the most effectual way to prevent the perpetration of a fraud.⁴

Irrevocable change of position.

But it is not enough that an act done should be a condition of or good consideration for a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.⁵ The act or

¹ 8 A. C., 475-6.

² Cf. Maine, *Ancient Law*, 343.

³ *Manlins v. Brown* [1850] 4 N. Y., 403, 1 Ames, 305. Cf. 4 Pomeroy, *Eq.*, J., s. 1409 n.

⁴ *Lawson, Con.*, 574 ; *Jacobs v. R. R. Co.*, 8 Cush., 225.

⁵ *Per Selborne, L. C., Maddison v. Alderson*, *supra*.

acts relied on, therefore, should be referable only to a contract like that alleged, and should have induced an irrevocable change of position.¹ "I take it," said Lord Redesdale, "that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed."² Taking of possession of the land in the case of a purchase may therefore be an act of part performance,³ but not payment of the purchase-money.⁴ The acknowledged possession of a stranger on the land of another is not explicable except on the supposition of an agreement,⁵ otherwise it would be wrongful and would render him a trespasser;⁶ but the payment of money is an equivocal act,⁷ and it may be repaid, in which case the parties will be just where they were before, especially if repaid with interest.⁸ Other conditions necessary

¹ *Per* Wigram, V. C., "It is in general of the essence of such an act that the courts shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract." *Dale v. Hamilton* [1846] 5 Hare, 369, 381. *Mundy v. Jolliffe* [1839] 5 Myl. & Cr., 167, 1 Ames, 289. Cf. 2 Pomeroy, *Eq. R.*, 1347. 12 C. L. J., 25.

² *Clinan v. Cooke* [1802] 1 Sch. & Lef. 22, 41, 2 Keener, 628; *Wright v. Pucket*, 22 Gratt., 374.

³ *Butcher v. Stapley* [1685] 1 Vern., 363, 1 Ames, 279. But in some jurisdictions in America, possession coupled with payment of the purchase-money or making of improvements has been insisted upon. 2 Pomeroy, *Eq. R.*, s. 821. *Burns v. Daggett* [1886] 141 Mass., 368, 1 Ames, 284 (and notes). *Lawson, Con.*, 574.

⁴ *Pengall v. Ross* [1709] 2 Eq. Abr., 46, pl. 12, 1 Ames, 276. But in Delaware, it has been ruled that "wherever non-performance on the part of the vendor, after receiving the purchase-money, or a part thereof, would put the party in a situation that is a fraud upon him, unless the agreement is performed, the court, upon the principle of preventing fraud, should decree a specific performance." *Houston v. Townsend* [1835] 12 Am. Dec., 109, 2 Scott, 184.

⁵ *Per* Plumer, M. R., *Morphett v.*

Jones [1818] 1 Sw., 172, 181. *Ungley v. Ungley* [1887] 5 Ch. D., 887, 1 Ames, 281; *Bailey v. Ogdens* [1808] 3 Johns, 399; 2 Scott, 177.

⁶ *Lester v. Foxcroft* [1701] 2 Wh. & T., 8th. ed. 464, *Cutler v. Babcock*, 29 Am. St. Rep. 882, 2 Story, *Eq.*, s. 761. But see *Allen's Estate*, 1 Watts & Serg., 383; *Waterman* 370.

⁷ *Maddison v. Alderson*, *supra*. But cf. *Frame v. Dawson* [1807] 14 Ves., 386, 1 Ames, 283.

⁸ *Clinan v. Cooke* [1802] 1 Sch. & Lef., 22, 6 R. C., 721. *Maddison v. Alderson*, is clear authority in England that the rendering of personal services cannot be deemed to be part performance. Cf. *Venkata v. Malra'u* [1909] 5 M. L. T. 108. The question has been much discussed in America, and the courts there seem to be evenly divided. "If equitable fraud be taken as the basis of the doctrine, and the impossibility of restoring the complainant to the situation in which he was before the contract was made, the rendering of services, for a long term of years, the value of which cannot be estimated by any pecuniary standard, must be considered an act of part performance of the highest character; the fraud upon the complainant is often greater than that resulting from either the taking of possession or the making of improvements." 2 Pomeroy, *Eq. R.*, s. 826, p. 1357. *Townsend v. Vandervoorker*, 160 U. S., 171; *Rhodes v. Rhodes*, 3 Sandf. Ch., 279, 284; *Pomeroy, S. P.*, s. 114.

to attract relief upon the ground of part performance are that (1) there is proper parol evidence of the contract alleged¹ and (2) the contract is such that, had it been in writing, a suit in respect of it might have been maintained in a court of equity.²

Such, in brief, is the equitable doctrine of part-performance which has been criticised³ and has been even repudiated in some jurisdictions.⁴ Where, upon certain considerations of policy, a rule of law is enacted in the form of a statute, courts ought to apply it loyally and not let exceptions or breaches eat up that rule.⁵ The Statute of Frauds has not been introduced into India. But the Indian Registration Act⁶ requires certain documents, which purport to create, assign, transfer, limit or extinguish rights in immoveable property of the value of Rs. 100 or upwards, to be registered. And section 49 of the same Act declares that, if such documents are not registered they cannot affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property.⁷ It is in view of these statutory provisions that a saving clause has been introduced into the Specific Relief Act. It runs thus:

Indian
Registra-
tion Act, ss.
17, 49.

S. R. A., s. 4.

"4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

(c) to affect the operation of the Indian Registration Act on documents."

This provision clearly implies the idea that the doctrine of part performance is not to be imported by the Indian courts into the consideration of cases where a contract relating to immoveable property cannot be established by reason of the absence of any registered instrument. The Transfer of Property

¹ Fry, 276, s. 99.

² Cf. *McManus v. Cooke* [1887] 35 Ch. D., 681; Fry, s. 593, p. 263; Pomeroy, S. P., 45n.

³ Cf. 2 Story, *Eq.*, S. 754; *Lindsay v. Lynch*, [1804] 2 Sch. & Lef, 1, 5, 7; 9 R. R., 54. (Lord Redesdale); *Foster v. Hale* [1798] 3 Ves., 696, 712, 713. (Lord Alvanley); *Fry. v. Shieler*, 7 Pa. St., 91 (Coulter, J.); *Patton v. McClure*, Mart. & Yerg., 333 (Catron, J.).

⁴ E. G., in Kentucky, Mississippi, North Carolina, Tennessee, 2 Pomeroy, *Eq. R.*, s. 824, p. 1354, n., 1 Ames, 288-9;

Waterman, s. 258, pp. 352-3.

⁵ Cf. *Balkishen v. Legge* [1899] 22 All., 149, where the Privy Council disapproved the equitable construction that certain Indian courts had placed upon s. 92, Evidence Act. "The doctrine which lets in one equitable exception," said the Mississippi court, "opens the door for the whole innumerable series," *Box v. Stanford*, 51 Am. Dec., 142.

⁶ Act XVI of 1908, s. 17.

⁷ Cf. *Howard v. Miller* [1914] 84 L. J. P. C., 49.

Act¹ will also be found to contain provisions, the effect of which is to make the execution of a registered document necessary for a legal conveyance by way of sale,² mortgage,³ exchange,⁴ lease,⁵ and gift,⁶ in certain cases. Where no such document is executed, there is no valid transfer of immoveable property of which Indian courts can take cognisance.⁷ It is upon this ground that a distinction is drawn between a contract *for* sale and a contract *of* sale,⁸ an agreement to execute a mortgage and a mortgage.⁹ It is the latter only which creates rights *in rem*: the former simply entitles the promisee to obtain a proper conveyance from the promisor. And it has even been suggested that the right, title, or interest in immoveable property which is created by or results from the fact of the execution of a document, registered if necessary, does not rest on a contract or a covenant, but arises by operation of law.¹⁰

But it by no means follows that a deed of sale, which has not been registered, is wholly ineffectual. It may evidence a valid agreement to sell, and, like a parol contract for sale, it may form the foundation of an action for specific performance.¹¹ And where, after execution, the document has been accidentally destroyed by fire, or the vendor wrongfully withholds it, and the plaintiff is not at fault, even secondary evidence may be adduced

Unregistered
sale-deed.

¹ Act IV of 1882.

² *Ibid*, s. 54.

³ *Ibid*, s. 59.

⁴ *Ibid*, s. 118.

⁵ *Ibid*, s. 107.

⁶ *Ibid*, s. 123.

⁷ Act XVI of 1908, s. 49.

⁸ T. P. A., s. 54. "A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." *Zackaraya v. Chummu* [1911] 9 M. L. T., 270, Cf. Indian Trusts Act (II of 1882), s. 91.

⁹ *Konchadi Shanbhogue v. Shiva Rao* [1904] 23 Mad., 54. Cf. *Panchanan v. Chandi* [1910] 6 I. C., 443 (agreement to create lease, contg. no present demise).

¹⁰ *Christacharlu v. Karibasayya*

[1885] 9 Mad., 399, 412; *Subrahmania v. Krishna* [1899] 23 Mad., 137, 143; *Mangal Sen v. Shunkar* [1903] 25 All., 580, 596, 604. Cf. *Gour v. Prasanna* [1906] 33 Cal., 812. In these cases, the effect of alterations in documents was considered.

¹¹ *Bengal Banking Corporation v. Mackertich* [1884] 10 Cal., 315; *Nagappa v. Devu* [1890] 14 Mad., 55; *Adakkolam v. Theethan* [1888] 12 Mad., 505. *Satyendra v. Anil* [1909] 14 C. W. N. 65; *Surendra v. Gopal* [1910] 12 C. L. J., 464. The same view has been taken of an unregistered agreement to lease which does not operate as a present demise. *Kenduri v. Gottumukkala*, [1907] 17 M. L. J. R., 218. But as the agreement itself requires registration, s. 49, S. R. A., applies. *Narayanan v. Muthiah* [1910] 21 M. L. J. R. 44.

to prove the contents of a document which has been allowed to remain unregistered.¹

Fraud.

And, it may be worth repeating, fraud is a substantive ground of relief, independent of any doctrine of part performance.² A good illustration is afforded by the old English case of *Mullet v. Halfpenny*.³ The defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour and get the plaintiff to deliver up that writing, and then to marry him, which she accordingly did, and the defendant stood at the corner of a street to see them go by to be married, and afterwards forced the plaintiff to bring his bill in the Court of Chancery. Trevor, M. R., gave the plaintiff a decree on the ground of fraud. Cowper, L. C., relates, "Halfpenny walked backwards and forwards in the court and bid the Master of the Rolls observe the Statute (of Frauds), which, he humourously said, 'I do, I do.'" In all cases of fraud and where transactions have been carried on *mala fide*, there is a resulting trust by operation of law, and the perpetrator of the fraud may be treated as a trustee *ex maleficio*.⁴

Trustee
ex maleficio.

Exception
in favour of
charities.

It is established by judicial decision in England that "a power well exercised in all other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power."⁵ The principle was thus

¹ *Chinna Krishna v. Dorasami Reddi* [1896] 20 Mad., 19; *Nynakka v. Vavana* [1869] 5 Mad. H. C. R., 123. 11 C. L. J. 548; 12 C. L. J. 25.

² Cf. *per* Lindley, L. J., "The Statute of Frauds does not prevent the proof of a fraud," *Rochevoucauld v. Boustead* [1897] 1 Ch., 206. See also 2 Pomeroy, *Eq. R.*, s. 830. *Peck v. Peck*, 1 L. R. A., 185; *Hidden v. Jordan*, 21 Calif., 92; *Waterman*, s. 249.

³ [1699] *Prec. in Ch.*, 404 (cited).

⁴ *Waterman*, 340-1. But "unless there be something in the transaction more than is implied from the

violation of a parol agreement, equity will not decree the purchaser to be a trustee. And the distinction is indispensable, otherwise there would be a repeal of the Statute (of Frauds) under the pretence of preventing fraud, by decreeing an express trust, which would be introductory of the very evils the Statute was designed to prevent." *McCulloch v. Cowcher*, 5 Watts & Serg., 427 (*per* Woodward, J.) *Pomeroy*, S. P., s. 144.

⁵ *Innes v. Sayer* [1851] 3 M. & G. 606, *per* Truro, L. C.

explained by Wigram, V. C.: "If a person has power by his own act to give property, and has, by some paper or instrument, clearly shewn that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shewn his intention to do it, the court will, in the case of a charity, by its decree, make the instrument effectual to do that which was intended to be done."¹ Equity is seldom troubled by a mere formal or accidental defect. But the jurisdiction of the court is to supply defects occasioned by mistake or inadvertence, not to supply omissions intentionally made.²

Nor, where notice³ is proved, is it necessary to invoke the aid of the doctrine of part performance. In the language of the Specific Relief Act, courts will recognise a "trust" in such a case. Two illustrations appended, to section 3, will explain my meaning:—

Notice:
Trust.

"(g) A buys certain land, with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(h) A buys land from B, having notice that C is in occupation of the land. A omits to make any enquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of that interest."⁴

Ill. (g) is a case of actual, and ill.(h) one of constructive notice. It should be borne in mind, however, that where a complete legal title has passed in the first instance, the doctrine of notice has no application. It is where the competition

Incomplete
title.

¹ *Ibid*, 7 Hare, 377.

² *Garth v. Townsend* [1869] 7 Eq., 220.

³ T. P. A., s. 3.: "A person is said to have notice of a fact, either when he actually knows the fact or when, but for wilful abstention from inquiry, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, s. 229." Cf. Trusts Act, s. 3.

⁴ Cf. Waterman, s. 250; "The provisions of the Statute of Frauds do not relate to implied trusts, or those which are raised or created by

operation of law, and not from the contracts of the parties. A trust results by implication of law: first, where the purchaser has paid the price with his money, but taken the conveyance in the name of another; or, where he has paid with the money of another, and taken the conveyance in his own name; second, where a trust has been declared of but part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue; and, third, where there has been a plain fraud" (p. 339, and see cases cited in n. 3).

is between a person holding an incomplete title and another holding the full title that it becomes necessary to enquire whether the latter is affected with notice of the former's title.¹ Where the owner has once conveyed what he had to convey, a second transferee can take nothing. But where the owner has not parted with all his rights, the second transferee, if he claims under a properly executed (and registered) deed, will obtain a valid title, unless by reason of notice, either actual or constructive, of a prior (possibly imperfect) title, a court of justice will not permit him to enforce his rights in supersession of the rights of which he has such notice. A prior contract for sale may thus be specifically enforced even against a subsequent vendee with notice, though he holds a properly executed and registered conveyance.²

Indian
courts and
part per-
formance.

But, where there is a contract valid in law, which may be proved in the regular way, and which is capable of specific performance, part performance is a circumstance that may weigh even with an Indian court, when it is called upon to make a decree in respect of such a contract.³ If the plaintiff has done substantial acts or suffered losses in respect of such a contract, the more reason why it should be enforced *in specie*. The courts under such circumstances may even be disposed to stretch a point in the plaintiff's favour. You will remember the case of *Price v. Corporation of Penzance*,⁴ where a municipal board purchased land with the covenant to make a road, and erect the market-house thereupon forthwith. They entered and made the road, but did not erect the market-house. Wigram, V. C., remarked that the defendants having had the benefit of the contract *in specie*, the court would go any length that it could to compel them to perform their contract *in specie*.⁵ A similar observation may be made in respect of the railway

¹ See notes to *Le Neve v. Le Neve* [1748] 2 Wh. & T., 8th ed. 187. *Mutual Life Assurance Society v. Langley* [1886] 32 Ch. D., 460.

² Trusts Act, s. 91: "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must

hold the property for the benefit of the latter to the extent necessary to give effect to the contract." Cf. S. R. A., s. 27 (b).

³ S. R. A., s. 22, III.

⁴ [1845] 4 Hare, 506.

⁵ Cf. *Wilson v. West Hartlepool Ry. Co.* [1865] 2 DeG., J. & S., 475; *Shib Lal v. Collector of Bareilly* [1894] 16 All., 423, 436.

cases like *Storer v. G. W. Ry. Co.*,¹ which I have discussed in a former lecture.² In such cases, the plaintiff, having parted with the land, has no opportunity of doing the work which the defendants had contracted to do, and so of ascertaining the amount of damages sustained by their non-performance.³ And even if the terms of the contract are not quite certain and definite, part performance will induce the court to struggle against such impediment.⁴ Part performance, be it noted, is generally a question of fact,⁵ and it will not by itself give rise to this equitable jurisdiction where the original subject-matter of the contract does not attract it.⁶ The contract "must be obligatory, and what is done must be done under the terms of the agreement and by force of the agreement."⁷

In a case of reciprocal promises, the fact of part performance may determine the discretion of the court. Where the plaintiff has performed a substantial portion of his agreement and has thereby altered his position, the fact that without any fault and by reason of circumstances not within his control he cannot perform the rest of his promise, will not deter the court from ordering the defendant to execute his part of the contract.⁸ But where the plaintiff is in *statu quo* as to the part of the agreement he has performed, the fact that he has not and cannot perform the whole of it is a bar to his requiring the defendant to perform his contract.⁹ And the court will not decree specific performance according to the letter, when, from change of circumstances, mistake or misapprehension, it will be unconscientious to do so. The court may so modify the agreement as to do justice as far as circumstances will permit, and refuse specific execution, unless the

Reciprocal promises.

Plaintiff in *statu quo*.

¹ [1842] 2 Y. & C., Ch., 48.

² Lect. III., pp. 109 sqq. *ante*.

³ *Per* Wood, V. C., *South Wales Railway Co. v. Wythes* [1854] 1 K. & J., 186, 200.

⁴ *Hart v. Hart* [1881] 18 Ch. D., 670, 685; *Hawksley v. Outram* [1892] 3 Ch., 374, 376, 381; *East India Co. v. Nuthumbadoo* [1851] 7 M.P.C., 482, 497.

⁵ *Howther v. Heaver* [1889] 41 Ch. D., 248.

⁶ *Kirk v. Bromley Union* [1846] 2

Ph., 640. Cf. *Mc Manus v. Cooke* [1887] 35 Ch. D., 681.

⁷ *Per* Lord Brougham, *Lady Thynne v. Earl of Glengall* [1848] 2 H. L. C., 131, 158.

⁸ *Meredith v. Wynne* [1711] Eq., Abr., p. 70, ca. 15, *Prec. Ch.*, 312, 24 E. R., 147.

⁹ *Lord Feversham v. Watson* [1678] Freeman, 35, 1 Ames, 317. Gilbert, *Lex Prætoria*, 240-2; 2 Story, *Eq.*, s. 772; Fry, ss. 944-7.

party seeking it will comply with such modification as justice requires.¹

Limitation.

We have now seen that an agreement, in every other respect good, may fail to have legal effect by reason of non-compliance with certain formalities prescribed by statute. So the enforcement of an agreement in every way good may be statute-barred after a certain time. The Indian Limitation Act² prescribes the period within which a suit must be instituted, and articles 113, 115 and 116 of the first schedule are relevant to the present discussion. The first article prescribes a period of three years for a suit to enforce a contract. The other two articles provide for suits seeking to recover compensation for breach of contract. If the contract in respect of which compensation is asked for is to be found embodied in a registered instrument, the suit may be brought within six years; otherwise it must be instituted within three. Ordinarily, the Limitation Act only bars the remedy, but does not extinguish the right. But where specific relief in the form of possession may be asked for, the right itself will determine by prescription, after the limitation for a suit for such relief has expired.³ A distinction, it is proper to note, has been taken between cases where the contract is executory and the relief sought is the execution of a document, and those where the contract is executed and the relief sought is consequential, *e.g.*, possession of the property conveyed. Strictly speaking, only the former class can be described as cases for specific performance of contract.⁴ But the right to possession arises coincidently with the right to the execution of a conveyance, it springs out of the contract, and the relief by giving possession in such a case may be held to be comprised in the relief by specific performance.⁵ The better opinion seems to be that a suit for possession of immovable property

¹ *Mechanic Bank of Alexandria v. Lynn*, 1 Peters, 376; *Davis v. Hone* [1805] 2 Sch., & Lef., 348, 9 R. R., 89.

² Act IX, of 1908.

³ See Limitation Act, s. 28, *Dalip v. Deoki* [1899] 21 All., 204; and other authorities collected in articles, 2 A. L. J., 259, 297.

⁴ *Ante*, 21; *Kalka v. Himayat* [1907] 10 O. C., 218.

⁵ *Muhiuddin v. Ma'lis* [1884] 6 All., 231; *Hari v. Raghunath* [1888] 11 All., 27 F. B. *Veera v. Poonambala* [1899] 9 M. L. J. R., 137; *Fazul v. Amiruddin* [1911] 217 P. L. R. *Distinguish Sheo v. Udai* [1880] 2 All., 718; *Madan v. Gaja* [1911] 14 C. L. J., 159. See also *Ranjit v. Radha* [1907] 34 Cal., 564; *Ramghulam v. Partale* [1907] 10 O. C., 173.

sold, let, or mortgaged, by the vendee, lessee, or mortgagee, in whom the title has vested, but who, contrary to the contract, fails to get possession, is governed by the 12 years and not the three years rule of limitation.¹

Here it is pertinent to observe that section 30, Specific Relief Act, provides—"The provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement." It has, accordingly, been argued that a suit to recover money due to the plaintiff under the terms of an award from the defendant is a suit for specific performance of a contract, and is governed by article 113.² But an award is not a contract, though it follows upon a contract, and this reasoning has been repudiated in recent cases at Calcutta, Allahabad and Madras.³ Where an award directs the delivery of immoveable property, the article of the Limitation Act applicable may be either 142 or, more generally, 144, which prescribes a period of twelve years for suits to recover possession of immoveable property not otherwise provided for.⁴ Where the subject-matter of the award is moveable property, one of the earlier articles may be applicable, and the limitation will ordinarily be three years. If none of these be in point, the plaintiff may have six years under the omnibus article 120,⁵ which is to be applied unless it is clear that the suit is within some other article.⁶

Awards.

Another circumstance which has been held to render a contract in writing, good in its inception, unenforceable at law, is a material alteration of the document. This is known as the rule in *Pigot's case*,⁷ and, though it does not find a place in the

Material alteration of document.

¹ *Mewa Kuar v. Hulas Kuar* [1874] 13 B. L. R., 312, 313, P. C.; *Betts v. Mahomed*, [1876] 25 W. R., 521; *Gopal v. Baji* [1884] 4 A. W. N., 123; *Kanhya v. Mohru* [1890] P. R. No. 96; *Talewar v. Bahori* [1904] 26 All., 497; *Bunwari v. Bidhu* [1908] 12 C. W. N., 459.

² *Sukho Bibi v. Ram Sukh Das* [1883] 5 All., 263; *Raghubar Dial v. Madan Mohan Lal* [1893] 16 All., 3; *Ma Hla Win v. Maung Shwe* [1897-1901] 2 U. B. R., 293.

³ *Sheo Narain v. Beni Madho* [1901] 23 All., 285; *Sornavalli Ammal v. Muthayya* [1900] 23 Mad., 593; *Bhajahari*

Saha v. Behary Lal Basak [1906] 53 Cal., 881; *Ma Pou v. Maung San* [1897-1901] 2 U. B. R., 446; *Sheo Narain v. Bishunath* [1904] 7 O. C., 369.

⁴ *Ibid.* *Distinguish Talewar Singh v. Bahori Singh* [1904] 26 All., 497.

⁵ *Kuldip Dube v. Mahant Dube* [1911] 34 All., 43 (art. 116 also referred to).

⁶ *Mahomed Riasat v. Hasin* [1893] 21 Cal., 157, 163, P. C. *Batul v. Mansur*, [1901] 24 All., 17, 24, P. C.; *Mitra, Lim.*, 934.

⁷ [1615] 11 Coke, 26 b, 77 E. R., 1177: "These points were resolved: 1 When a lawful deed is raised, whereby

Indian Contract Act,¹ yet our courts have given effect to it in a number of cases. A party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state;² and the principle, said Grose, J., is "founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it," and it is "as applicable to one kind of instrument as to another."³ The doctrine has been recently examined with great learning by Prof. Williston, and the distinction he draws between conveyances and covenants is fully supported by the Indian cases: "A distinction should be observed between a deed of conveyance and a bond or covenant obliging the maker to some future performance. If a conveyance is valid when delivered, the title to the property vests in the grantee, and no subsequent alteration or loss of the deed can affect the title of the grantee, though for want of evidence he may find difficulty in enforcing his title. A bond or covenant for future performance, however, must be valid when the obligee seeks to enforce it, and the rules in *Pigot's case* are applicable."⁴ But, where a deed of conveyance has been altered, the suit must be based on the vested title or right, and not on the altered deed.⁵ The authorities further discriminate between cases in which the altered document is the foundation of the claim and those in which it is only used as evidence. Consequently, an interpolation or alteration in a written acknowledgment of debt does not vitiate it, as such acknowledgment is only evidence of a pre-existing liability.⁶ The alteration, I have said, must be

Material
alteration.

it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed. Secondly, it was resolved that, when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void." In this case, it was also held that an immaterial alteration by the obligee would avoid the deed. But this is no longer law, *Aldous v. Cornwell* [1868] 3 Q.B., 573.

¹ But see *Negotiable Instruments Act* (XXVI of 1881), ss. 87-9. Pollock has a note on this topic as an excursus to s. 62, I.C.A.; so also Cunningham & Shephard.

² *Davidson v. Cooper* [1884] 13 M. & W., 343, 352, 67 R.R., 628; *Gour v. Prasanna* [1906] 33 Cal., 812.

³ *Master v. Miller* [1791] 4 T.R., 320, 345, 1 Sm. L.C., 12th ed. 80.

⁴ Pollock, *Con.* (W. W.), 845-6.

⁵ *Subrahmanya v. Krishna* [1899]. 25 Mad., 137, 143; *Mangal Sen v. Shankar* [1903] 25 All., 580 F. B. (collects a large number of cases).

⁶ *Atmaram v. Umedram* [1901] 25 Bom., 616; *Harindra Lal v. Uma Charan* [1905] 9 C. W. N., 695.

material. This means that it should be of such a character as to affect the legal effect of the contract, so as to make it cease to be the same.¹ The substance of the contract as expressed in the document must be altered, or the identity of the document destroyed;² and an alteration does not cease to be material because it is advantageous to the obligor.³ But an innocent attempt to correct a clerical error,⁴ or to add what is already implied in the document or is superfluous,⁵ will not render it inoperative. Where, therefore, a document does not require attestation by witnesses, the affixing of the signature of a witness, after it has been executed, is only an immaterial alteration.⁶

In the rule, as laid down in *Pigot's case*, no distinction is made between an alteration by a stranger and one by a party to the document. But it is not easy to see why the act of a stranger, over whom he has no control, should be visited on a party, when total loss or destruction of the document by accident does not damnify him.⁷ The American courts, therefore, seem to have reason on their side when they hold an alteration by a stranger, in making which the party took no part, to be excusable.⁸ An alteration made under a mistake of fact, it may be added, is not fatal.⁹

Alteration
by stranger.

(d) Discharge from the Contract.

The next legal plea open to the defendant is discharge from the obligation of the contract. Ordinarily, in India, a contract may be discharged before any of its provisions has been broken, first, by the agreement of all the parties thereto, and, next, owing to impossibility of performance.

(d) Contract
discharged.

¹ *Abdool Hoosain v. Goolam Hosain* [1905] 7 Bom. L. R., 742. See *Pollock, Con. (W. W.)* 865-6.

² *Suffell v. Bank of England* [1882] 9 Q. B. D., 555 (number of a Bank of England note altered); *Gogun Chander v. Dhuronidhur* [1881] 7 Cal., 616 (names of two executors added); *Govindasami v. Kuppusami* [1889] 12 Mad., 239 (date of bond altered.)

³ *Gardner v. Walsh* [1855] 5 E. & B. 83.

⁴ *Howgate & Osborn's Contract* [1902] 1 Ch., 451.

⁵ *Lowe v. Fox* [1887] 12 A. C., 206.

⁶ *Kashi Nath v. Surbanaund* [1885]

12 Cal., 317; *Venkatesh v. Baba* [1890] 15 Bom., 44; *Ramayyar v. Shanmugan* [1891] 15 Mad., 70.

⁷ *Per-Eyre, C. J.*, "God forbid that a man should lose his estate by losing his title deeds" *Bolton v. Bishop of Carlisle*, [1793] 2 H. Bl., 259, 263.

⁸ *Pollock, Con. (W. W.)*, 853. Cf. *Lowe v. Fox*, *supra*, 217; *Bashiruddin v. Surakumar* [1908] 12 C. W. N., 716.

⁹ *Raper v. Birbeck* [1811] 15 East, 17; *Prince v Oriental Bank* [1878] 3 A. C., 325. Distinguish *Bank of Hindustan v. Smith* [1867] 36 L. J. C. P., 241.

Discharge by agreement may take one of the four following forms, *viz.*: “(1) simple and express waiver or abandonment of the contract; (2) implied waiver by entering into a new contract inconsistent with the performance of the old; (3) non-fulfilment of some condition imposed by mutual assent, and taking effect either as a condition precedent to the existence of the contract or as a condition subsequent annulling it; and (4) rescission in exercise of an express proviso in the contract.”¹

(1) Waiver
or abandon-
ment, I.C.A.,
s, 6².

(1) Section 63 of the Indian Contract Act lays down:—

“Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.”

This is a deliberate departure from the Common Law of England, inasmuch as under that law a prior contract can be altered or rescinded only by a new agreement, which must in general satisfy all the requirements of an independent contract.² Further, the English doctrine of accord and satisfaction does not recognise the payment, say, of £10 as a payment of £20,³ and requires some consideration for the relinquishment of the residue.⁴ In this country, however, where the contract is such as to affect the right of only one of the parties, he

¹ 2 Williams, *V. & P.*, 908, Prof. Williston makes an exhaustive analysis and says: “A contract may be discharged in the following ways:—

(1) Performance according to its terms.

(2) A breach of such a nature as to justify the innocent party in treating the contract as rescinded or as giving rise to a right of action for breach of the entire contract.

(3) Rescission of a voidable contract, at the will of one party, as for fraud, mistake, duress.

(4) Release.

(5) Rescission by parol agreement.

(6) Accord and satisfaction.

(7) Cancellation and surrender.

(8) Alteration.

(9) Merger.

(10) Arbitration and award.

(11) Impossibility.

(12) Bankruptcy.

(13) Statutes of Limitation, though in general barring the remedy only,

may be added.

A right of action upon a contract may be discharged in any of these ways, except the second and the eleventh.” Pollock, *Con.* (W. W.), 811-2. Some of the above matters I have already dealt with, and I use the term “discharge” here in a limited sense.

² Leake, *Con.*, 6th ed. 576, where authorities are collected. In England, the statement, “a simple contract may, before breach, be waived or discharged, without a deed and without consideration” means “without other consideration than is implied in the mutual abandonment of the contract.” 2 Williams, *V. & P.*, 908; *Foster v. Dawber* [1851] 6 Ex., 839, 851.

³ *Per* Brian, C. J., *Y. B.* 33, Hen. VI, 48 A., pl., 32. See article by Ames, 12 Harv. L. R., 521.

⁴ *Fitch v. Sutton* [1804] 5 East, 230, 232. See notes to *Cumber v. Wane* [1790] 1 Smith, L. C., 12th. ed. 376.

may renounce such right at his choice, without receiving any consideration from the other party.¹ He may, therefore, if he so pleases, accept Rs. 2,000 where Rs. 5,000 are due to him, and the whole debt may be discharged.² He may, where he has ordered an artist to paint a picture, forbid him to do so, and the artist need not bother himself further about the matter.³ The Bombay High Court in a recent case suggested that "it is only by a promise that there can be a dispensation or remission within the meaning of section 63; there must be a proposal of the dispensation or remission which is accepted."⁴ According to this view, therefore, the artist, unless he agrees to the dispensation, may be entitled to carry through the commission and force the picture, when completed, upon his client. But the view is a reversion to the English doctrine which the Indian legislature has clearly abandoned, and, it is apprehended, cannot be supported.⁵ A subsequent oral agreement for remission of a part of debt, which originally was recorded in writing, may be excluded from evidence by proviso 4, section 92, Evidence Act; but the discharge will operate all the same as valid and legal.⁶

Bombay
view.

And it may be added here that, where one party repudiates a contract, the other need not perform it.⁷

(2) Section 62 of the Indian Contract Act provides:—

(2) Novation
of contract,
I.C.A., s. 62.

"If the parties to a contract agree to substitute a new contract for it, or rescind or alter it, the original contract need not be performed."

This means that there is a contract in existence, and a new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.⁸ *E.g.*, A owes B Rs. 10,000, he enters into an arrangement with his creditor and gives him a

¹ *Davis v. Cundasami* [1896] 19 Mad., 398. Cf. *Manohur v. Thakur Das* [1888] 15 Cal., 319; *Naoroji v. Kazi Sidick* [1896] 20 Bom., 636.

² I. C. A., s. 63, ill. (b) and (c).

³ *Ibid.*, ill. (a).

⁴ *Abaji Sitaram v. Trimbak Municipality* [1903] 28 Bom., 66.

⁵ Cf. Pollock, I. C. A., 3rd. ed. 79-80.

⁶ *Karampalli v. Thekku Vittil* [1902] 26 Mad., 195. Cf. Lawson, *Con.*, s. 500, p. 585.

⁷ Pollock, *Con.* (W. W.) 333. Cf. I.C.A., s. 39; *Hochster v. De La Tour* [1853] 22 L. J. Q. B., 455, 6 R. C., 576.

⁸ *Scarf v. Jardine* [1882] 7 A.C., 345, 351.

mortgage on his (*A*'s) estate for Rs. 5,000, in place of the original debt. This is a new contract, and extinguishes the old.¹ Or, suppose the arrangement (to which *C* agrees) is that *B* shall thenceforth accept *C* as his debtor instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.² Here we have a *novation* of contract, as the result of an agreement to which all the parties have consented,³ and it is the new contract which must in future be enforced. It, however, appears that the substitution of a new contract for the old pre-supposes a case where the old contract affected more or less the rights of both parties,⁴ and it can take place only before breach of that contract.⁵ The novated contract must also be one capable of being enforced in law,⁶ and it must be properly proved⁷ as an issue of fact.⁸ So, where accounts were stated between a creditor and his debtor, and the latter passed the former a hypothecation bond for the balance found due payable by instalments, it was held that by the execution of this bond the debt due on the accounts stated had come to an end.⁹ But, where the debtor-defendant denied the execution of the bond, which could not therefore be registered; the bond could not displace the account stated, and the court said, "We cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond, and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts."¹⁰

Variation
enforced.

It is proper to add here that a mere alteration of some term or terms of the old contract is not sufficient, it can be discharged

¹ I.C.A., s. 62, ill. (b).

² Ibid, ill. (a).

³ Novation is not consistent with the original debtor remaining liable in any form, *Commercial Bank of Tasmania v. Jones* [1893] A. C., 313; and where the variation is by course of conduct, and not express agreement, it must be shown to have been intended and understood by both parties, *Darnley v. L. C. & D. Ry. Co.* [1867] 2 H. L., 60.

⁴ *Davis v. Gundasami* [1896] 19 Mad., 398.

⁵ *Manohur v. Thakur Das* [1888] 15

Cal., 319.

⁶ *Nundo Kishore v. Ramsookhee Koer* [1879] 5 Cal., 215. The English rule seems to be the same, 2 Williams, V. & P., 911. But see Fry, s. 1039.

⁷ *Roushan Bibee v. Hurray Kristo* [1882] 8 Cal., 926, 929. The provisions of s. 92, Evidence Act, must not be lost sight of in this connection.

⁸ *Banshidhar v. Government of Bengal* [1872] 9 B.L.R., 364, P. C.

⁹ *Sirdar Kuar v. Chandrawati* [1882] 4 All., 330.

¹⁰ *Kiamuddin v. Rajoo* [1888] 11 All., 13.

only by an entire abandonment of it.¹ But it may be altered by a subsequent contract to vary it, and in this case only the varied contract can be specifically enforced.² Where, *e.g.*, there is a contract of tenancy at a specified rent, the lessor first putting the premises into tenantable repair, but they turn out not to be worth repairing, and with the lessee's consent, the lessor pulls down the old house and erects a new one instead, the lessee contracting orally to pay an increased rent, the lessor cannot enforce specifically the original contract, even if reduced to writing, but may enforce it with the variations made by the subsequent oral contract.³ In England, in cases where a written agreement is sought to be varied by parol subsequently to its execution, the variation, to be available as a defence, is required to be accompanied by such a part performance as would enable the court to enforce it if it were an original, independent agreement.⁴ But such a circumstance in India will only have an evidentiary value, and cannot be deemed to be essential.

(3) Promises, again, may be absolute or conditional. An absolute promise is due immediately and independently of any event or contingency, as a debt due and payable at the present time. A conditional promise is one of which the performance becomes due only after a lapse of time, or upon the happening of some event, certain or uncertain.⁵ Such a promise the Indian legislature prefers to describe as "contingent,"⁶ and section 32 of the Indian Contract Act provides that "contingent contracts to do or not to do anything, if an uncertain future event happens, cannot be enforced by law unless and until that event has happened."⁷ *E.g.*, if *A* contracts to pay *B* a sum of money when *B* marries *C*, and *C* dies without being married to *B*, the contract is discharged.⁸

(3) Contin-
gent con-
tract.

I. C. A., s. 32.

A distinction is drawn in law between a condition precedent

Condition
precedent.

¹ Cf. *Price v. Dyer* [1810] 17 Ves. 356; *Vezey v. Rashleigh* [1904] 1 Ch. 634.

² S.R.A., s. 26 (e). Cf. *Ryno v. Darby* [1869] 20 N.J., Eq. 231.

³ *Ibid.*, ill. (e). Cf. *Bruner v. Moore* [1904] 73 L. J., Ch., 377.

⁴ *Legal v. Miller* [1750] 2 Ves. Sr., 299; 2 Dart, V. & P., 1053.

⁵ Leak, Con., 6th. ed. 454.

⁶ I. C. A., s. 31.

⁷ When the event happens, the contract becomes absolute, and rests on the same footing for all purposes as if it had been originally made positively and without reference to any contingency. *Regent's Canal Co. v. Ware* [1857] 23 Beav., 575, 586.

⁸ I. C. A., s. 32, ill. (c).

and a condition subsequent. Where a certain act has to be performed or a certain event is to happen before the contractual obligation can be fixed, this act or event is a condition precedent. Such is an undertaking in a contract of lease that the lessor shall build a new warehouse and put an old warehouse in repair.¹ So, where a railway company purchases land for the proposed railroad, there may be a condition precedent that the railway shall be made.²

Condition
subsequent.

Where, on the other hand, a valid contract is formed in the first instance, but it is stipulated that the contract shall be annulled if a certain act be not performed or a certain event do not happen, there is a condition subsequent, the non-fulfilment of which discharges the contract. A leasehold not transferable without the lessor's consent may, *e.g.*, be sold subject to such consent being obtained,³ or an equity of redemption may be assigned subject to the mortgagee's consenting to allow the mortgage to remain for a specified period.⁴ In such cases, a contract good in its inception may fall through, if the lessor or the mortgagee subsequently refuse to give his consent.

But where there is a contract, the right to specific performance cannot be defeated by reason of the non-performance of a condition or stipulation, unless the latter is such as a court of equity considers essential.⁵

Failure to
perform
condition or
exercise
option.

The plaintiff's failure to perform an express condition precedent, unless waived,⁶ has been held to be fatal to his claim for specific performance,⁷ and, as the contract does not become absolute till the condition has been fulfilled,⁸ the

¹ *Counter v. Macpherson* [1845] 5 Moo. P. C., 83.

² *Gage v. Newmarket Ry. Co.* [1852] 18 Q. B., 457. Cf. *Scottish N. E. Ry. Co v. Stewart* [1859] 3 McQ., 382.

³ *Day v. Singleton*, [1899] 2 Ch., 320.

⁴ *Smith v. Butler* [1900] 1 Q. B., 694. The condition may, in general, be fulfilled at any time before completion.

⁵ Fry, ss. 50-51, p. 21.

⁶ *Hauksley v. Outram* [1892] 3 Ch., 359, 376, 378. But the waiver must be made intentionally and with knowledge of all circumstances by the

party entitled to performance. *Earl of Darnley v. London C. & D. Ry. Co.* [1867] 2 H. L., 43.

⁷ *Earl of Feversham v. Watson* [1678] Freeman 35, 1 Ames, 317; *Job v. Banister* [1856] 2 K. & J., 374; *Williams v. Brisco* [1882] 22 Ch. D., 441.

⁸ "The right to specific performance has never vested for the party in default. The contract cannot be said to be of equitable cognizance, until the condition is performed." 2 Pomeroy, *Eq. R.*, s. 806, p. 1327. Cf. *Scott v. Corporation of Liverpool* [1858] 3 DeG. & J., 334.

justice of the decision is manifest. So, where there is an option to purchase land to be exercised within a specified time and it is not so exercised, the right to compel a conveyance is lost.¹ For the relation of vendor and purchaser between the parties is to arise only upon the condition being fulfilled, viz., the act agreed upon being performed on or before a day fixed for its performance, and the lapse of that day without its being performed determines the offer to sell. As Mr. Pomeroy points out, there is no contract if the election is not made before the expiration of the time, and equity finding no contract to use its discretion upon, cannot be concerned with the element of time, which presupposes an existing contract.²

Time of the
essence of
contract.

This brings me to the much debated question when time may be deemed to be of the essence of a contract. Extreme views have been taken, and while the Common Law courts in olden times held that it always was of the essence, Lord Chancellor Thurlow declared that in equity it never could be.³ If A agrees to do a certain thing by a certain day, and fails to complete performance till after several days, is A entitled to the benefit of such performance, or does the contract fail altogether? Now, it is clear that the act may be of such character as it is absolutely necessary for the promisee that it should be performed within a certain time, or it may be such that, unless it is so performed, the promisee is likely to suffer loss, or, lastly, performance may be the material thing and it may be comparatively, if not wholly, immaterial to the parties when the performance is completed, so long as there is no unreasonable delay. In the first case, time is essential, in the

¹ *Lord Ranelagh v. Melton* [1864] 2 Dr. & Sm., 278, 1 Ames, 319; *Joy v. Birch* [1836] 4 Cl. & F., 57, 89; *Campbell v. London Co.* [1846] 5 Hare, 519, 524; *Waterman v. Banks*, 144 U. S., 394.

² 2 *Eq. R.*, s. 807, p. 1328. Cf. *Pomeroy. S. P.*, ss. 373, 387-8.

³ *Gregson v. Riddle*, 7 Vcs., 275 (cited).

⁴ *Per Phelps, J.*, "Every agreement, as to time, is not of the essence of the contract, and therefore every failure by the petitioner in a literal performance does not, of necessity,

furnish a sufficient defence against a bill for a specific performance; and we think no better or safer general rule on this subject can be prescribed than that the broken stipulation should be of such a character as to constitute a condition precedent to the petitioner's right to enforce the contract; or be such as, on its non-fulfilment, without a reasonable excuse, to render in terms the contract void; or in some other manner to render it clearly inequitable under circumstances of fraud, mistake, surprise, unreasonable delay, gross

second it may be material, in the third it is immaterial.¹ The question, therefore, is primarily one of intention. The Indian legislature accordingly enacts :

I.C.A., s. 55.

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."²

Substance
and form.

"A party may not trifle with his contracts," remarked Allen, J., "and still ask the aid of a court of equity. Neither will the bar be administered in a spirit of technicality, and so as to defeat the ends of justice."³ "Courts of equity," said Romilly, M.R., "make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."⁴ It has, accordingly, been laid down that a court of equity will relieve against literal default, and enforce specific performance of the substantive agreement, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the

neglect, bad faith, or other manifest unconscientiousness, that the petitioner should have a decree." *Quinn v. Roath*, 37 Conn., 16; *Pomeroy*, S.P., 55 n.

¹ Cf. *Pomeroy*, S.P., ss. 400-2; 2 *Pomeroy*, Eq. R., ss. 810-2.

² I.C.A., s. 55. *Kuppusami v. Doraisami*, [1909] 5 M. L. T., 247; *Subramanian v. Gangaya*, [1909] 4 L. B.R., 365; *Jamshed v. Burjori* [1916] 30 M.L.J. 186 P.C.

³ *Hubbell v. Von Schoening* [1872] 49 N. Y., 326, 2 Keener, 1107.

⁴ *Parkin v. Thorold* [1852] 16 Beav., 59, 329, 1 Ames, 329 ("It [the court] then considers how far either party is injured by the delay, and will not permit one to insist upon that which, although a formal part of the contract, would, in reality, defeat the object which both had in view at the time when it was made. It is, I apprehend, on a similar principle, also, that the whole doctrine relating to the equities of redemption, as administered by this court, is founded.")

Direct stipulation or necessary implication.

parties, and if (as Turner, L. J., said in *Roberts v. Berry*),¹ there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right."² A case of express stipulation is one where the parties to the contract introduce a clause expressly or directly stipulating that time is to be of the essence of the contract.³ And the implication that time is essential may be derived from the circumstances of the case, such as, where the property sold is required for some immediate purpose, *e.g.*, residence,⁴ trade or manufacture;⁵ or where the property is of a determinable character,⁶ or its value necessarily fluctuates and changes with the mere lapse of time,⁷ *e.g.*, an estate for life or reversion,⁸ mining property,⁹ or stock.¹⁰ Solemn agreements ought not to be slightly got over,¹¹ and the party seeking the remedy of specific performance should show himself ready, desirous, prompt and eager.² Circumstances may be so

¹ [1853] 3 DeG. M. & G., 284. Cf. *Parkin v. Thorold*, supra, ("Time is held to be of the essence of the contract in equity, only in cases of direct stipulation or of necessary implication.")

² *Tilley v. Thomas* [1867] 3 Ch. Ap., 61. 1 Ames, 337, *per* Lord Cairns, who added, "This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract." See also *per* Rolt, L. J., 2 Keener 1097. Cf. *Taylor v. Longworth*, 14 Pet., 172, 174, cited in *Brown v. Guarantee Trust Co.* [1888] 128 U. S., 403, 2 Keener, 1112; *Jennisons v. Leonard*, 21 Wall., 302.

³ *Seton v. Slade* [1802] 7 Ves., 269, 270, 2 Wh. & T., 8th. ed. 478; *Lloyd v. Rippingale* [1835] 1 Y. & C. Ex., 410 (cited), 1 Ames, 335; *Barclay v. Messenger* [1874] 43 L. J. Ch., 448; *Baldeo Das v. Howe* [1880] 6 Cal., 64. As to unilateral contracts, see *Brooke v. Garrod* [1857] 3 K. & J., 608; *Pomeroy, S. P.*, ss. 387-8. *Janardan v. Bhairab* [1915] 30 L. C., 365.

⁴ *Tilley v. Thomas* [1867], supra. Cf. *Nokes v. Kilmorye* [1847] 1 DeG. & Sm., 444 (land desired for immediate building). Distinguish *Wells v. Maxwell* [1863] 32 Beav., 408.

⁵ *Seaton v. Mapp* [1846] 2 Coll., 556 (public-house as a going concern);

Cowles v. Gale [1871] 7 Ch., 12 (ditto); *Tadcaster Tower Brewery Co. v. Wilson* [1897] 1 Ch., 709, 711; *Glassbrook v. Richardson* [1874] 23 W. R. (Eng.), 51 (trade property). Cf. *Norrington v. Wright* [1885] 115 U. S., 189 ("in the contracts of merchants, time is of the essence."); *Carter v. Phillips*, 144 Mass., 100; *Bowes v. Shand* [1877] 2 A. C., 463; *Wright v. Howard* [1823] 1 Sim. & St., 190 (land purchased for erecting mills.) *Kishen v. Purnendu* [1911] 16 C. W. N., 753, 760.

⁶ *Parkin v. Thorold*, supra.

⁷ 4 *Pomeroy, Eq. J.*, s. 1408, n. 2. *Myers v. League*, 62 Fed. R., 654. *Goldsmith v. Guild*, 10 Allen., (Am.) 239 (land in war-time).

⁸ *Spurrier v. Hancock* [1799] 4 Ves., 667; *Newman v. Rogers* [1793] 4 Bro. Ch., 391, 393.

⁹ *Huxham v. Llewellyn* [1873] 28 L. T., 577; *Macbryde v. Weekes* [1856] 22 Beav., 533, 2 Keener, 1088; *Taylor v. Longworth*, 14 Pet., 172, 174; *Waterman v. Banks*, 144 U. S., 394.

¹⁰ *Doloret v. Rothschild* [1824] 1 Sim. & St., 590; *Lewis v. Lechmere* [1722] 10 Mod., 508.

¹¹ *Vernon v. Stephens* [1722] 2 P. Wms., 66, 1 Ames, 339.

¹² *Per* Lord Alvanley, *Milward v. Earl Thanet* [1801] 5 Ves., 720 n.

Compensation.

changed by reason of the delay that the object of the parties can be no longer accomplished; and he who is injured by the failure of the other contracting party cannot be placed in the situation in which he would have stood had the contract been performed.¹ But where there is nothing special in the object, subject-matter or terms of the contract, and where the delay is satisfactorily accounted for,² substantial, and not literal, performance as to time may be deemed enough.³ A contract cannot be deemed to be discharged because the promisor makes default in complying with one of its essential terms within the time stipulated by him.⁴ Where time admits of compensation, it cannot be said to be an essential part of the agreement.⁵ Lapse of time in payment of the purchase-money by the vendee may generally be recompensed with interest and costs,⁶ and it is upon this ground and because it would be a very great hardship on the plaintiff to lose all the money which he has paid, that equity ordinarily relieves against forfeiture.⁷ In many contracts for sale, a stipulation may be found to the effect that the purchaser should forfeit all right to enforce the contract and also all payments till then made, in the event of failure to comply with certain terms of the agreement (notably as to time.) In such cases

¹ *Brashier v. Gratz*, 6 Wheat, 533 (Marshall, C. J.); *Coslake v. Till*, [1826] Russ., 376.

² *Heckard v. Sayre* [1874] 34 Ill., 142, 1 Ames, 340 ("If courts were to allow a vendee to neglect to make his payments at the stipulated times, where he is not hindered or prevented from so doing by fraud, accident, or mistake, the consequences of his negligence would be visited upon his vendor. Justice does not require relief from the result of one's own negligence." *Per Beckwith, J.*)

³ *Hosmer v. Wyoming Ry. & Iron Co.*, 129 Fed. R., 883; *Taylor v. Longworth*, 14 Peters, 172; *Pomeroy, S. P.*, 459 n. Cf. *Seaton v. Mapp*, supra, where Knight Bruce, V. C., repelled "the plaintiff's position that the purchaser shall be held by a cable, and the vendor by a skein of silk," and ruled that, where time was of the essence in respect of some conditions in the vendor's favour, it was so also in respect of others against him.

⁴ *Haradhan v. Bharabali* [1914] 19

C. L. J., 420 (sale was to be completed within 3 months, but vendor did not satisfy purchaser about title, and afterwards sold to a third party).

⁵ *De Camp v. Feay*, 5 S. & R., 323; *Pomeroy, S. P.*, 456 n.

⁶ *Vernon v. Stephens*, supra. But this recompense is to be distinguished from the compensation or abatement, for which ss. 14 and 15, S. R. A., provide in the event of deficiency or defect in the subject-matter of the contract. Cf. *per Walworth, C.*, "Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate," *Wells v. Smith* [1837] 7 Page, 22, 2 Keener, 1084.

⁷ *In re Dagenbaum* [1873] 8 Ch., 1022; *Harris v. Greenleaf*, 25 Ky. L. R., 1940; *Edgerton v. Peckham*, 11 Paige, Ch., 351.

equity assumes that the real intention of the parties was only to create a security for the purpose of enforcing the contract, and relieves "against the penalty of a forfeiture upon the ground of full compensation by giving interest."¹ But where the default is intentional and continued, one cannot ask equity to relieve him against his own wrong,²—no equity can arise out of one's own neglect,³—and a condition for forfeiture of what the buyer has paid "as a deposit" may even be deemed to be a reasonable guarantee that he means business.⁴ In the absence of an express stipulation to the contrary, a deposit is in the nature of an earnest or guarantee for the fulfilment of the contract.

"The notion that seems too much to prevail," said Kent, C., "that a party may be utterly regardless of his stipulated payments, and that a Court of Chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contract, and to the character of this court." This learned judge pointed out that a distinction was to be made between a case of a sale and that of a mortgage. In the latter case, the only object of the security is the payment of the money, and not the transfer of the estate. Where there is such transfer, however, the purchaser cannot be suffered to lie by and speculate, for instance, on the rise of the estate.⁵

Sale and mortgage.

Time may be made essential by notice,⁶ but such notice ought to fix the longest time that could be reasonably required for the performance of the acts which remained to

Notice.

¹ *Davis v. Thomas* [1881] 1 Russ. & My., 506. *Pomeroy, S. P.*, s. 379. Some American jurisdictions, however, apply a stricter rule, 2 *Pomeroy, Eq. R.*, 1342. *E.g.*, the New Jersey Court has said, "But such contracts will be enforced... unless it can be shown that thereby some hardship or wrong not within the presumed contemplation of the parties at the time will result." *Grigg v. Landis*, 21 N. J. Eq., 494, 503. *Grey v. Tubbes*, 43 Calif., 359. *Yacoma Water Supply Co. v. Dumermuth* [1909] 99 Pac. 741. Cf. 20 M. L. J. R. 230 (*Natesa v. Appavu* (1910)).

² *Howe v. Smith* [1883] 22 Ch. D 89, 98.

³ *Lloyd v. Collett* [1793] 4 Bro. Ch., 469.

⁴ *Soper v. Arnold* [1889] 14 A. C., 429. *Hall v. Burnell* [1911] 2 Ch. 551.

⁵ *Benedict v. Lynch* [1815] 1 Johns. Ch., 370, 2 Keener, 1074.

⁶ *Beuson v. Lamb* [1846] 9 Beav., 502, 507. But this right can be exercised only when unreasonable delay or default has been made. *Fry, s. 1092. Parkin v. Thorold*, supra. *Taylor v. Brown* [1839] 2 Beav., 180; *Mahomed v. Wilkie* [1907] 11 C. W. N., 946, P. C.

Waiver.

be done.¹ So a condition making time of the essence of the contract may be waived by the defendant, as, *e.g.*, when he acquiesces in performance after time.² In such case, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.³

(4) Rescission.

4. A contract may also be discharged, before breach, by rescission in the exercise of an express power reserved in that behalf to either party in the agreement, or by a condition of defeasance which is fulfilled.⁴ *E.g.*, the vendor in a contract of sale may stipulate that he will be entitled to rescind if the purchaser insist on an objection or requisition he cannot or cares not to comply with;⁵ and so may the purchaser, in the event, say, of the vendor failing to construct buildings within a specified time.⁶ But it will be necessary for me to consider the topic of rescission of contracts at some length in a subsequent lecture.

Impossibility of performance.

A contract may also be discharged, as I have said, for impossibility of performance.⁷ English and American courts seem disposed to treat the question raised by this plea as one of construction, and enquire into the intention of the parties.⁸ But the Indian legislature has promulgated certain positive rules of law on the subject, and Indian courts in dealing with such a defence must bear section 56 of the Indian Contract Act in mind. I quote the first two paragraphs of this section :—

I. C. A., s. 56.

“An agreement to do an act impossible in itself is void.

¹ *Crawford v. Toogood* [1880] 13 Ch. D., 143, 158 (five weeks were considered too short in this case). *Webb v. Hughes* [1870] 10 Eq., 281, 2 Keener, 1101.

² *Hipwell v. Knight* [1835] 1 Y. & C. Ex., 401; *Hudson v. Bartram* [1818] 3 Madd., 440; *Webb v Hughes* [1870] 10 Eq., 281.

³ I.C.A., s. 55, para 3.

⁴ *Head v. Tattersall* [1871] 7 Ex., 7, 6 R. C., 566.

⁵ *Falkner v. Equitable Reversionary Soc.* [1858] 4 Drew., 352; 1 Davidson, *Prec. Conv.*, 564; 1 Williams, *V. & P.*, 54, 147.

⁶ *Whitbread & Co. v. Watt* [1902] 1 Ch., 835.

⁷ “This form of discharge,” suggests C. Williams, “is perhaps no more than a species of discharge by mutual assent on failure of a condition subsequent, it is the impossibility not so much of performing the contract as of fulfilling the condition on which alone it was to be carried out, that is the ground of release.” 2 *V. & P.*, 916-7. Cf. Benjamin, *Sale*, 569, sqq.

⁸ Pollock, *Con.* (W. W.), 519. Cf. *Goculdas Madhavji v. Narsu Yankuji* [1889] 13 Bom., 630. 3 Paige, *Con.*, s 1363, p. 2114.

"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."¹

The first paragraph may be easily disposed of. An "act impossible in itself" means one which the very nature of things does not permit the performance of.² *E.g.*, if I undertook to walk from the earth to the moon, I simply could not do it, and the agreement creates no liability.³

"Impossible in itself."

The second paragraph marks a departure from the doctrine of *Paradine v. Jane*⁴ that a contract, which refers to no conditions, generally imports an unqualified undertaking. A contract in India is apparently conditional upon possibility of performance.⁵ This possibility may be destroyed by (i) reason of a rule of law, which, in view of altered circumstances or owing to a statutory modification, may make the performance of what has been contracted illegal. Where A contracts, *e.g.*, to take in cargo for B at a foreign port, but, before the contract can be performed, A's Government declares war against the country in which the port is situated, the contract becomes void.⁶

Departure from English law.

In India contract conditional upon possibility of performance
(i) Contrary law.

(ii) Or, the possibility may be displaced by reason of the destruction of the subject-matter of the contract or the failure of what was regarded by both contracting parties as its foundation. Where the contract relates to the use, or possession, or any dealing with a specific thing, whose existence is necessary to the performance of the undertaking, the perishing or destruction of that thing, without default in the party, is held, even under the Common Law, to excuse the performance, because,

(ii) Subject matter destroyed.

¹ I have already dealt with the case of supervening illegality, *ante*, 138.

² Just., Inst., III, xxix, 11.

³ There is no *animus contrahendi*, Pollock, *Con.* (W.W.), 520. Cf. Arnold, *Psych. Leg. Ev.*, 240-2.

⁴ [1648] Aleyn. 26. *Turner v Goldsmith* [1891] 1 Q. B., 544, *Ashmore v. Cox*, [1899] 1 Q. B., 436, furnish later instances. See also *School Dt. v. Dauchy*, 68, Am. Dec., 371. Cf. Pollock, *Con.* (W. W.), 527, sqq; Lawson, *Con.*,

ss. 440-2.

⁵ "S. 56 evidently refers to a case, in which the performance of a contract becomes impossible otherwise than by reason of the default of the promisor," *Ganga Dei v. Asuram* [1907] 4 A. L. J. R., 778, 780.

⁶ I. C. A., s. 56, ill.(d). Cf. *Esposito v. Bowden* [1857] 7 El. & Bl., 763; *Baily v. De Crespigny* [1869] 4 Q. B., 180. *Distinguish Bombay & Persia Steam Nav. Co. Ltd. v. Rubattino Co. Ltd.* [1889] 14 Bom., 147.

*Taylor v.
Caldwell.*

from the nature of the contract, it is apparent that both parties contracted on the basis of its continued existence.¹ The leading English case on the point is *Taylor v. Caldwell*.² There the defendants had agreed to let certain gardens and a music-hall to the plaintiffs on four specified days to come, for the purpose of giving a series of concerts, at and for a specified rent for each of the said days. The defendants were to provide a band of music and certain specified entertainments, and to issue advertisements of the entertainments. The plaintiffs were to pay £100 in the evening of each of the said days, to receive and take all the money paid by persons entering the gardens, and to provide the necessary *artistes* for the entertainments. After the agreement was entered into, and before the day arrived for the first concert, the music-hall was accidentally destroyed by fire. Blackburn, J., delivering the judgment of the court, said, "We find that the parties contracted on the basis of the continued existence of the music-hall at the time when the concerts were to be given, that being essential to their performance. We think, therefore, that the music-hall having ceased to exist, without fault of either party, both parties are excused; the plaintiffs from taking the garden and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things."³ An Indian illustration may be found in the case of *Inder Pershad v. Campbell*.⁴ Here a sub-tenant of certain lands had agreed to cultivate indigo there for a specified period, but during the continuance of the agreement, his immediate landlord having failed to pay rent, he was ejected. The Calcutta High Court held that performance was excused by the ejectment, and it

¹ Lawson, *Con.*, s. 445, p. 510. As to the civil law, see Pothier, *Oblig.*, pt., 3, ch. 6.

² [1863] 32 L. J. Q. B., 164, 6 R. C., 603.

³ "The principle seems to us to be," said the learned judge, "that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance." See also

Howell v. Coupland [1876] 1 Q. B. D., 258; *Appleby v. Myers* [1876] 2 C. P., 651; *Nickoll v. Ashton* [1901] 2 K. B., 126. Cf. T. P. A., s. 108 (c), "If by fire, tempest or flood or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void."

⁴ [1881] 7 Cal., 474.

did not matter that the sub-tenant might have paid up the rent and thus averted dispossession. The judgment is perhaps not quite satisfactory, but the actual decision seems to be within the letter of the section.

A good illustration of the case, where the foundation of the contract failing, the parties are discharged, is afforded by the facts of *Krell v. Henry*.¹ It will be remembered that the coronation procession of our King-Emperor was to have passed through London on June 26 and 27, 1902, but owing to His Majesty's illness no such procession took place. Henry had agreed to hire the use of one of Krell's rooms, with the object of witnessing the intended procession, and paid some money, but subsequently refused to pay the balance of the rent. The Court of Appeal held that Krell was not entitled to recover this, since the taking place of the procession was the foundation of the contract in the view of both the parties.²

Krell v. Henry.

(iii) Lastly, where the contract is for personal services, possibility of performance may be destroyed by death, sickness or misadventure of the promisor.³ Where, *e.g.*, a player contracts to act at a theatre for six months, in consideration of a sum paid in advance, and then falls ill, performance is excused during the period of his illness.⁴

(iii) Performer sick or dead.

The above considerations make it clear that where there is a contract for the conveyance of an estate, and, say, by an accident no estate is left, there can be no conveyance.⁵ Where

Summary.

¹ [1903] 2 K. B., 74. Distinguish *Elliott v. Crutchley* [1904] 1 K. B., 565.

² This case may also be regarded as an illustration of a contingent contract, where the contingent event becomes impossible. Pollock, *J. C. A.*, 3rd, ed. 205

³ Cf. *per* Pollock, *C. B.*: "All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them. A contract by an author to write a book, or by a painter to paint a picture, within a reasonable time, would in my judgment be deemed subject to the condition that if the author became insane, or the painter

paralytic, and so incapable of performing the contract, by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." *Hall v. Wright* [1858] E. B. & E., 746, 793. 3 Paige, *Con.*, pp. 2116, sqq.

⁴ *I. C. A.*, s. 56, ill. (e). Cf. *Robinson v. Davison* [1871] 6 Ex., 269.

⁵ *White v. Nutt* [1702] 1 P. Wms., 61, 1 Ames, 227. *Gould v. Murch* [1879] 70 Me., 288, 2 Keener, 426. *Per* Gray, J., "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to

there is an agreement for the sale and purchase of goods and chattels, and after the agreement but before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction.¹ And no reason can be given why the same principle should not be applied to real estate.²

Equitable
conversion.

But acting upon the maxim that equity looks upon that as done which is agreed to be done, Chancery Courts in England have introduced a fiction making an agreement to purchase equivalent to an actual purchase.³ In contemplation of equity, therefore, what we should call a contract *for* sale does not practically differ in its effects from a contract *of* sale.⁴ And, according to the doctrine of equitable conversion, "if a contract of purchase is to be completed at a given period, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor."⁵ In a case, accordingly, where the intending purchaser had declared himself satisfied with the title, but the deeds were not ready for

pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money.¹ *Wells v. Culnan*, 107 Mass., 514. *Goldman v. Rosanberg* [1889] 116 N. Y., 78, 2 Keener, 431. But see *Kenney v. Wexham* [1822] 6 Madd., 355, 2 Keener, 80.

¹ *Turling v. Baxter* [1827] 9 Dow. & Ry., 276; *Hinde v. Whitehouse* [1806] 7 East, 558; *Rugg v. Minett* [1809] 11 East, 210; *Sweeting v. Turner* [1872] 7 Q. B., 310, 313. *Benjamin, Sale*, 402. Cf. 1 C. A., s. 86, ill. (b); *Shoshi Mohun v. Nobo Krishto* [1878] 4 Cal., 801.

² *Thompson v. Gould* [1838] 20 Pickering, 134, 1 Ames, 235. 2 Kent, Com., 367.

³ *Thompson v. Gould*, *supra*; *Hughes v. Morris* [1852] 2 DeG. M. & G., 349, 353.

⁴ *White v. Nutt*, *supra* ("In equity, the estate is as conveyed from the time of the articles sealed."); *Seton v. Slade* [1802] 7 Ves., 265, 274. (*Per*

Lord Eldon, "The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee.") *Attorney-General v. Brunning* [1860] 8 H. L. C., 243.

⁵ *Harford v. Purrier* [1816] 1 Madd., 534, 538. From the date of the contract the purchaser is in equity the owner of the property sold, though not absolutely, but subject to the condition that the contract be specifically enforceable. *Broome v. Monck* [1805] 10 Ves., 597; *Lysaght v. Edwards*, [1876] 2 Ch. D., 499, 2 Keener, 360. *Sugden, V. & P.*, 191-3; 1 *Williams, V. & P.*, 439-440. But see *Langdell, Eq. Jur.*, 63-5, who points out that when performance of a contract is enforced in equity, the performance may relate back to the time fixed by the contract for its performance, but not to the time of making the contract.

execution, and the houses contracted to be sold were burnt down without any fault of the vendor, who thereupon sued for specific performance, Lord Eldon remarked, "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for, if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir."¹ The doctrine consequently is well settled in England that where the title in equity has passed, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains; subsequent events can neither determine the contract nor give either party a right to resist its performance.² A contract to sell for an annuity has been held not to be avoided by the death of the annuitant, even before any payment,³ nor a contract to purchase shares in a company by its failure or winding-up before transfer of the shares.⁴

But, as Dean Langdell, who has examined the whole doctrine of equitable conversion with great ability,⁵ has pointed out, this doctrine has "nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any

Doctrine examined.

¹ *Paine v. Meller* [1801] 6 Ves., 349, 1 Ames, 228; *Robertson v. Skelton* [1849] 12 Beav., 260, 50 E. R., 1061; *Brewer v. Herbert* [1869] 30 Md., 301, 2 Keener, 421. Distinguish *Ex parte Minor* [1855] 11 Ves., 559, 2 Keener, 420. Cf. S.R.A., s. 13, ill. (a); *Eppstein v. Kuhn* [1906] 10 L. R. A., N. S., 117. See article by Prof. Keener, 1 Columbia Law Rev., 1. Prof. Williston has forcibly argued that the loss in such cases should be borne by the party in possession, 9 Harv. L. R., 106.

² Per Lord Manners, *Revell v. Hussey* [1813] 2 Ball & Beat., 280, 287, 12 R.R., 87; Fry, s. 914. Two exceptions seem to have been recognised: (1) if the loss is due to the vendor's negligence, he must answer for it; (2) if vendor

agrees expressly to deliver possession of the premises in the same condition in which they are at the time of the bargain, he must bear the loss resulting from fire or other accident. *Marks v. Tichenor* [1887] 85 Ky., 536, See 2 Keener, 430. 1 Ames, 229 n. Cf. 1 Williams, V. & P., 441 n.; *Counter v. Macpherson* [1845] 5 Moo. P. C., 83, 2 Keener, 412.

³ *Mortimer v. Capper* [1782] 1 Bro. Ch., 156. But see *Pope v. Roots* [1774] 1 Bro. P. C., 370. Cf. also S.R.A., s. 13, ill. (b).

⁴ *Paine v. Hutchinson* [1867] 3 Eq., 257, 3 Ch., 388.

⁵ *Harv. L. Rev.*, Vols. XVIII and XIX.

right, nor is subject to any duty. In a word, it is not the contract *qua* contract that effects the equitable conversion, but the contract as expressing the intention of one of the parties to it, in reference to a matter within his exclusive control.”¹ “An agreement to convey,” to quote the same authority, “is very far from being, in equity, an actual conveyance. It is only by specific performance that equity ever converts an agreement to convey into an actual conveyance. By specific performance, however, equity converts an agreement to convey into an actual conveyance, at law as well as in equity. How, then, can specific performance impart to an agreement to convey any further effect or operation in equity than it has at law? Only by making the performance of it relate back. Even, therefore, if equity made every performance (whether compulsory or voluntary) of an agreement to convey relate back to the date of the agreement, it would by no means follow that an agreement to convey would, in equity, be an actual conveyance. The operation of such an agreement in equity would still be wholly dependent upon its operation at law, *i.e.*, it could never operate in equity unless and until it operated at law. Since, then, it is only such conveyances as are actually enforced in equity that relate back, and since, of all conveyances that are made (even of land), not one in a million is enforced in equity, the statement that an agreement to convey is in equity an actual conveyance seems extraordinary.”²

Maitland has also taken pains to point out that the mere agreement for sale does not transfer the *dominium* or ownership, it passes an equitable estate which is not a bare chose in action but which is essentially different from the *jus in re*, and is altogether unavailing against a subsequent *bond fide* purchaser for value.³

Indian law.

It is not necessary for me to pursue this controversy further. In India, as we know, the administration of justice does not suffer by reason of any unnatural divorce between law and equity. The Transfer of Property Act declares—“A contract for the sale of immoveable property is a contract that a sale of

T. P. A., ss.
54, 55.

¹ *Eq. J.*, 65.

² *Langdell, Eq. J.*, 63 n.

³ Maitland, *Eq.*, 250-2.

such property shall take place on terms settled between the parties. *It does not, of itself, create any interest in or charge on such property.*"¹ It further enacts: "The buyer is bound, where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller."² A reference to section 86 of the Contract Act—"When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury"—makes it clear that the Indian law does not recognise any distinction between real and personal property in respect of this matter.³ In the case of immoveable property, no doubt, here, as in England,⁴ a conveyance distinct from the contract is always required. We begin with negotiations, which result in an agreement, but there is no transfer of property till there has been delivery of possession, in the event of the property being of small value, or the execution and registration of a deed in writing.⁵ Before conveyance, the property belongs to the vendor; it is only after conveyance that the title to the estate passes to the purchaser. The maxim of law is *res perit domino*.⁶ Depreciation in value must be borne by the owner for the time being,⁷ and appreciation in value must enure to his benefit.⁸

I. C. A., s. 86.

Res perit domino.

S.R.A., s. 13.

It has, however, been suggested that section 13, Specific Relief Act, lays down the law differently.⁹ Let us examine this section. It runs thus:-

"Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance."

This section is framed as an exception to section 56 of the Contract Act,¹⁰ and its obvious meaning seems to be that

Effect of supervening partial impossibility.

¹ T. P. A., s. 54.

² T. P. A. s. 55, subs. 5, cl. (c).

³ See esp. ill. (b), I. C. A., s. 86.

⁴ Williams, *Pers. Prop.*, 65, 71.

⁵ T. P. A., s. 54.

⁶ Institutes, 1 iii, tit. 24, s. 3; Pothier, *Cont. de Vente*, pt. iv. *Martineau v. Kitching* [1872] 7 Q. B., 453, 454.

⁷ Cf. *Poole v. Shergold* [1786] 1 Cox.,

273.

⁸ T. P. A., s. 55, subs. 6, cl. (a). Cf. *Ex parte Manning*, [1727] 2 P. Wms., 410; *Monro v. Taylor* [1850] 8 Hare, 51, 60, affd. 3 M. & G., 713.

⁹ Gour, T. P. A., 518; Mitra, S.R.A., 155-6.

¹⁰ Nelson, S.R.A., 133. His 'summary of the doctrine of s. 13' is, however, different: "Because A, owing to

supervening impossibility, where it affects only a part of a contract, will not discharge the whole contract. To take a simple illustration, suppose there is a contract for the sale of some land and a house,—a valid and possible contract at its inception,—to be performed at some future time. Before the date fixed for performance arrives, suppose the house is destroyed by fire. It becomes impossible, therefore, for the vendor to convey the entire property he originally agreed to sell, and the purchaser cannot have all that he agreed to purchase. But the contract *as a whole* has not become impossible of performance, and is therefore not altogether void ; and all that section 13 enacts is that, in a proper case, there may be specific performance of the portion which it is still possible for the parties to perform.¹ There is nothing in this which conflicts in any way with section 54 of the Transfer of Property Act. Section 13, Specific Relief Act, must be read along with the following sections ; and when a case under it arises, the principles relating to partial performance of contracts, which I have already discussed,² will have to be applied.

S.R.A., s. 13
illustrations.

The illustrations to section 13, however, are not so easily disposed of. Illustration (a) is framed upon the English case of *Paine v. Meller*,³ and illustration (b) upon that of *Mortimer v. Copper*.⁴ Now, as to illustrations in Indian Acts, it has been said that they are decisions by the legislature, settling points which, without them, would have been left to be determined by the judges.⁵ But where the words of the enactment are clear, illustrations cannot be held to restrict or alter them ; it is the section which governs, and not the illustrations.⁶ The illustrations to section 13 do not seem to me to be in harmony with the section. In both cases, it appears that, at the time of

a special inevitable accident, is unable to perform his promise, it is no reason why B should not perform his, especially as he might have protected himself by making the performance of his promise, conditional upon performance by A. Having made an unqualified promise, by it he must stand." (p. 135).

¹ Cf. Schuster, *German Civil Law*, 169.

² *Ante*, 215 sqq. *Eppstein v. Kuhn* [1906] 10. L.R.A., N.S., 117.

³ [1801] 6 Ves., 349.

⁴ [1782] 1 Bro. C. C., 156.

⁵ Collett, 10 n. *Charlesworth v. MacDonald* [1898] 23 Bom., 103, 112.

⁶ 1 Blackstone, *Com.*, 183 ; *Nanak v. Mehin* [1877] 1 All., 487, 495 ; *Koylash v. Sonatun* [1881] 7 Cal., 132 ; *Govinda Pillai v. Thayammal* [1904] 28 Mad., 57, 61.

the performance, the entire subject-matter of the contract, *viz.*, the house in illustration (a) and the life in illustration (b), had ceased to exist; the contract therefore became wholly impossible of performance. However this may be, it is clear, that when illustration (a) was framed there was an idea that the doctrine of *Paine v. Meller*¹ and *Hughes v. Morris*,² was not inapplicable to India. Since then, the Transfer of Property Act has been enacted, and I apprehend that no section of or illustration in the Specific Relief Act should now be so interpreted as to be out of harmony with the remainder of the Indian statute-book. As I have said before, there is no ground for limiting specific relief to executory contracts.³ A frequent case in practice is where a conveyance relating to immoveable property has been properly executed and registered, but possession has not yet been delivered, or the purchase-money in whole or in part has yet to be paid. In such a case, if after the execution of the deed, the premises sold were devastated by fire, tempest, earthquake or flood, the contract could not be avoided. That is how I would apply illustration (a) to section 13 of the Specific Relief Act.

Where the contract is not absolute and unconditional, even Western courts will not probably take a different view. In the case of *Counter v. Macpherson*,⁴ the Privy Council had to consider an agreement for a lease for five years, where the landlord had undertaken to erect by a certain date a new warehouse, on part of the ground to be demised, and to put the old warehouse in repair, and the amount of the rent was to be determined with reference to the amount of the landlord's expenditure on the buildings. The whole premises were subsequently destroyed by fire. The Judicial Committee held that it was a condition precedent that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the warehouse had not become the property of the lessees, and the contract could not be enforced in equity.⁵ So, where the plaintiff had contracted

Contract
conditional
and not
absolute.

¹ [1801] 6 Ves., 349.

² [1782] 2 DeG. M. & G., 349, 355.

³ *Ante*, 22.

⁴ [1845] 5 M. P. C., 83.

⁵ *Ibid*, 105. Langdell, *Eq. J.*, 60 n.

to sell, and the defendant to buy a leasehold interest in land to commence in the future, but, before this future date arrived, an ocean storm washed away a part of the land, an American court refused to decree specific performance.¹

Contingen-
cy.

Where the contract is in respect of a contingency, neither party can complain if the contingency turns out unfavourably to him, and the equities may be somewhat different.² Where, again, there is a unilateral agreement to convey property, the vendee having already paid the price, the vendor may even be treated as trustee for the purchaser, and a suit to compel the performance of such an agreement partakes more of the nature of an action by a *cestui que trust* against a trustee than of one for specific performance of a contract.³

Trust.

Benefit of
fire insur-
ance.

I must here notice a corollary of the English equitable doctrine just considered. Where, subsequently to the contract for the sale of a house it is burnt down, not only must the purchaser bear the loss, but, in the absence of any provision in the contract, he will not be entitled to the benefit of an existing insurance against fire effected by the vendor.⁴ The reason given is that the contract of insurance is a collateral contract, which cannot be considered to be appurtenant to or necessarily connected with the use and enjoyment of the property agreed to be sold.⁵ It may be doubted, however, if this conclusion is in harmony with the doctrine of equitable conversion which regards the relation between the vendor and the purchaser from the date of the contract up to the completion of it as that of trustee and *cestui que trust*,⁶ and it is certainly not founded on what James, L. J., called "the natural equity which commends itself to the general sense of the lay world not instructed in legal principles."⁷ That learned judge, in a forcible dissenting judgment, said,

¹ *Huquelin v. Courtenay*, 53 Am. Rep., 688. Distinguish *Whitlock v. Ashburn Lumber Co.* [1907] 12 L. R. A., N. S., 1214

² Cf. *per* Leach, V. C., *Kenny v. Wexham* [1822] 6 Madd., 355.

³ *Langdell, Eq. J.*, 64.

⁴ *Poole v. Adams* [1864] 33 L. J., Ch., 639; *Rayner v. Preston* [1881] 18 Ch. D., 11, Ames, 280, affg., 14 Ch. D., 297. Cf. *Castellain v. Preston* [1883] 11

Q. B. D., 380, 2 Keener, 427.

⁵ *Per* Cotton, L. J., *Rayner v. Preston*, *supra*.

⁶ *Lysaght v. Edwards*, [1876] 2 Ch. D., 499, 2 Keener, 360, is the great case upon this point. Cf. *Shaw v. Foster* [1871] 5 H. L., 321; *Clarke v. Ramuz* [1891] 2 Q. B., 456, 1 Ames, 222.

⁷ *Rayner v. Preston*, *supra*, 1 Ames, 231.

"I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner....The policy of fire insurance is not, in my opinion, a collateral contract, it is not a wagering contract, a contract that, if a fire happens, then a certain sum of money shall be paid to the insured; it is in terms and in effect a contract that, if the property is injured, then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership and in respect solely of the injury done to that legal ownership that the right to recover from the insurance company accrued to the insured."¹ His Lordship's conclusion that the purchaser could recover the insurance money from the vendor, has been approved in America and adopted in India. Section 49 of the Transfer of Property Act³ lays down:

T. P. A., s.
49.

"Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property."

So, in respect of the corollary of the rule, too, the English and the Indian laws do not seem to be identical.⁴

Bankruptcy or insolvency of the promisor also discharges a contract under the Common Law,⁵ and the Insolvent Debtors Act,⁶ which is applicable in the Presidency towns, supports a similar doctrine. But in England it has been held that, notwithstanding bankruptcy, the equitable liability to perform a

Insolvency.

¹ Ibid, 252.

² 2 Pomeroy, *Eq. lt.*, s. 860, p. 1391;

¹ Ames, 234, n. 1.

³ The section, which is rather loosely worded, seems to have been settled in the Bill of 1879.

⁴ Cf. Schuster, *German Civil Law*, 169.

⁵ Stat., 46 & 47 Vict. c., 52, s. 56, also ss. 30, 37; Stat. 53 and 54 Vict. c., 71, s. 3 (12).

⁶ Stat. 11 & 12 Vict., C. 21.

contract specifically remains unimpaired,¹ and the Madras High Court, accordingly, holds that on insolvency the legal estate vests in the official assignee subject to the equities of third parties, and the proper person to execute a deed, in pursuance of a decree for specific performance against the insolvent, is the official assignee.²

(e) *Denial of the Breach.*

(e) No
breach.

The last legal defence to an action for damages for breach of contract is a plea disputing the facts alleged to constitute the breach. This plea, however, does not displace the court's jurisdiction to decree specific performance,³ it affects only the question of damages.⁴ In a contract of sale, *e.g.*, the vendee has the right, immediately upon the execution and delivery of the contract, to apply to the court of equity for a specific performance, and the only consequence of such immediate application will be to charge him with costs; but the relief cannot be denied him, merely because the suit may be ill advised, hasty, and unnecessary.⁵ As Allen, J., explained, "the distinction between an action for a specific performance in equity and a suit at law for damages for non-performance, is this, that in the latter the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not a breach of it, gives the action."⁶

Equitable Defences.

Equitable
defences.

I have now disposed of the various pleas that would be considered equally relevant and equally good, whether raised in an action for damages or in one for specific relief. But, as we have seen, "an action for a specific performance is an appeal

¹ *Pearce v. Bastable's Trustee* [1901] 2 Ch., 122; *Re Reis* [1904] 2 K. B., 769. Cf. *Bailey v. Thurston* [1903] 1 K. B., 137. The Provincial Insolvency Act (III of 1907) throws but little light on the subject; see esp. ss. 16, 20. Cf. Williams, *Bankruptcy*, 205 sqq.

² *Purushotam v. Ponnurungam* [1913] M.W.N., 897.

³ 2 Williams, *V. & P.*, 991; also 987, "A breach of the contract is not neces-

sarily a condition precedent to obtaining this relief, though it is usually requisite to induce the court to interfere." But see 3 Paige, *Con.*, s. 1614, p. 2448.

⁴ *Bass v. Olivley* [1829] Taml., 80, 48 E. R., 33.

⁵ *Bruce v. Tilson* [1862] 25 N. Y., 194, 1 Ames, 348.

⁶ *Ibid.*, 1 Ames, 347.

to the equitable jurisdiction of the court,—the relief is matter not of absolute right in the party, but of sound discretion in the court; and to sustain such an action, the granting of such relief must appear to be entirely equitable. The court will never compel a performance specifically when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be done.”¹ As another American judge put it in language at once happy and forcible, “Such an application is addressed to the sound discretion of the court. Not every party, who would be entitled as of right to damages for the breach of a contract, is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud, and enforceable at law, but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason cause a result, harsh, inequitable, or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity, and can obtain only equity.”² We, accordingly, find there are several peculiar pleas that may be raised in answer to a suit for specific performance of a contract which are taken into consideration by courts purporting to act according to the dictates of justice, equity and good conscience, but which cannot avail a defendant when sued for compensation for a breach of contract. I now proceed to examine these equitable pleas. But it is necessary to premise that whatever the reason may be which induces a court to refuse specific relief, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. “We have never found a case,” remarked Gilfillan, C. J., “where the court refused the relief as a means of enforcing some

¹ *Per Strong, J., Clarke v. Rochester R. R. Co.* [1854] 18 Barb, 350, 1 Ames, 411.

² *Per Emery, J., Mansfield v. Sherman* [1889] 81 Maine, 365, 1 Ames, 385. *Per Knowlton, J., “Courts of*

equity will grant relief only when the plaintiff asks for that which, in equity and good conscience, ought to be granted.” Chute v. Quincy [1892] 156 Mass., 189, 2 Keener, 1004.

independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it."¹

(a) *Uncertainty of the Contract.*

(a) Contract uncertain.

Speaking of contracts which a court of equity will enforce, "nothing is more established in this court," said Lord Hardwicke, "than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance."² And Lord Rosslyn ruled in a similar strain, "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined: secondly, they must be equal and fair; for this court, unless they are fair, will not execute them: and, thirdly, they must be proved in such manner as the law requires."

Certainty.

The first requirement, then, that a contract sought to be specifically enforced must satisfy, is certainty, definitude. As a matter of construction, words have the same meaning in equity and in law.⁴ But a contract may not be so absolutely uncertain as to be void within the meaning of section 29, Indian Contract Act, yet it may be such that its terms the court cannot find with reasonable certainty, owing either to imperfect specification or to vague description. In such case, there will be no specific performance,⁵ though breach will give rise to a right to sue for compensation. The reason is plain. In an action for damages, all you have got to show is that a contract has been broken;

¹ *Thompson v. Winter* [1839] 42, Minn., 121, 2 Keener, 1045.

² *Buxton v. Lister* [1746] 3 Atk., 386.

³ *Lord Walpole v. Lord Orford* [1797] 3 Ves., 402, 420.

⁴ *Tilley v. Thomas* [1867] 3 Ch., 61;

Terry & White's Contract [1886] 32 Ch. D., 20, 27.

⁵ S. R. A., s. 21, cl. (c). Cf. *Chunder Sikhar Mookerjee v. Collector of Midnapore* [1878] 1 C. L. R., 384. *Huse etc. Co. v. Heinze*, 102 Mo., 245; *Stanton v. Singleton*, 47 L. R. A., 334.

but when you ask a court to enforce it *in specie*, it is not enough to show that there is a contract; it has to be shown clearly what the exact nature and exact scope of that contract is, so that the court may be in a position to render a decree which can be carried into execution.¹ The plea of uncertainty must, however, be distinguished from one of incompleteness. "The element of *completeness* denotes that the contract embraces all the material terms; that of *certainty* denotes that each one of those terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may, indeed, embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language, that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect."²

Completeness.

An agreement which is not so definite in its terms or in its nature as to make it certain that better justice will be done by attempting to enforce it than by leaving the parties to their remedy in damages, is not one which the court will specifically perform.³ There may even be ground for doubting if both parties to it understood it alike.⁴ It may not be clear that the party defendant meant to contract to the extent that he is sought to be charged.⁵ The contract must be clear, definite and unequivocal, leaving no room for any reasonable doubt.⁶ But the certainty that is required need be only a reasonable one, having regard to the subject-matter of the agreement, its object, the situation of the parties and the circumstances under which, and with reference to which, the agreement was made, so that on a fair construction of its terms there can be no good reason to doubt what was intended.⁷ In the case of a contract for sale,

Reasonable certainty.

¹ Fry, s. 380; Waterman, s. 151.

² Pomeroy, S. P., s. 145.

³ Wilson v. Northampton & B. J. Ry. Co. [1874] 9 Ch., 279.

⁴ O'Brien v. Pentz, 48 Md., 562; Coles v. Bowne, 10 Paige, 526; Lawson, Con., 566-7. Where the court is unable from all the circumstances of a case, to say whether the minds of the parties met upon all the essential particulars, or if they did, then cannot say exactly upon what sub-

stantial terms they agreed, or trace out any practical line where their minds met, specific performance will be refused. Blouchard v. Detroit R. R. Co., 31 Mich., 44. Waterman, 199, 200.

⁵ Harnett v. Yielding [1805] 2 Sch. & L., 549, 554, 9 R. R., 98; Lehmann v. M'Arthur [1868] 3 Ch. 496.

⁶ McKee v. Higbee, 79 S. W., 407; 2 Poweroy, Eq. R., 1287, n. 9.

⁷ Marsh v. Milligan [1857] 3 Jur.

e.g., the parties, the price and the land or other subject-matter must be indicated with sufficient definiteness for identification or ascertainment. If I agree to convey "my house" and I happen to own three houses, the uncertainty as to the subject-matter will vitiate the contract.¹ But if I own only one house, there is no uncertainty.² In some cases, the thing may not admit of precise specification. In the case of undivided property, "the judgment-debtor's right to get by division or separation 150 *bighas* of land by measurement" has been held to be a description specific enough.³ And where a Mahomedan lady in her father's life-time purported by deed to relinquish "all her rights and claims to any property there may be on her father's death," the document was said to contain not only a sufficient, but the only, description that could be given of the property meant.⁴ And not only must the specific thing be identified,⁵ it must be defined. *E.g.*, a reservation in a contract for sale of an estate of "the necessary land for making a railway through the estate to Prince Town" has been held to make the contract uncertain.⁶ And a contract for the purchase of "the land required" for the construction of a railway at a specified rate per acre, which contained provisions about roads, etc., to be made according to the agreement between the land agents of the railway company and the vendors, was characterised by Knight Bruce, L. J., as "too vague, too uncertain, too obscure to enable this court to act with safety or propriety."⁷

Definition.

Time.

A contract which does not fix the time of performance and yet shows that a *definite* time was intended, and not a *reasonable* time, is too indefinite for specific enforcement.⁸

Consideration.

Similarly, where the consideration named in a contract for sale was that the purchaser should erect on the land "a certain

N. S. 979 (Wood, V. C.). *Gajkumar v. Lachman* [1911] 14 C. L. J., 627.

¹ *Farthing v. Rochette*, 43, S. E., 1; *Rampe v. Buchler*, 203 Ill., 384 ("lots in either section 8 or 9").

² Cf. *Deojit v. Pitambar* [1876] 1 All., 275; *Ogilvie v. Foljambe* [1817] 3 Mer., 53; *Waldron v. Jacob*, [1868] 54 Eq., 131.

³ *Rudra Perakash v. Krishna Mohan*

[1886] 14 Cal., 241.

⁴ *Abdool Hoosain v. Goolam Hoosain* [1905] 7 Bom. L. R., 742.

⁵ 2 Pomeroy, *Eq. R.*, 1290.

⁶ *Pearce v. Watts* [1875] 20 Eq., 492 (Jessel, M. R.).

⁷ *Stuart v. London & N. W. Ry. Co.* [1852] 15 Beav., 513.

⁸ *Oxford v. Crow* [1895] 3 Ch., 535 3 Paige, *Con.*, 2444.

building,"¹ or where a landlord agreed to renew a lease for as much as any one else would pay,² the contract was held objectionable for uncertainty. So an agreement "to lay out £ 1000 in building" on specified lands has been deemed to be too uncertain.³

So, where a person subscribed "fifty dollars and the lot to build on" to a subscription paper to build a church, but did not state the extent or boundaries of the lot, a bill for specific performance was dismissed.⁴

In a similar way, it has been held to be an insuperable difficulty in the way of maintaining a suit for the specific performance of a contract to convey or devise a house and lot, that it was doubtful who the parties were to whom the conveyance or devise was to be made.⁵ And where the owner of real estate promised, in a general way, to establish a right to pass over it, but made no specific contract with any person permitting him to do so, the courts refused to interfere.⁶

So, an agreement in general terms for the construction of a railway according to specifications to be prepared by the engineer of the company for the time being,⁷ a contract for the lease of a house, providing that it should be put in thorough repair and handsomely decorated according to the present style,⁸ and an agreement by the owner of a refreshment-room to give accommodation there for the sale of his goods to a vendor thereof, and to fit it up with the necessary appliances,⁹ are all contracts in which the plaintiff's remedy has been held to be compensation, and not specific performance.

But a court will endeavour to put a reasonable interpretation

¹ *Mastin v. Halley*, 61 Mo., 196. Cf. *Wilson v. Northampton & B. J. Ry. Co.* [1874] 9 Ch., 279 (agreement to build "station" without further description, or particulars).

² *Gleston v. Sigmund*, 27 Md., 334.

³ *Mosely v. Virgin*, [1796] 3 Ves., 184.

⁴ *Church of the Advent v. Farrow*, 7 Rich. Eq., 378 (bill filed after subscriber's death against his devisee).

⁵ *Shanton v. Miller*, 58 N. Y., 192.

⁶ *Hall v. McLeod*, 2 Mete. (Kentucky), 98. *Waterman*, s. 155, p. 205.

⁷ *South Wales Ry. Co. v. Wythes* [1854] 5 DeG. M. & G., 880.

⁸ *Taylor v. Portington* [1855] 7 DeG. M. & G., 328. Cf. S. R. A., s. 21, ill. (11) of cl. (b). *Rushbrook v. O' Sullivan* [1908] 1 Ir. R., 232. Distinguish *Jones v. Parker* [1895] 163 Mass., 564, and *Lawrence v. Saratoga Lake Ry. Co.* [1885] 36 Hun., 467 (agreement to build "neat and tasteful station building").

⁹ *Paris Chocolate Co. v. Crystal Palace Co.* [1855] 3 Sm. & Giff., 119; S. R. A., s. 21, ill. of cl. (c), the amount and nature of the accommodation and appliances are undefined.

Vague expressions to be reasonably interpreted.

upon vague expressions in an agreement.¹ Indefinite terms like "*etcætera*," "other works," "more or less" (in specifying area of land),² may be understood with sufficient certainty by reference to the words to which they are added and the surrounding facts of the case;³ and where general expressions are used, the details may be supplied by law.⁴ Where two railway companies agreed that one should have the use of the line of the other for running engines, carriages and trucks, and for carrying traffic, Parker, V. C., held that "a reasonable use" was meant,— "a use consistent with the proper enjoyment of the subject-matter, and with the rights of the granting party."⁵ And in a case where the rector of a glebe had contracted to grant a lease thereof, "except 37 acres" unspecified, Lord Romilly, M. R., repelled the objection of uncertainty, because the lessor could select the thirty-seven acres at any time before the execution of the lease.⁶ A general description of the subject-matter, *e.g.*, "the Bank End Estate," may suffice, though the agreement (of lease) may provide, as to parcels let—"the boundaries to be hereafter defined."⁷

Sale "at proper rate."

So, where land was sold "at a proper rate," but by reason of the extraordinary character of the land, which contained coal, and other valuable minerals, there was considerable difficulty in fixing a reasonable price, the Calcutta Court and the Privy

¹ *Saunderson v. Cockermouth & Worthington Ry. Co.* [1849] 11 Beav., 497 (contract to "make such roads, ways and slips for cattle as might be necessary." But in this case, there had been part performance) *Zerugue v. Texas & P. R. R.*, 34 Fde. Rep., 239 (stipulation "to build and keep in repair such bridges as may be necessary over the lands herein acquired").

² Cf. *Waterman*, s. 509; 4 Kent, Com., 466; *Noble v. Gookings*, 99 Mass., 231; *Stebbins v. Eddy*, 4 Mason, 414.

³ Fry, s. 382; *Cooper v. Hood* [1858] 26 Beav., 293; *Baumann v. James* [1868] 3 Ch., 508. Distinguish *Price v. Griffith* [1851] 1 DeG. M. & G., 80 (expld. *Hexter v. Pearce* [1900] 1 Ch., 341).

⁴ *South Wales Ry. Co. v. Wythes*, supra, 888.

⁵ *Great Northern Ry. Co. v. Manchester S. & L. Ry. Co.* [1851] 5 DeG. & Sm., 188, 149. Cf. *Ross v. Purse*, 17 Colo., 24 (contract to dig well, inference ordinary well intended).

⁶ *Jenkins v. Green* (No. 1), [1858] 27 Beav., 437 ("But the right of selection must be so exercised as not to interfere with the lessee's beneficial enjoyment of the lands included in the lease"). Lord Romilly was evidently disposed to take a liberal view of indefinite agreements. Sitting as court of first instance, he had sustained the plaintiff's bill in *Taylor v. Portington*, supra, as well as in *Stuart v. London & N. W. Ry. Co.*, supra.

⁷ *Haywood v. Cope* [1858] 25 Beav., 140. But cf. *Agnew v. Southern Ave. Land Co.*, 204 Pa. St., 752.

Council held that sufficient reason had not been made out for refusing specific relief.¹

And there are cases in which the court will go to a great extent in order to do justice between the parties when possession has been taken, and there is an uncertainty about the terms of the contract.² Where therefore a contract, originally uncertain, but not altogether void³ has been acted upon, and a user and course of dealing have existed between the parties which give it certainty, the court may not feel pressed by the difficulty.⁴ What was indefinite originally becomes definite by the subsequent conduct of the parties.⁵

Subsequent
conduct.

Lastly, where there is fraud, a court of equity is not inclined to listen to a plea of uncertainty. In *Chattock v. Muller*.⁶ a contract was proved whereby the defendant had agreed that if the plaintiff would not try to buy a certain estate, he (the defendant) would try and, in the event of success, would transfer a portion of the estate to the plaintiff at a certain price. The plaintiff desisted, and the defendant purchased the property but refused to let the former have any portion of it. In an action for specific performance the court directed an enquiry to ascertain the extent of the portion to be transferred and its price, and suggested that, if the said portion was not capable of ascertainment, the plaintiff might claim the whole estate.

Fraud.

(b) Unfairness in the Contract.

The second requirement that a contract sought to be enforced *in specie* must satisfy is fairness. This does not mean that a court of equity will go out of its way to see that the

(b) Contract
unfair.

¹ *New Birlbloom Coal., Co., v. Bularam Mahata* [1880] 5 Cal., 932, P. C. *Salamat v. Tulsi* [1914] 71 P. L. R.

² *Per Turner, L. J., East India Co. v. Nuthumbadao* [1851] 7 Moo. P. C., 482, 497.

³ *Waring v. Thompson* [1913] 29 T. L. R., 154 (Buckley, L. J., "Where a contract is complete in itself, in that a defined act is to be done upon reasonable terms, evidence is admissible as to what terms are reasonable, and the conduct of the parties may be the best evidence upon this point").

⁴ *Per Sir W. Erle*: "With respect

to the supposed vagueness of the memorandum of agreement, their Lordships propose to consider what is the true construction of that memorandum, having regard to the terms of the instrument and to the surrounding circumstances, and also in reference to the suit for specific performance, and to the conduct of the parties in the interval between the making of the agreement and the commencement of the suit," *Oxford v. Provaud* [1868] 2 P. C., 135.

⁵ *Cobban v. Hecklen*, 70 Pac., 805; *Rank v. Garvey*, 92 N. W., 1025.

⁶ [1878] 8 Ch. D., 177.

advantages to be secured to the several parties to the contract are reasonably equivalent, nor, that it requires from them conduct distinguished by a higher degree of good faith than the law ordinarily exacts from men in similar position.¹ But its object being to administer justice as completely as practicable, it has regard for considerations outside the strictly legal incidents of a contract. Therefore, be a contract ever so specific in its terms, specific relief will not be decreed unless it appears to accord with good conscience that it should be so decreed.² If injustice would result from such a decree, then the parties must be remitted to the ordinary remedy that law allows.³ A court of equity will, therefore, examine the terms of an agreement as also the parties' conduct in making the bargain, and if it finds either or both unfair or unreasonable, in the exercise of its discretion, it may refuse to interfere.⁴ The plaintiff may not have been guilty of actually improper or fraudulent conduct, and the agreement may be such as is under the law neither invalid nor voidable, but all the same it may be one-sided, unjust, unequal, unconscionable or inequitable.⁵ A less strong case than is requisite to obtain specific performance may yet be sufficient to defeat a suit for this remedy,⁶ and the plaintiff

¹ 2 Williams, V. & P., 997. This learned author, referring to recent decisions like *Turner v. Green* [1895] 2 Ch., 205, and *Greenhalgh v. Brindley* [1901] 2 Ch., 324, remarks, "In these respects it does not appear that a higher standard of conduct is required in equity than at law."

² *Freetly v. Barnhart*, 51 Pa., 279, 1 Ames, 409.

³ *Rennyson v. Rozell*, 106 Pa. 407, 1 Ames, 410.

⁴ Per Lord Langdale: "What is more or less reasonable is not a thing that you can define; it must depend on the circumstances of each particular case. The court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable,

by way of general rule, you may very well, in a particular case come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." *Wedgwood v. Adams*, [1843] 6 Beav., 600, 1 Ames, 401.

⁵ The equality required in contracts consists, according to Grotius, partly in acts, and partly in the subject-matter of the contract. As to the precedent acts, equality is required between the parties, both as to the knowledge of the thing, and the exercise of the will. As to the principal act, the equality required is, that more be not demanded than is just. As to the subject-matter, the equality is to be sought in the absence of all hidden defects in it, or mistakes as to it. *De Jure Belli ac pacis*, bk. II, Ch. 12, s. 3, sqq.

⁶ *Ante*, pp. 20, 83, 155 sqq.; 2 Story, *Eq.*, s. 769; 4 Pomeroy, *Eq. J.*, s. 1405, n. 5. Cf. *Vigers v. Pike* [1842] 8 Cl. & F., 562, 645.

will, in the event of breach, be left to content himself with a decree for damages.

In looking at a contract with reference to its fairness, regard must, first, be had to the subject-matter, terms and the manner in which it was executed as well as to the price as compared with the real value of the property, and, next, to the circumstances under which the contract was entered into, particularly the character of the parties and the relation they sustain towards each other.¹

Matters for consideration.

Take a case where parties contract in respect of a contingency, about a life-interest, for instance. Now, if both the parties are in equal possession of knowledge, or means of knowledge, or in equal ignorance, and they speculate on the chance of life as an uncertain event, about which each is in the same position to judge or guess, the agreement is perfectly fair, though in the end it may turn out profitable to the one and ruinous to the other.² But where one of the parties is aware of a special circumstance which makes the contingency no longer uncertain for him, and he does not communicate this information to the other party, he takes an unfair advantage against which a court of equity will relieve.³ A good illustration is afforded by the case of *Ellard v. Lord Llandaff*,⁴ which was decided about a century ago by the Irish Chancellor, Lord Manners. That was a bill for specific performance of a contract to grant a new lease for lives, a part of the consideration for which was the surrender of the old lease, which depended on the life of one Thomas Ellard. When the treaty for the lease commenced, this old tenant was not in a dangerous state of health, but when it was concluded in about a fortnight's time, he was *in extremis*, a fact which was known to his nephew, the plaintiff, but not to the lessor, the defendant. In dismissing the bill, the Lord Chancellor said, "This is too sharp a practice to be countenanced here. The plaintiff must not be allowed to deal on a lease, as a good and subsisting

Contract regarding contingency.

Ellard v. Llandaff.

¹ Waterman, s. 159; Pomeroy, S. P., ss. 179-83 *Gobinda v. Nanda* [1914] 18 C. W. N., 689.

² Cf. S. R. A., s. 18, ill. (b). *Mortimer v. Copper* [1782] 1 Bro. C. C., 156;

Parker v. Palmer [1663] 1 Cas. Ch., 42 (mistake in judgment).

³ 2 Kent, Com., 490.

⁴ [1810] 1 Ball & Be., 241, 1 Ames, 362.

one, when at the time he was conscious it was worth nothing, and the other party was ignorant of that fact."¹ You will note that there was no duty to disclose here, but the agreement was not fair and just in all its parts. In fact, the circumstances under which the contract was made were such as to give the plaintiff an unfair advantage over the defendant.²

*Smith v.
Harrison.*

A not dissimilar case was *Smith v. Harrison*,³ in which the subject-matter of a contract of sale was described as the interest, if any, of one Francis Norton in certain stock and in a lease. The particulars of sale further stated that there was a lien of £ 100 on the lease, and the conditions provided that even if it should appear that Francis Norton had no interest in the premises, the purchaser should not be entitled to claim a refund from the vendor. You will thus see that the purchaser may even be said to have been by express terms put upon his guard. Now, the facts were that the said Francis Norton was heavily indebted to certain partners, and the value of his interest, which depended on the result of the partnership accounts, was practically *nil*. These facts were known to the vendor, but not to the purchaser. Wood, V.C., set aside the sale on the ground that the purchaser was buying what might be worth nothing, while the vendor was selling what was worth nothing.

Nature of
contingency

The contingency must be not only real to both the parties, but it must have been understood by them as within the contract. The event which actually happens afterwards must have been the uncertainty contemplated by the parties to the contract. If, therefore, a vendor sells a manor without defining its boundaries and it is subsequently found that it comprises a

¹ His Lordship also said, "All the material facts must be known to both parties; and is it not against all principles of equity that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?" Some doubt has been thrown upon the decision by Chitty, J., *Turner v. Green*, *supra*; but it has apparently the approval of the Indian legislature. See S.R.A., s. 22, I. ill. (a): "A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest.

Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B." Upon *Turner v. Green*, see 2 Pomerey, *Eq. R.*, 1308.

² S.R.A., s. 22, I.

³ [1857] 26 L.J. Ch., 412. Cf. S.R.A., s. 22, I. ill. (b).

valuable property previously unknown to both the vendor and the purchaser, specific performance will be refused to the latter.¹ So, where the owners of certain lands agreed to let to *A* the minerals under that portion of the lands which lay to the eastward of a supposed upthrow fault running east, describing it as about 98 acres or thereabouts, and leased to *B* the remaining portion of the lands to the westward of the fault, describing it as about 83 acres, but the fault was afterwards found to run so as to leave 173 acres to the east and 8 acres to the west of it, the Court of Appeal in Chancery said that *A* could not have, by way of specific performance, a demise of all minerals to the east of the fault. *B* therefore was not enjoined from working the mine to the east.²

What the court requires is a full, entire, and intelligent consent to the contract;³ and where it appears from a consideration of the surrounding circumstances that there was an inequality in the respective situations of the parties to a contract, and the plaintiff obtained it under conditions of advantage, though possibly without any unfair dealing on his part, equity will not be disposed to favour its enforcement *in specie*.⁴ This inequality may arise from difference in age, sex, knowledge, intelligence, mental condition, means or even need.⁵ Grant, M. R., said, "A court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been

Unequal position of parties.

¹ *Baxendale v. Seale* [1854] 19 Beav., 601. Romilly, M.R., held that neither party intended to sell or buy a mere doubtful matter, and that both parties at the time of the contract believed that it included something different from what would be conveyed to the plaintiff by literal execution. The uncertainty, if any, was understood by both parties to be confined to the matter of boundary. Pomeroy, S. P. 259 n. S. R. A., s. 22, II, ill (*g*).

² *Davis v. Shepherd* [1866] 1 Ch., 410. Distinguish *Jeffreys v. Fairs* [1876] 4 Ch. D., 448.

³ *Fry*, s. 400, p. 175.

⁴ Pomeroy, S. P., s. 183.

⁵ 2 Pomeroy, *Eq. J.*, s. 948, *Falke v. Gray* [1859] 4 Drew. 651; *Cuff v. Dorland*, 55 Barbour, 427 (vendor invalid widow in embarrassed circumstances, without legal advice, misapprehended condition for deferred payment of purchase-money); *Fish v. Leser*, 60 Ill. 394 (owner imperfectly acquainted with English, appointed agent to sell real estate much below its value); *Gasque v. Small*, 2 Strobb. Eq., 72 (inexperienced youth of 21 contracted to purchase at exorbitant price property, value of which had been greatly exaggerated by its clever owner).

Conduct. intoxicated at the time.”¹ In short, if the conduct of a party seeking the specific performance of a contract be not perfectly conscientious, honourable and fair, or if the contract itself be such that a specific performance thereof would necessarily in its consequences to the defendant produce a loss or injury greatly above the value of the price to be received by him under the contract, and which could not have been readily foreseen unless by a man perfectly competent for the management of all his concerns, possessing at the time an unclouded mind free from embarrassment, and capable of deliberating and reflecting maturely on what he was about to do, a specific performance according to the established principles of equity, ought not to be enforced.²

Arbitration. Where a contract is made to sell at a price to be fixed by valuers or arbitrators, any unfairness in the conduct of the latter would bar the right to specific performance.³ So, where the terms of a submission to arbitration are hard and unfair, the court is disinclined to interfere ;⁴ but it is not for the court to consider whether the terms of an award are unreasonable.⁵ The parties having chosen their judge, must abide by his decision.⁶

Misconduct unnecessary. An agreement may be unfair and unenforceable in the view of a court of equity, even though no legal or moral misconduct may be laid at the door of the party seeking specific relief. Circumstances that render an agreement unfair, may arise out of inadvertence. The case of *Twining v. Morrice*⁷ is a good illustration of this. The facts have been thus put in illustration (d) to section 22, (I), Specific Relief Act. “A’s property is put up to auction. B requests C, A’s attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor’s attorney bidding, think that he is a mere puffer, and cease to compete. The lot is knocked down to B

¹ *Cooke v. Clayworth* [1811] 18 Ves., 12, 15 ; *Cragg v. Holme*, *ibid*, 14 n. (“the court would not act on either side”). Cf. I.C.A., s. 12. Also *Shaw v. Thackray* [1851] 1 Sm. & G. 537. But, where a man is none the worse for liquor, there is no inequality. *Pomeroy, Eq. Jur.*, s. 949. *Lightfoot v. Heron* [1838] 3 Y. & C. Ex., 586.

² *Henderson v. Hayes*, 2 Watts, 148 ;

Waterman, 216, n. 2.

³ *Eads v. Williams* [1854] 4 DeG. M. & G., 674 ; *Chichester v. M’lure* [1830] 4 Bli. N. S., 78.

⁴ *Nickels v. Hancock* [1855] 7 DeG. M. & G. 300.

⁵ *Wood v. Griffith* [1818] 1 Sw. 43.

⁶ *Pomeroy, S. P.*, 271 n.

⁷ [1788] 2 Bro. C. C., 326, 1 Ames, 416.

at a low price." Kenyon, M.R., refused specific performance to *B*, as a damp had been cast upon the sale which was hurtful to the vendor.¹

In another case, a solicitor's conduct was held to have made a contract for sale unenforceable at the instance of the purchaser. The solicitor had acted for both the parties to the contract, but had not disclosed to them the whole nature of the dealing, nor placed his principals at arm's length in the transaction.²

Common
solicitor.

A court of equity refuses its assistance not only where, in the actual result an agreement has placed the plaintiff in a position of unfair advantage over the defendant, but also where the specific execution of the agreement is likely to prove detrimental to the interests of third persons. Where, therefore, a tenant for life contracted to sell the fee or absolute estate, specific performance was refused to the purchaser, in view of prejudice to the interests of the remainder-men.³ So, where a tenant, holding under a covenant not to assign or underlet without his landlord's consent, agreed to underlet part of the land, with the option of purchasing the whole within five years, but the landlord refused his consent, the under-lessee was held not to be entitled to specific performance, as that would involve a breach of the covenant between the said landlord and tenant.⁴ Contracts by trustees which involve a breach of trust and thus damnify the beneficiaries, may be rejected on the ground of unfairness in jurisdictions where trusts are administered as a branch of equity jurisprudence.⁵

Prejudice to
interests of
third per-
sons.

¹ But where a puffer bids unknown to the vendor, the circumstance affords no defence to specific performance, *Union Bank v. Munster* [1887] 37 Ch. D., 51.

² *He-se v. Briant* [1856] 6 DeG. M. & G., 423. 2 Keener, 858

³ *Thomas v. Dering* [1837] 1 Ke., 729. In India, a declaration may be obtained in such a case that the sale binds only the life-interest. Cf. *Mc Kewan v. Sanderson* [1875] 20 Eq., 65 (secret guarantee to the prejudice of creditors); *Mayor of New Windsor v. Stonell* [1884] 27 Ch. D., 665. See also *Owens v. McNally*, 33 L. R. A., 369 (contract to leave bulk of property

to niece of bachelor uncle, whom she looked after; uncle married subsequently and died leaving widow; specific performance denied to niece, in consideration of natural right of widow); *Booth v. Burdock* 94 N. W., 177 (agreement for transfer of patent, subsequently transferred to bona fide purchaser for value).

⁴ *Willmott v. Barber* [1880] 15 Ch. D., 96, 107.

⁵ Cf. Fry, ss. 407-414. *White v. Cuddon* [1842] 8 Cl. & F., 766. C. Williams suggests, "the true reason appears to be that the court will not stultify itself by ordering the specific performance of an act which would

But in India, the duties and liabilities of trustees are matters of statute law,¹ and contracts involving a breach of trust are as unlawful as those which involve a breach of a prior contract, and violate vested rights. I have, accordingly, considered them when examining unlawful or illegal agreements.²

Prejudice or
inconve-
nience to
public.

Where the consequence of the specific enforcement of a contract is to prejudice or inconvenience the public, the discretionary power of equity is exercised to refuse its aid. The plaintiff's equity may readily be outweighed by considerations of public policy.³ Where a city in America, for instance, agreed to build a hall,⁴ or a sewer,⁵ on land conveyed to it, specific performance was refused against it upon the ground that the discretion of the city common council as to the location of a public building should not be interfered with. So it has been said of a railway company in America that it is a corporation organised under the laws of the State and is a common carrier of passengers and freight; its duties are largely of a public nature, and it is bound to so run its trains and operate its roads as to promote the public interest and convenience. Consequently, if it enters into an agreement with the plaintiff, in consideration of, say, a right of way, to build a station on his land and stop its express trains thereat, and it is found that the station, if established, will be of no use to the public, and the stoppage of the trains there will delay public travel and not promote public convenience, a court of equity will refuse specific performance of the agreement to the plaintiff.⁶ But a merely temporary inconvenience to the public is not sufficient reason for refusing specific performance of a contract. A railway company was, accordingly, compelled to perform its

be in exact contravention of the rules of equity—the very rules which the court sits in its place to uphold.” He accordingly formulates the rule in these words: “The court will not enforce specifically a contract, of which the performance would be in contravention of some superior equity affecting the subject of the agreement,” 2 V. & P., 1000.

¹ Act II of 1882.

² Lect. V, ante, 208. Cf. S. R. A., s. 21, cl. (e).

³ *Mine Hill R. R. v. Lippincott*, 86 Pa. St. 468; *Pomeroy*, S. P., 254.

⁴ *Kendall v. Frey*, 17 Am. St. R., 118.

⁵ *Gove v. City of Biddeford*, 27 Atl., 264.

⁶ *Conger v. New York W. S. & B. R. Co.* [1890] 120 N. Y., 29. 1 Ames, 412. Cf. *Lloyd v. London C. & D. Ry. Co.* [1865] 2 DeG. J. & S., 568, 581; also *Curran v. Holyoke Water Power Co.* [1874] 116 Mass., 90, 1 Ames, 414.

agreement to make an approach for the plaintiff's benefit by lowering the level of the line.¹

Fairness or unfairness of a contract, it may be lastly noted, is judged at the time it is entered into. "The period at which," said Lord Manners, "the court is to examine the agreement between the parties is the time when they contracted."² A compromise of family disputes, *e.g.*, will be supported, if, at the time of its making, the questions in issue are actually involved in doubt in the judgment of the parties, though a subsequent judicial proceeding may show that the consideration given by one of the parties to the compromise was worthless.³ So, in contracts the beneficial character of which to the defendant depends on a contingency, the fact that the contingency does not ultimately turn out as the defendant expected, will not stay the hands of the court in decreeing specific performance.⁴ Where, however, a contract does not become absolute till some condition is performed, the time to be looked at may be the date of its so becoming absolute.⁵ And if the subsequent changed circumstances and conditions, to which the defendant objects as unfair, were caused by the plaintiff's wrongful acts or omissions, that may be a ground for denying specific relief.⁶

Fairness at
time of
contract.

(c). *Hardship of the Contract.*

"It is a well established doctrine of a court of equity," said Lord Brougham, "that it will not enforce the specific performance of a contract, the result of which would be to impose great

(c) Contract
hard.

¹ *Raphael v. Thomes Valley Ry., Co.* [1867] 2 Ch. A., 147, revg. 2 Eq., 37.

² *Revell v. Hussey* [1813] 2 Ball & B., 288; *Low v. Treudwell* [1835] 12 Me., 441, 450. *Per* Field J., "The question in such cases always is, was the contract at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement," *Willard v. Tayloe* [1869] 8 Wallace, 557. The rule is especially, if not universally, applicable to "contracts which do not look to a completed performance within a defined and reasonable time,

but contemplate a continuous performance extending through an indefinite number of years, or perpetually," *per* Strong, J., *Marble Co. v. Ripley* [1870] 10 *ibid.*, 330, Waterman, s. 165. But see 2 Story, *Eq.*, ss. 750, 776; *Pomeroy, S. P.*, s. 178.

³ *Shib Lal v. Collector of Bareilly* [1894] 16 All, 423, 433. See *Stapilton v. Stapilton*, [1737] 1 Wh. & T., 8th. ed. 234 and notes. *Ante* 99-100.

⁴ *Parker v. Palmer* [1663] 1 Cas. in Ch., 42; *Anon.*, before Jekyll, M. R., 6 Ves., 24 (cited); *Ex parte Peake* [1816] 1 Madd., 355, 16 R. R., 233.

⁵ *Fry, s.* 390, p. 171.

⁶ *Stone v. Pratt* [1860] 25 Ill., 25; *Waterman*, 220; *Pomeroy, S. P.* 257.

hardship on either of the parties to it;¹ for the court will not become the instrument of injustice, or deprive a person of rights which he is fairly entitled to have protected."² The plaintiff "must show no oppression or unconscionable advantage when he comes into a court of conscience asking for a remedy beyond the letter of his strict rights. He must not ask for a favour beyond his technical legal rights when he bases his claim to that favour upon a hard, oppressive, technical advantage. He must stand before the court prepared to meet its scrutiny without a blush, relying upon the advocacy of a well-regulated conscience in his favour, but he must show that it is not unjust or oppressive to the defendant to compel him to perform specifically."³

Hardship
and
unfairness
compared.

The objection of hardship or oppression is cognate to that of unfairness just discussed. But it has a wider application, for the reason that hardship may either be in the agreement itself, or arise from circumstances exterior and even subsequent to it.⁴ "The oppressive nature of the performance," says Pomeroy, "may result from the situations or relations of the parties exterior to and unconnected with the terms of the contract itself or the circumstances of its conclusion."⁵ *E.g.*, where a contract of service was so drawn that a young man, working as a traveller and clerk, put himself entirely in the power of his employers, who were great traders, so that, in the event of his illness or incapacity, they had the option either to discharge him or to discontinue the payment of his salary and insist that during the remainder of the term of his service he should not take employment under any other master, *Shadwell, V. C.*, ruled, "it is a hard bargain, and therefore this court will not interfere" in favour of the employers.⁶ Where, again, there was a contract for the sale of certain leasehold house and premises, but before completion thereof the vendors allowed an insurance thereupon to drop and the title became defective,

¹ *Gould v. Kemp*, 2 My. & K. 308.

² *Tobey v. County of Bristol*, 3 Story, 800.

³ *Per Caton, C. J., Stone v. Pratt* [1860] 25 Ill., 25.

⁴ *Waterman*, s. 168, p. 223.

⁵ *S.P.*, s. 185, p. 268.

⁶ *Kimberley v. Jennings* [1836] 6 Sim. 340, 2 Keener, 204 (overruled on another point in *Lumley v. Wagner* [1852] 1 DeG. M. & G. 604).

Kindersley, V. C., refused specific relief to them. 'The plaintiffs were not bound to renew the insurance for any particular period, but His Honour observed, "if in renewing they thought fit to run the matter so fine as to cause great risk to the purchaser, they must not be surprised if a court of equity refuses to lend them its assistance against the purchaser."¹

But hard and unconscionable are loose expressions, which, unless they are properly applied, mean little or nothing.² The scope of this defence, therefore, must be carefully defined. The limitations must be first stated.

"A court of equity," as we have seen, "does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party saying that another man would have given him more money or better terms than he agreed to take. It may be an improvident contract, but improvidence or inadequacy do not determine a court of equity against decreeing specific performance."³ "Where parties have made a bargain with their eyes perfectly open and no surprise⁴ whatsoever,"⁵ the mere fact that for the defendant the bargain turns out to be a losing one, or that it enables the plaintiff to reap great gains, is clearly never a ground to refuse specific relief.⁶

• The reason is that equity does not take account of the motives of advantage or disadvantage, which have led a party to enter into an engagement.⁷ Where, *e.g.*, a person agreed to purchase certain premises with the intention of improving the same by

Limitations
of doctrine.

Miscalculation, bad judgment, change of conditions which might have been foreseen.

¹ *Dowson v. Solomon* [1859] 1 Dr. & Sm., 1, 1 Ames, 418. The contract was made on June 8, 1858, and was to have been completed on July 20 following. By the terms of the lease the landlord had the right to re-enter and avoid the lease if the lessee failed to keep the premises insured. The vendors, finding the insurance would expire on June 24, renewed it, not for a year as is customary, but for one month only. By reason of disputes as to fixtures, the meeting for completion was delayed till August 26, when, the insurance having expired, in view of the covenant for re-entry, the purchasers refused to complete.

² *Adams v. Weare* [1748] 1 Bro. C. C., 567, 1 Ames, 398 (Thurlow, L.C.)

³ Sugden, V. & P., 111-12: *Lawrie v. Lees* [1882] 7 A. C., 31, 36, *Haradhan v. Bharabali* [1914] 19 C. L. J., 420.

⁴ This term, of which the present generation of English lawyers fight shy, will be explained in Lect. VII. See 1 Story, *Eq.*, 129 n., 259 n.

⁵ *Per* Thurlow, L.C., *Adams v. Weare*, *supra*.

⁶ *Morley v. Clavering* [1860] 29 Beav., 84; *Young v. Wright*, 4 Wis., 144; *Clark v. Hutzler*, 96 Va., 73; *Southern Ry. Co. v. Franklin P. R. Co.*, ib., 693.

⁷ *Pomeroy, S.P.*, s. 189.

building thereon a mill, and in the expectation that he would be able to obtain the consent of the corporation to such building, but his speculation subsequently miscarried by reason of failure to obtain this consent, the vendor was granted a decree for specific performance against him.¹ So, where a person contracted for the lease of a mine, having previously examined the coal himself, and there was no fraud or misrepresentation on the part of the lessor, the facts that he was ignorant of mining matters and that the seams of coal proved worthless, were held to constitute no defence to an action for specific performance by the lessor.² It is not only just in itself, but essential to the maintenance of business relations between the parties, that an agreement fairly entered into between them, upon a sufficient consideration, in view of the then existing state of things, should not be evaded in consequence of subsequent events, rendering it less advantageous to one of the contractors than he had expected.³ Hardship arising from bad judgment, miscalculation, or changes of conditions that ought fairly to have been in contemplation of the defendant, cannot be considered by the court. Where, therefore, a lessee of renewable leaseholds had covenanted with his sub-lessee for renewal without fine on every renewal to himself, the fact that subsequently, contrary to his expectations, a renewal was made to him on less favourable terms than what he had obtained previously, was held not to be a defence to the sub-lessee's bill for renewal.⁴ So, where by the rapid growth of population in New York and Philadelphia the right to the exclusive use of a telegraph wire, previously leased for a small annual sum, became extremely valuable, equity refused the lessor relief from the bargain which changing circumstances had made unequal.⁵ So, again, where a father conveyed his entire estate to his children, on their agreeing to support and maintain their parents in a way suitable to their condition, wherever they might desire to reside, but the

¹ *Adams v. Weare*, *supra*.

² *Haywood v. Cope* [1858] 25 Beav., 140. Cf. *Corson v. Mulvany*, 49 Pa. St., 88.

³ *Low v. Treadwell*, 12 Me., 441; *Waterman*, s. 173.

⁴ *Evans v. Walshe* [1805] 2 Sch. & Lef.,

519.

⁵ *Franklin Telegraph Co. v. Harrison* [1892] 145 U. S., 459, 2 Keener, 1055. Cf. *Nims v. Vaughan* [1879] 40 Mich., 356, 360 (unexpected hardship attributable to general business depression).

property conveyed proved wholly inadequate to such support, the court yet decreed a specific performance against the children.¹

Again, where the hardship has been brought upon the defendant by himself² and what he has agreed to is "reasonably possible,"³ a court of equity refuses to interfere. Thus a contract for the purchase of land entered into by a railway company was enforced against it, though owing to its own laches its powers had expired before the completion of the purchase, and the proposed route had to be abandoned.⁴ Nor was a buyer at an auction-sale permitted to resist performance on the ground of hardship, where it was his own determination to outbid others that led him to bid an extravagant price.⁵

Defendant
responsible
for hardship.

In cases against companies or corporations, hardship to individual members thereof is no defence. "The court cannot recognise," said Lord Cottenham, "any party interested in the corporation, but must look to the rights and liabilities of the corporation itself."⁶

Members of
corporation.

Nor will a plea of hardship be allowed unless the defendant is in a position to do equity. The plaintiff, *ex hypothesi*, has not been guilty of any impropriety of conduct,⁷ but the defendant is the victim of unforeseen circumstances, and he cannot get quit of his own improvidence or bad luck, unless he can save harmless the plaintiff.⁸ So, the refusal of specific relief should involve no hardship on the plaintiff.⁹ But the fact that the plaintiff may suffer great inconvenience by the court's refusal will not apparently deter it from refusing specific relief.¹⁰

Defendant
cannot do
equity.

¹ *Chubb v. Peckham* [1860] 13 N. J. Eq., 207, 2 Scott, 298.

² *Per Lord Hardwicke, Pembroke v. Thorpe* [1740] 3 Swans, 437, 443 n., 19 R. R., 254.

³ *Per Knight Bruce, V.C., Storer v. G. W. Ry. Co.* [1842], 2 Y. & C., Ch. 52.

⁴ *Eastern Counties Ry. Co. v. Hawkes*, [1855] 5 H.L.C., 331.

⁵ *Coote v. Coote*, 1 Sausse Scully, 693.

⁶ *Edwards v. Grand Junction Ry. Co.* [1836] 1 My & Cr., 650, 674; *Hawkes v. Eastern C. Ry. Co.* [1852] 1 DeG. M. & G., 737, 754. Fry, s. 428, p. 188.

⁷ *Falcke v. Gray* [1859] 4 Drew., 660.

⁸ Collett, 182. So in England it has been held that where the vendor of land is liable to covenants in relation thereto, although there is no stipulation for indemnity against them in the contract, yet the purchaser, upon notice of the covenants, must elect either to rescind the contract or to execute an indemnity to the vendor; else the vendor might lose his land, and yet retain his liability respecting it. *Moxhay v. Inderwick* [1847] 1 De G. & Sm., 708, 63 E. R., 1261, *Lukey v. Higgs* [1855] 24 L. J. Ch., 495.

⁹ 2 Story, Eq., 769.

¹⁰ *Wedgwood v. Adams*, supra, 1 Ames, 401.

Hardship
flowing from
contract.

Where, lastly, the hardship alleged flows from the very terms of the agreement, the court will not lightly entertain the plea, as it might and ought to have been foreseen by the parties who agreed to those terms. The courts therefore make a distinction between latent and patent hardship.¹ So, Lord Eldon remarked, "unless hardship arises to a degree of inconvenience and absurdity so great that the court can judicially say such could not be the meaning of the parties, it cannot influence the decision."² The court will more readily interfere where the hardship could not be foreseen or anticipated, *e.g.*, where it arises from something collateral or incidental to the contract or from events and circumstances entirely independent of it.³

S. R. A., s.
22, II.

Having indicated the limitations of the doctrine, I now come to the doctrine itself. It is thus formulated in section 22, Specific Relief Act :

"The following are cases in which the court may properly exercise a discretion not to decree specific performance :—

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff."

Inequality
in inception
of contract.

Now, this hardship may consist in a forfeiture, penalty, heavy outlay of money, or any other loss not contemplated by the party at the time the contract was entered into, and it may arise out of an inequality either in the inception of the contract or in its operation.⁴ Inequality in the inception is one which exists when the contract is made and may arise out of the situation of the parties. *E.g.*, the defendant may be inexperienced or in distress and, by reason of not being acquainted with the ways of the world⁵ or of pressing necessity,⁶ he may agree to the hard terms offered by the plaintiff. Consider a case like that of *Friend v. Lamb*.⁷ A widow

¹ Fry, s. 425.

² *Preble v. Boghurst* [1881] 1 Swanst., 309. But see Pomeroy, *S. P.*, 274.

³ Pomeroy, *supra*.

⁴ 2 Pomeroy, *Eq. R.*, s. 787.

⁵ *Gasque v. Small*, *supra*; *Clitherall v. Ogilvie*, 1 Dessaus. *Eq.*, 250.

⁶ *Coff v. Dorland*, 50 Barbour, 438. Cf. *Auseri Lal v. Maneshar Baksh Singh* [1906] 10 C. W. N., 149, 28 All., 570, P. C.

⁷ [1898] 152 Pa. St., 529, 1 Ames, 408. Cf. *Chambers v. Livermore* [1867] 15 Mich., 381 (contract one sided and unconscionable.)

without capital agreed to purchase an estate for 50,000 dollars, 5,000 paid down, and the balance secured by a mortgage payable in annual instalments of five and seven thousand dollars respectively, with interest on all, and reaching over a period of seven years. The Pennsylvania court deemed this contract as "highly improvident and rash, and most likely to result in great disaster even before the maturity of the payments and therefore oppressive in its character," and it dismissed the vendor's bill for specific performance with costs. So, where the defendant undertook to assign in gross to the plaintiff all his future inventions,¹ or to give him one-half of the profits in any business he (the defendant) should engage in,² the agreement was considered so improvident and "so manifestly over-balanced in favour of the plaintiff that it will not receive the aid of the court of equity." In an old case, the defendant had entered into articles with the plaintiff to settle upon him all his estate, real and personal, which he then had or might thereafter acquire, except a sum of £ 3000. A decree had been made to settle all he then had. On an attempt being made for a new decree to settle new acquisitions made by the defendant, Lord Nottingham did not think that, "a court of conscience was obliged to execute such a strange agreement any further than it had been carried already, since it tended to the discouragement of all honest industry."³ Some of these cases lie on the borderland, and they may be treated as instances either of unfair and unconscionable or of hard and oppressive agreements.⁴

Inequality in the operation of a contract may be illustrated by cases of agreements which cannot be performed without involving a forfeiture by the defendant. The old case of *Faine v. Brown*⁵ is in point. A man, who was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother, agreed in writing to sell it before

Inequality
in operation
of contract.

¹ *Bates Mach. Co. v. Bates*, 87 Ill. Ap., 225.

² *Ferguson v. Blackwell*, 58 Pac., 647.

³ *Coke v. Bishop* [1677] 3 Swanst., 401 n.

⁴ S. R. A., s. 22, I and II. Cf. *Mercier v. Mercier*, 50 Geo., 566 (contract to divide expectant estate.)

⁵ [1750] 2 Ves. Sr., 307 (cited), 1 Ames, 397. Cf. S. R. A., s. 22, II. ill., (e).

the expiration of that period.¹ Lord Hardwicke said that the hardship alone of losing half the purchase-money, if the agreement were carried into execution, was sufficient to determine the discretion of the court not to interfere in favour of the purchaser. So, where a lessee contracted to sell certain building sites and agreed to make a road thereto, which it was afterwards found he could not do without exposing himself to the risk of forfeiting the leasehold land through which the road was to pass, or to litigation at the instance of his lessor, the court granted specific performance of the contract for sale, but refused to enforce this stipulation and gave the purchaser instead compensation for the loss of the road.²

*Stone v.
Pratt.*

An instructive case is *Stone v. Pratt*.³ In September, 1852, *A* entered into a contract with *B* to sell him some land for 4,500 dollars. After a year, *A* agreed that certain covenants of his with *C* should be performed on October 10 following, and, in the event of default, he would forfeit and pay 1,000 dollars as damages. To secure this, he deposited with *D* the obligation of *B* to pay him the purchase-money, and he authorised *D* to deliver the said obligation to *C* if he failed to pay the stipulated damages. But, later on, *A* alleged fraud on the part of *C* and withdrew this authority. In January, 1853, *B* sold to *S* a parcel of the land *A* had contracted to convey to him. *D* delivered to *C* the obligation of *B*, which *A* had left with him, as just stated, and in January, 1854, *C* sold it to *S* for 1,000 dollars, which amount was just enough to pay the forfeiture agreed upon between *A* and *C*. *S* filed a bill to compel *A* to convey to him the parcel of land sold to him by *B* and claimed that by the purchase of the obligation, he was entitled to recover the money due thereon in place of *A*, who was in effect thereby fully paid the purchase-money for which he had agreed to convey the premises sold to *B*. The Illinois court rejected the bill, and said, "the defendant, by his own folly, may have frittered away his legal right to

¹ "Forgetting the condition" adds ill. (e), *supra*. In the original case, the defence was intoxication.

² *Peacock v. Penson* [1848] 11 Beav., 355. Cf. S. R. A., s. 22, II, ill. (h); also

s. 14. *Weatherall v. Geering* [1806] 12 Ves., 504, 511.

³ [1860] 25 Ill. 25, 2 Scott, 294; *Waterman*, 233 n.

this money, or to the land; but it is not such a transaction as should induce a court of equity to throw down the legal barriers which surround the defendant, and compel him to do more for the ease and benefit of the complainant than the strict rules of law will give him. Equity will never give the pound of flesh, although it is in the bond; but will leave the law to give its value only."¹

Where, however, the defendant might have performed the agreement without a forfeiture, but for some act of his own subsequent to the making of the contract, he will not be permitted to resist a claim for specific performance.² And it is not enough to allege a risk of forfeiture. The court must be satisfied that the forfeiture is a necessary or natural effect of the agreement when originally made, and it will follow on the judgment for specific performance.³

Forfeiture.

Risk of litigation or criminal proceedings is also considered a circumstance of hardship.⁴ A contract to purchase leaseholds was accordingly not enforced *in specie*, where it would have involved the purchaser in litigation as to the payment of ground rents, the title to which was disputed.⁵ So, where the purchaser at an auction sale of property described as "eligible freehold for investment," discovered, before completion, that, unknown to the vendors, their tenants were keeping it as a disorderly house, specific performance was refused to the vendors upon the ground that the court will not compel a man to buy property, which, if it takes no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale.⁶

Risk of litigation.

¹ The plaintiff's improper conduct and the "well-settled rule of law that an entire contract cannot be divided so as to compel a party to perform it in parcels, either to different persons or at different times," were also relied upon by the court.

² *Helling v. Lumley* [1858] 3 DeG. & J., 493, 2 Keener, 1022 (lessee of a theatre who could let only 41 boxes, agreed to let one to plaintiff, and then subsequently having let the full number, pleaded risk of forfeiture: defence over-ruled).

³ *Fry*, s. 430, p. 188; *Pomeroÿ*,

S. P., s. 190; *Shade v. Olroyd*, 18 Pac., 198.

⁴ Cf. *S.R.A.*, s. 22, 11, ill.(h); *Peacock v. Penson*, *supra*.

⁵ *Pegler v. White* [1864] 33 Beav., 403.

⁶ *Hope v. Walter* [1900] 1 Ch., 257, 260. See as to this case, 2 Williams, V. & P., 687-8, 999, where the rule is formulated that specific performance of a contract to buy a property which would be positively noxious to its purchaser, will not be enforced.

Property
purchased
not capable
of enjoy-
ment

So a contract which, in the event of enforcement, would make a person buy what he could not enjoy, will not be executed *in specie*. Thus, where *A* contracted to buy certain land from *B*, and the contract was silent as to the access to the land, but, as a matter of fact, no right of way could be shown to exist, the hardship was enough "to neutralize the court," and specific performance of the contract was refused to *B*.¹

Unforeseen
harsh conse-
quence.

So, again, where the terms of a contract are so unqualified or assented to with such lack of caution that their enforcement would produce a harsh consequence, which could not have been contemplated as the effect of the agreement by the defendant, a court of equity may refuse to interfere.² A case in point is *Talbot v Ford*,³ the facts and effect of which are thus stated by the Indian legislature:⁴ "*A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease, *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*."⁵

Inadvert-
ence of act
or covenant.

Similarly, where the oppressive consequence may be attributed to inadvertence of act or covenant, equity is slow to interfere. A case in point is *Wedgwood v. Adams*,⁶ upon which our illustration (*f*)⁷ is founded. "*A* and *B* trustees, join their beneficiary, *C*, in a contract to sell the trust-estate to *D* and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though at the date of

¹ S. R. A., s. 22, II, ill. (j); *Denne v. Light* [1857] 8 DeG. M. & G., 774.

² Cf. *Ferguson v. Blackwell*, supra; *Waite v. O'Neill*, 72 Fed., 348 (lease of water-front and wharves containing covenant to make all repairs, held not to cover destruction of property to a large extent by flood of river).

³ [1842] 13 Sim., 173.

⁴ S. R. A., s. 22, II, ill. (i).

⁵ "It is not unusual in mining leases that there should be a stipulation that the lessor should be able, shortly before the expiry of the lease, to give

notice to take the plant at a valuation; but here the notice might be given at any time after the lease had begun, and would have the effect of preventing the lessee from afterwards, moving or altering any of the machinery. It was mere want of caution that this covenant was worded as it was; for I cannot suppose that the parties could have intended that it should be expressed in the unqualified terms in which we find it."

⁶ [1843] 6 Beav., 600, 1 Ames, 400.

⁷ S. R. A., s. 22, II.

the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D.*"

Another English case which the Indian legislature has utilised as an illustration¹ is *Hills v. Croll*². Here the defendant, being the patentee of certain inventions for manufacturing and purifying gas, agreed with the plaintiff to purchase from him and of no other person, for the term of fourteen years, all the acids that he should require for the manufacture of muriate or sulphate of ammonia; and the plaintiff contracted to supply the same. The defendant, having after some time refused to abide by his agreement, Hills sued for specific performance and prayed that Croll might be enjoined from purchasing acids elsewhere. The Lord Chancellor said, "Has the court any power to compel Hills to fulfil his part of the agreement? Can the court order him to continue the manufacture of acids, or to purchase them elsewhere, for the purpose of supplying the defendant? It is clear, I apprehend, that the court has no such power;"³ and he refused to restrain Croll in the manner asked for. As Lord St. Leonards explained in the later case of *Lumley v. Wagner*,⁴ if Croll had been restrained from obtaining acids from any other quarter, he might have been ruined in the event of Hills breaking his affirmative covenant to supply the acids. So where a manufacturer of lumber contracted to sell all that he manufactured to the plaintiff and not to sell to others under penalty, Searles, C.J., said, "With results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."⁵

Hills v. Croll.

¹ S. R. A., s. 22, II, ill. (k).

² [1845] 2 Phillips, 60, 1 Ames, 427. Upon this case, see *Cutt v. Tourle* [1869] 4 Ch., 654, 660, 662. and *Singer Sewing Machine Co. v Union Button-hole Co.* [1873] 1 Holmes, 253, 257, 2 Keener, 258.

³ Cf. S. R. A., s. 2, cl. b, ill. 10.

⁴ [1852] 1 DeG. M. & G., 604, 1 Ames, 100.

⁵ *Santa Clara Valley M. L. Co. v. Hoyes* [1888] 76 Calif., 387, H. & W., 377. But see *Lira L. M. Co. v. National S. C. Co.* [1908] 11 L. R. A., N. S. 713.

Little benefit, to plaintiff.

Another case where a court of equity is slow to interfere is where it finds that specific performance of a hard contract will benefit the plaintiff very little or not at all. The disproportion between the burden upon the defendant and the gain to the plaintiff makes performance inequitable.¹ Where, therefore, a railway company had agreed to construct a passage way under its road, enforcement *in specie* of the contract was denied, in view of the inutility of such passage to the plaintiffs and the difficulty of the construction.² Similarly, where the working of the lower levels of a mine was calculated to prove ruinous to the mine and benefit the plaintiff but little, the New York Court declined to compel the execution of a lease thereof for twelve years.³

Contract substantially performed.

So, where the contract has been substantially carried out, but owing to what has been done under it, its literal performance will be peculiarly hard to the defendant, the court may feel disposed to stay its hand. Thus, where a person, who had contracted to rebuild several houses, built only two new ones, but repaired the others at great cost and so well that they were almost made new, Lord Hardwicke refused to interfere, upon the ground that a strict enforcement of the agreement would entail great loss and hardship on the defendant contractor, and be useless to the plaintiff.⁴

Change of conditions.

If, again, by reason of a change of conditions, the plaintiff's object is no longer attainable, specific performance, if prejudicial to the defendant, may be refused. Thus, where restrictive covenants were imposed against the use of land for business purposes with the object of making the locality a suitable one for residences, but owing to the general growth of the city and the subsequent use of the whole neighbourhood for business, this object no longer remained capable of accomplishment, the

¹ *Clarke v. Rochester R. R. Co.* [1854] 18 Barb., 350, 1 Ames, 400 (crossing not built: "the burden of performing the duty would be greatly disproportioned to the value of the land to be benefited by its performance"); *Conger v. New York R. R. Co.* [1890] 120 N. Y., 29, 1 Ames, 412 ("very little, if any, benefit would result to the plaintiffs by the erection of a sta-

tion or the stoppage of the trains thereat").

² *Murdfeldt v. New York R. R. Co.*, 102 N. Y., 703 Cf. *Shrewsbury Co. v. N. W. Ry. Co.* [1857] 6 H.L.C., 113, 139.

³ *Miles v. Dover Furnace Co.*, [1891] 125 N. Y., 294, 2 Keener, 1048.

⁴ *City of London v. Nash* [1747] 3 Atk., 512.

Massachusetts Court refused to enforce the said covenants¹. And the reason for applying this principle will be all the stronger where the change of conditions has resulted from acts attributable to the plaintiff himself.²

As we have seen, where a contract was fully understood by the parties at the time of its inception, and is not vitiated by illegality or fraud, a court of equity will not ignore or rescind it, although subsequent events may have so materially changed its operation as to make it hard and oppressive on one of the parties.³ "Facts which were considered by the parties when the contract was made cannot be invoked," says Professor Page, "to establish hardship."⁴ But it has been repeatedly asserted by judges, especially in America, that even when the agreement is perfectly good, the price adequate, and no blame attaches to the purchaser, if the transaction be inequitable and unjust in itself, or *rendered so by matters subsequently occurring*, specific performance may be denied, and the parties turned over to their remedy in damages.⁵ Sir Edward Fry suggests that, where the

Subsequent events.

¹ Per Barker, J.N., "If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made." *Jackson v. Stevenson* [1892] 156 Mass., 496, 1 Ames, 181. Cf. per Danforth, J., "Though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff." *Trustees of Columbia College v. Thacher* [1882] 87 N. Y., 311, 2 Keener, 1038, 1091.

² *Duke of Bedford v. Trustees of British Museum* [1822] 2 My. & K., 552, 2 Keener, 1010.

³ *Addington v. McDonnell*, 63 N. C.,

389; *Franklin Tel. Co. v. Harrtson*, supra; *Marble Co. v. Ripley*, supra; *Stuart v. London & N. W. Ry., Co.* [1852] 15, Beav., 513; *Jackson v. Lever* [1792] 3 Bro. C. C., 605. "The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into, and if fair when made, the fact that it has become a hard one by the force of subsequent circumstances or changing events, will not necessarily prevent its specific performance," per Bartlett, J., *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* [1894] 144 N. Y., 152, 1 Ames, 85; *Lawder v. Blachford* [1815] Beat., 522; *Jones v. Lees* [1857] 26 L. J. Ex. 9; Fry, ss. 418-422; *Gunga Baksh v. Jagat Bahadur* [1895] 23 Cal., 15, P. C.

⁴ 3 Page, 2463, citing *Willard v. Tayloe*, infra. Cf. *Lee v. Kirby* [1870] 104 Mass., 420, 2 Scott, 300.

⁵ Per Clark, J., *Rennyson v. Rozell*, 106 Pa. St., 407; *Willard v. Tayloe* [1869] 8 Wall., 557, 1 Ames, 406; *Curran v. Holyoke Water Power Co.* [1874] 116 Mass., 90, 1 Ames, 414. Cf. *City of London v. Nash* [1747] 3 Atk., 512; *Costigan v. Hastler* [1804] 2 Sch. & Lef., 160.

subsequent events brought forward to show the hardship of enforcing a contract are acts of the plaintiff himself or events in some sense within his power, the court may have regard to them in exercising its discretionary jurisdiction in specific performance.¹ The true rule, however, seems to be this. Equity will not relieve against hardship arising from a change in circumstances or the result of subsequent events, where *these should have been in contemplation of the parties as possible contingencies*, when they entered upon the agreement.² With regard to subsequent events, the question should be—Are they contingencies, the possibility of which might have been foreseen?³ Where, *e.g.*, after a contract has been made for sale of land, the Municipal Board orders costly street improvements which enhance the value of the land, the contract may be deemed as burdensome upon the vendor.⁴ The leading case of *Willard v. Tayloe*⁵ furnishes an apt illustration. This was a suit for the specific performance of a covenant contained in a lease of premises known as "The Mansion House" to the plaintiff, whereby it was stipulated that the lessee should have the right or option of purchasing the property, with the buildings and improvements thereon at any time before the expiration of the lease, for 22,500 dollars. It appears that when the lease was made, gold and silver were the standard of values in the United States, but subsequently a paper currency was introduced and by Act of Congress made a legal tender for

*Willard v.
Tayloe.*

¹ Fry, s. 422 Cf. *Duke of Bedford v. Trustees of British Museum*, [1822] 2 My. & K., 552; *Peer Mohamed v. Mohamed* [1904] 29 Bom., 234.

² *Pomeroy, Eq. R.*, s. 797, pp. 1317-8. *Trustees of Columbia College v. Thacher*, *supra*, 2 Keener, 1043.

³ *Marble Co. v. Riple*, [1870] 10 Wall., 339, 356-7. Cf. *S. R. A.*, s. 22, II. *Gotthelf v. Stranham*, 20 L. R. A., 455 ("where by reason of circumstances which have intervened between the making of the contract, and the bringing of the action, the enforcement of the equitable remedy would be inequitable, and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches, or

inattention by the party resisting specific performance in not foreseeing and providing for contingencies which have subsequently arisen, the court may well refuse to specifically enforce the contract and will leave the party to his legal remedy.")

⁴ *King v. Raub*, 123 Iowa, 632; 2 *Pomeroy, Eq. J.*, s. 798. *East St. Louis, R. Co. v. East St. Louis* 182 Ill., 433 (franchise not exercised for ten years, greatly increased in value by city's growth). Distinguish *Morgan v. Scott*, 26 Pa. St., 51.

⁵ *Supra*. Upon this case see *Waterman*, 219, n. 5. Cf. *Whitaker v. Bond*, 63 N. C., 290; *Fitzpatrick v. Dorland* 27 Hun., 291. Distinguish *Hale v. Wilkinson*, 21 Gratt., 75.

private debts. At the time of suit the United States notes had become greatly depreciated, and the value of the property in question very much enhanced. The lessee-plaintiff, seeking to exercise his option, offered in payment legal tender notes. The Supreme Court of the United States held that the plaintiff was entitled to specific performance on payment of the price of the land in gold and silver coin.¹

It remains to add that where a contract has been executed by the parties, the court will not, as a rule, entertain the objection that it is hard and unconscionable.²

Contract
executed.

¹ Per Field, J., "The parties at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognised by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes, worth, when tendered in the market, only a little more than one-half the stipulated

price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provisions against the substitution."

² The case of an heir expectant, which used to be formerly treated as an exception, is now in England governed by the Sale of Reversions Act, 31 Vict. c. 4.

LECTURE VII.

DEFENCES TO THE ACTION,—(concluded.)

(d) *Inadequacy of Consideration.*

(d) Consi-
deration
inadequate.

Old doc-
trine.

Among circumstances of hardship relied upon by learned judges one requires separate treatment, and the reason is that there has been some veering of judicial opinion in this matter. This circumstance is inadequacy of consideration, and it differs with the difference in the point of view. In a contract of sale, if the property is sold at an undervalue there is inadequacy of consideration from the stand-point of the vendor, and if the property is sold at an overvalue there is inadequacy of consideration from the stand-point of the purchaser.¹ Now, at one time, inadequacy of consideration was in itself considered enough to render the specific enforcement of a contract inequitable,² and so late as 1859 Kindersley, V. C., gave expression to such a view.³ In the celebrated case of *Savile v. Savile*,⁴ Lord Maclesfield sustained this defence. A house had there been sold, during the South Sea mania, when there was quite a rage for speculation in England, for £10,500, and the purchaser had paid £1000 as a deposit. After the Bubble burst, upon the purchaser submitting to a forfeiture of the deposit, he was discharged by the Lord Chancellor on the ground of the national delusion which had prevailed at the time of the contract and by reason of which people had put imaginary values on estates.

Modern
doctrine.

But the doctrine is now exploded. Eyre, C.B., said, "The value of a thing is what it will produce, and admits of

¹ "Consideration" is defined in I. C. A., s. 2 (d).

² *Day v. Newman* [1798] 2 Cox, 77; *Seymour v. Delaney* [1822] 6 Johns. Ch. 222 (Kent, C.) revd. in [1824] 3 Cowen, 445, 2 Keener, 772 (the judgments in this case deserve careful study).

³ *Falcke v. Gray* [1859] 4 Drew, 651.

Cf. *Vigers v. Pike* [1842] 8. C. L. & F., 645.

⁴ [1721] 1 P. Wms., 745. So in *McCarty v. Kyle*, 4 Cold., 348, specific performance of a contract to convey one's homestead and furniture in exchange for a share in a mining property, made in the excitement of a mining boom, was refused.

no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a pressure of circumstances, which may induce him to sell it at a particular time. Now, if courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat all the contracts of mankind. Therefore, I never can agree that inadequacy of consideration is *in itself a principle* upon which a party may be relieved from a contract which he has wittingly and willingly entered into. It may, indeed, be a strong *evidence* of fraud, when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs. When you see distress on the one side and money on the other, and a wish on the one side to press that distress into submission to his own terms, inadequacy of price goes a great way in warranting the court to infer from this that some sort of fraud was used to draw the other party into the bargain; it may be such an ingredient of fraud as to make the court presume more than is in actual proof; and I shall never quarrel with a court of equity which makes such an inference where the inadequacy is so gross, as makes it impossible that the bargain could have been fairly made."¹ And this is common sense. For the right to freedom of contract is elementary and radical,² and every person who is not from his peculiar condition and circumstances under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon.³ If hard and fast rules were laid down, as has been attempted under the Civil Law,⁴ people desiring to part with their estates may find it difficult to do so.

Evidence
of fraud.

¹ *Griffith v. Sprotley* [1787]. 1 Cox., 388, 388-9, 29, E. R., 1215.

² Cf. Fry, s. 446.

³ 1 Story, *Eq.*, s. 244. *Juzan v. Toulmin* [1846] 9 Alabama, 662, 686.

⁴ In Rome, if the inadequacy amounted to half or more of the real price, the law interfered in favour of

the vendor. *Cod.*, bk. iv, title 44, 2. Pothier, *Oblig.* pt. 1, ch. 1, s. 1, art. 3, s. 4. The Code Civil of France entitles a vendor of immoveable property to rescind if he suffers injury to the extent of more than 7/12th of the price (art. 1674).

Lord Eldon, accordingly, ruled: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance;"¹ and this doctrine is now part of the statute law of India. Section 28, Specific Relief Act, provides:—

S.R.A.,
s. 28.

"Specific performance of a contract cannot be enforced against a party thereto—

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff."²

Theory.

Theoretically considered, inadequacy in the price or of the subject-matter is, as pointed out by Professor Pomeroy, a species of inequality and unfairness, and may be an instance of hardship and oppression. But in no individual instance it is for a court to determine the numerous and different considerations and motives which enter into and affect the question. The modern tendency, therefore, is to regard inadequacy as evidence of fraud, and not as a hardship. But it may be doubted if the difficulty has been really simplified by the altered mode of treatment.³ The present doctrine, however, is that fraud in the purchaser is of the essence of the objection to the contract, on the ground of inadequacy.⁴

Tested at
time of
contract.

To determine, therefore, whether the consideration of a contract for sale was adequate, and whether the court can, upon a suit being instituted, refuse to decree specific performance of the contract on the ground of gross inadequacy of consideration (as defined above,) we must carry ourselves back to the date of the contract, and the time when the purchase-money

¹ *Coles v. Trecothick* [1804] 9 Ves., 234, 246. Cf. *Burrowes v. Lock* [1805] 10 Ves., 470, 1 Wh. & T., 8th. ed., 74 (Grant, M.R.); *Abbott v. Swooner* [1852] 4 DeG. & Sm., 448; *Ready v. Noakes*, 29 N. J. Eq., 497, 499, 2 Keener, 799.

² Inadequacy of consideration has been said to be not of much consequence in a contract in the nature

of a family arrangement, in a recent Punjab case, in which the Indian law of consideration was elaborately discussed. *Daropti v. Jaspat Rai* [1905] P. L. R., 28, P. R., no. 49.

³ Pomeroy, S.P., s. 194.

⁴ *Borell v. Damu* [1843] 2 Hare, 440, 450. Cf. *Gitabai v. Balaji* [1892] 17 Bom. 232.

was paid. Fraud is a mental condition and, as such, must have existed, if at all, at the very inception of the agreement.¹ If at that time the consideration would have been deemed adequate, and the court would have decreed a specific execution of the contract, had the suit been then brought, it follows necessarily that the consideration must, at a subsequent date, be also deemed adequate, and the court must decree such specific execution.² Where, therefore, the consideration or a part of it is an annuity for life, and the life terminates before any payment but after the conclusion of the contract, the consideration does not by reason of such termination become inadequate.³ So a contract to develop a mine, fair and reasonable when made, does not suffer from inadequacy of consideration if a rich vein of ore is subsequently discovered.⁴

Next, the inadequacy must be so gross as by itself or, taken in conjunction with other circumstances, to evidence fraud or unconscionable dealing;⁵ it must, it has been even said, be so striking and so substantial as to shock the common sense of mankind,⁶ and render the bargain such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.⁷ Fraud may be any act fitted to deceive,⁸ and "undue advantage" will include all forms of inequitable pressure. There may therefore be proof of misrepresentation, deliberate suppression of the truth,⁹ or circumstances of oppression and

Nature of
inadequacy

Unequal
position of
parties.

¹ *Pomeroy, S.P.*, s. 195.

² *Hale v. Wilkinson*, 21 Gratt., 75; *Waterman*, 247. *Poole v. Shergold* [1786] 2 Bro. C.C. 118, 119.

³ *S.R.A.*, s. 13, ill. (b); *Mortimer v. Capper* [1782] 1 Bro. C.C., 156. Cf. *Strickland v. Turner* [1852] 7 Ex., 208 ("The question between the parties is this, whether the purchase took effect during the existence of the annuity. If it did but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity and cannot complain that, in so doing, he has made a bad bargain, as the event has turned out. But if, on the contrary, the annuity had ceased to exist before the purchase, then he has got nothing for his purchase-money and is entitled to recover it

back from the defendant.")

⁴ *Finlen v. Heinze*, 73 Pac., 123.

⁵ Inadequacy of consideration creates no presumption of fraud, but may be evidence of fraud as a fact. *Borrell v. Dann* [1843] 2 Hare, 440, 450; 2 *Pomeroy, Eq. J.*, s. 926; *S.P.*, 285.

⁶ *Per Nelson, J., Erwin v. Parham*, 12 Howard, 197; *Waterman*, 246 n. See *Sugden, v. & P.*, 275; *Vigers v. Pike*, supra; *Prince v. Lamb*, 128 Calif., 120; 3 *PAGE, CON.*, 2446.

⁷ 1 *Story, Eq.*, ss. 244, 246. Cf. *Gwynne v. Heaton* [1778] 1 Br., Ch. 1, 3 *Keener*, 506.

⁸ *I.C.A.*, s. 17 (4).

⁹ *Deane v. Rastron* [1792] 1 Ans., 64; and cases cited, 2 *Dart, V. & P.* 1094, n.

Unequal
position.

inequality.¹ Inadequacy of consideration, therefore, may become a most material circumstance when one of the parties to a transaction is from age, ignorance, distress, incapacity, weakness of mind, body, or disposition, or from humble position or other circumstances unable to protect himself.² A distinction has obviously to be drawn between cases where parties have knowingly and deliberately fixed upon a price and where there is no evidence of such knowledge, intention or deliberation.³ The artful, the importunate and the cunning,⁴ unhappily, abound in the world, and they may have victimised a person so situated that the just result of his judgment was misled, confused or disturbed.⁵ For instance, proper time may not have been allowed to him and he may have acted inprovidently;⁶ or he may have been importunately pressed,⁷ or strongly persuaded by those who enjoy his confidence;⁸ or he may not have been fully aware of the consequences and may have been suddenly drawn in to act;⁹ or he may not have been permitted to consult disinterested friends,¹⁰ or legal advisers,¹¹ before he was called upon to act in circumstances of sudden emergency or unexpected right or acquisition. In such cases, if the bargain is unequal, the court may find fraud, imposition or unconscionable advantage, and refuse specific performance. Where, therefore, a woman, who was under a misapprehension as to the precise nature of her rights, agreed to sell land worth 1200 dollars for a horse valued at 100 dollars, the court considered the agreement unequal and unreasonable,

¹ *Fulke v. Gray*, supra (vendor, a lady, ignorant of value of China jars, valuer, her agent, confessedly incompetent to value them, purchaser, a dealer in such articles, who stood by, knowing price named was wholly unfair). Cf. *Young v. Clerk* [1720] Prec. Ch., 538, 2 Scott, 225.

² Kerr, *Fraud*, 4th. ed. 185. *Osgood v. Franklin* [1816] 2 Johns. Ch., 1, 23. Leases of charity estates have been set aside for undervalue in England, Tudor, *Charities*, 246. As to English law, present and past, regarding sales of reversions, see Fry, 199, s. 99; 2 Dart., V. & P., 769, s. 99.

³ *Pomeroy*, S. P., p. 282 n., citing *Davidson v. Little*, 10 Harris, 245, 247.

Where calculating speculators purchased property worth 500 or 600 dollars for 21 dollars, they were not

held entitled to the aid of the court. *Modisett v. Johnson*, 2 Blackf. 431.

⁴ Cf. 1 Story, Eq., 251; *Bell v. Howard* [1842] 9 Mod., 302; *Martin v. Mitchell* [1820] 2 J. & W., 413, 423; *Stanley v. Robinson*, [1830] 1 R. & M., 527.

⁵ *Graham v. Pancoast*, 30 Pa. St., 89. Cf. *Clark v. Malpas* [1862] 31 Beav., 80.

⁶ *Clitherall v. Ogilvie*, 1 Dessaus., Eq., 250.

⁷ *McCormick v. Malin*, 5 Blackf., 509.

⁸ *Clitherall v. Ogilvie*, supra.

⁹ *Ibid.*

¹⁰ Cf. *Summers v. Griffiths* [1866] 35 Beav., 27; *Barker v. Monk* [1864] 33 Beav., 419; *Haygarth v. Wearing* [1871] 12 Eq., 320; *Fry v. Lane* [1888] 40 Ch. D., 312.

and refused to enforce it.¹ And where the consideration was about ten times the value of the land agreed to be sold,² but the purchase had been made the condition of a loan which the plaintiff, a poor and illiterate man, was very anxious to negotiate with the object of prosecuting his claim in Chancery to some valuable property, Lord Romilly said, "Coupled with such circumstances, the evidence of over-price is of great weight, and if the case had stood here I should have been of opinion that this transaction was one which could not stand."³ Great inadequacy," remarked Bradley, J., "requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."⁴

The question of inadequacy apparently does not arise where at the time of the contract neither party has any knowledge of the value of the property,⁵ unless, possibly, where the inadequacy is so gross as to take a case out of the general rule.⁶ Every man must bear the loss of a bad bargain legally and honestly made; if not, he could not enjoy in safety the fruits of a good one.⁷

Bargain
honestly
made.

Inadequacy of consideration should be distinguished from failure of consideration, which arises by reason of events which either determine the existence of the subject-matter of the contract or materially affect it. Where the purchase-money is not paid, the liability to pay remains, and may be enforced. But, where the thing contracted about is, say, destroyed prior or subsequent to the agreement, the contract may fail by reason either of mistake⁸ or of impossibility of performance.⁹ The contract has no valid inception.¹⁰ So, where a suit between a

Failure of
consider-
ation.

¹ *Higgins v. Butler* [1886] 78 Maine 520, 1 Ames, 419.

² Unlike a case of alleged under-value, where the court may generally obtain data to ascertain the market-value of the property sold, in the case of alleged over-value, the court has seldom satisfactory means of pronouncing price excessive, for there is no standard to determine what represents the money value of the property to an individual, 2 Dart., V. & P., ed. 6, 1210.

³ *Cokell v. Taylor* [1851] 15 Beav., 103, 115. Distinguish *Abbott v. Swor-*

der [1851] 4 DeG. & S., 448; *McManus v. Boston* [1898] 171 Mass., 152, 1 Ames, 420.

⁴ *Graffam v. Burgess* [1886] 117 U.S., 180, 3 Keener, 521.

⁵ *Knight v. Marjoribanks* [1848] 11 Beav., 322 affd. [1849] 2 Mac. & G., 10.

⁶ 2 Dart., V. & P., 746-7.

⁷ Per Black, J., *Harris v. Tyson* [1855] 24 Pa. St., 347, 3 Keener, 564.

⁸ *Ante*, 133.

⁹ Lect. VI, *ante*, 279.

¹⁰ *Pomeroy, S. P.*, s. 321. But cf. *Hanuman v. Hanuman* [1891] 19 Cal., 123, P. C.

party claiming an estate under an alleged adoption and another disputing the fact and validity of such adoption, was compromised upon the latter admitting the adoption and agreeing not to question it in future, but the second party did afterwards repudiate the adoption and unsuccessfully tried to rescind the agreement of compromise, the Judicial Committee held that the principal consideration for the compromise was an abstention on the second party's part to question the legality of the first party's adoption, and there having been a failure on the former's part to keep up to the terms of the compromise and his conduct having been at variance with and having amounted to a subversion of the relation intended to be established by the compromise, there was such a failure of consideration for the agreement of compromise as to disentitle the second party to maintain a subsequent suit for a specific performance of the same.¹ Partial failure of consideration, *e.g.*, where the article contracted about is found to be in existence, but in a damaged condition,² will seldom avoid a contract,³ unless a material part of the subject-matter of the contract, supposed by both parties to exist, has, before it has been made, ceased to exist. *E.g.*, if there is a contract to pay an annuity to the promisee for the lives of two persons, and it turns out that at the date of the contract, unknown to the contractors, one of these persons was dead, the contract cannot be specifically enforced.⁴ So, where there was a contract for sale of a leasehold interest in land to commence in the future, but before the day arrived an ocean storm washed away a part of the land, the South Carolina Court refused to decree specific performance.⁵ But a person may contract in such terms as to preclude himself from objecting on the score of the non-existence or determination of the subject-matter at the time of the contract.⁶

¹ *Srish Chandra Roy v. Banomali Rai* [1904] 2 A. L. J. R., 31, 31 Cal., 584, P. C.

² *Barr v. Gibson* [1838] 3 M. & W., 390 (ship at sea sold, found stranded).

³ *Ardesir v. Vujsing* [1901] 25 Bom., 593, 601. Cf. *Vincent v. Berry*, 46 Iowa, 571 (purchaser requested to inspect property, neglected to do so).

⁴ *Cochrane v. Willis* [1865] 1 Ch.

Ap., 58; S. R. A., s. 21, ill. to cl. (h).

⁵ *Huguenin v. Courtenay*, 53 Am. Rep., 688.

⁶ *Hanks v. Pulling* [1856] 25 L. J., Q. B., 375 (sale of free-farm, condition as to no objection about non-payment or non-receipt of ground-rent, rent not paid for 20 years and extinguished).

(e) *Mistake.*

Mistake in its legal aspects, I have already to some extent discussed.¹ If by reason of mistake the minds of the parties never meet, there is no agreement either at law or in equity. But there may be mistake present which does not avoid the agreement, but which excludes such full, free and intelligent consent as a court of equity deems necessary in the case of a contract, which it is called upon specifically to enforce.² Mistake has been described as "some unintentional act, omission, or error, arising from unconsciousness, ignorance, or forgetfulness, imposition or misplaced confidence."³ But mistake is *internal*, and may be more correctly described as an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time.⁴ Wherever, by reason of an erroneous impression or a wrong conclusion a person is induced either to do or to omit to do what he would not otherwise have done or omitted, there is a mistake,⁵ and if this mistake is material, that is, of the essence of the transaction, which without it would not probably have taken place,⁶ and if it is unconscionable for the party deriving benefit from the mistake to retain his advantage,⁷ a court of equity will feel

¹ *Ante*, 133-5.

² The principle upon which equity proceeds is thus stated by Sir E. Fry: "There must be a contract legally binding, but that this is not enough,—that to entitle the plaintiff to more than his common law remedy, the contract must be more than merely legal. It must not be hard or unconscionable: it must be free from fraud, from surprise, and from mistake: for where there is a mistake there is not that consent which is essential to a contract in equity: *non videtur qui errant consentire*." S. 752, p. 329. Cf. *Wilding v. Sanderson* [1897] 2 Ch., 534.

³ 1 Story, *Eq.* s. 110; Kerr, *Fraud*, 4th. ed. 465; 2 Pomeroy, *Eq. J.*, 1475 n.

⁴ *Ibid.*, s. 839; S. P. 328.

⁵ Cf. Haynes *Out. of Equity*, 132.

⁶ *Stone v. Godfrey*, [1854] 5 DeG. M. & G., 76; (*Arpmucl v. Powis* [1849] 10 Beav., 39. Where the mistake is in respect of the matter of the agreement, as distinguished from the inducements thereto, no question regarding the materiality of the term can properly arise; "the parties by making it a subject of agreement have made it material, and the courts can have no right to put a different construction upon it," Bigelow's note, 1 Story, *Eq.*, s. 109.

⁷ 1 Fonblanque, *Eq.*, bk. 1, ch. 2, s. 7; *Warner v. Daniels*, 1 Woodl. & Minot, 90. "In all such cases, the ground of relief is not the mistake or ignorance of material facts alone, but the unconscionable advantage taken by the

disposed to interfere. Knowledge and intention exclude mistake.¹ The mistake may be either common to both the parties, or it may be a mistake of the plaintiff alone, or of the defendant alone. Where there was a dispute as to whether a contract of sale covered seven acres of copyhold land, said to be part of the estate sold, Lord Thurlow observed: "No doubt, if one party thought he had purchased *bonâ fide*, and the other party thought he had not sold, there is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say one shall be forced to give price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so,—if the buyer did not imagine he was buying, any more than the seller imagined that he was selling this part, then his pretence to have the whole conveyed, is as contrary to good faith upon his side, as refusal to sell would be in the other case."²

Mutual
mistake.

Mutual mistake, as we shall see, may be a ground for rescinding or reforming an agreement. *A fortiori* it will operate as a bar to a specific performance of the contract. Where, *e.g.*, the owner of an estate contracted to sell it, and stipulated that he should not be obliged to define its boundary, and the estate really comprised a valuable property not known to either the vendor or the purchaser to be part of it, though the agreement had been reduced to writing and was expressed in the form intended,³ yet, as the contract had been entered into upon a mutual but erroneous assumption, it was not specifically enforced.⁴ So, where a person contracts to purchase property which belongs to himself, though that fact is unknown to both the vendor and the

party by the concealment of them," 1 Story, *Eq.*, s. 147.

¹ *Irnham v. Child* [1781] 1 Bro. C. C., 92. Distinguish *Jervis v. Berridge* [1873] 8 Ch., 351.

² *Calverley v. Williams* [1790] 1 Ves., 210.

³ The general rule that parties may not prove their intention

dehors, their writing or deed admits of an exception in favour of a case of mistake. I. Ev. Act, s. 92, prov. 1. Cf. *Marquis Townshend v. Stangroom* [1801] 6 Ves., 328.

⁴ *Baxendale v. Seale* [1855] 19 Beav., 601, 2 Keener, 943. S. R. A., s. 22, II, ill. (g). Cf. *Marvin v. Bennett*, 8 Paige, 312.

purchaser, there will be no specific performance decreed against the mistaken owner.¹

Plaintiff's mistake.

Where the mistake is of the plaintiff he may, under certain circumstances, sue for reformation of the agreement or rectification, and may enforce specific performance of the amended contract.² But this is a matter the consideration of which I will reserve for a future lecture.³ I will simply observe in passing that the fact that at one stage of a suit, the plaintiff has misinterpreted a contract, will not preclude him at the hearing from claiming its specific performance according to the true construction.⁴

Where the mistake is of the defendant and he seeks to resist specific performance in whole or in part upon that ground, the cases present some difficulty, as there has been a marked veering round of judicial opinion on the point with the march of time. In the beginning of the nineteenth century, an eminent Lord Chancellor of England affirmed: "It is not necessary that fraud should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this court will not, especially if upon other circumstances the case is hard, decree a specific performance;"⁵ and towards the middle of that century an eminent Master of the Rolls stated the principle upon which equity courts proceed in cases of mistake in these terms: "If it appears upon the evidence that there was, in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him. If there appear on the particulars

Defendant's mistake.

Old view.

¹ *Jones v. Clifford* [1876] 3 Ch. D., 779; *Cochrane v. Willis* [1865] 1 Ch. Ap., 58; *Cooper v. Phibbs* [1867] 2 H. L., 149, 3 Keener, 43. Cf. *Bingham v. Bingham* [1748] 1 Ves., Sr., 126; *Lawrence v. Beaubien* [1831] 2 Bailey, 623, 2 Scott, 562. But the rule cannot be affirmed generally in respect of mistakes of law, 2 Pomeroy, *Eq. J.*, s. 846; Kerr, *Fraud* 4th. ed. 470.

² *S. R. A.*, s. 34; *Olley v. Fisher* [1886] 34 Ch. D., 367. Cf. *Harris v. Pepperell* [1867] 5 Eq., 1; *Brown v.*

Lamphear, 35 Vt., 252 (option given to defendant.)

³ Lect. IX, *infra*.

⁴ *Preston v. Luck* [1884] 27 Ch. D. 497, 2 Keener, 985.

⁵ *Mason v. Armitage* [1806] 13 Ves., 25, 1 Ames, 375. Lord Erskine added, "But the law is open to him: *Joynes v. Statham* [1746] 3 Atk., 388. Upon this subject the court is governed by a sound, not a capricious and arbitrary, discretion.

no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about.”¹

Taking the older cases, therefore, we find equity has afforded relief under the following circumstances:—

1. Mistake induced by plaintiff.

1. Where the defendant's mistake has been induced, or contributed to, by the plaintiff. This may be so on account of either some act performed or a statement made by, or attributable to, the plaintiff.² *E.g.*, where in a sale by auction, the plaintiff led the defendant to believe that he (the plaintiff) would not be the purchaser and thus put the defendant off his guard, and then he subsequently went into the auction-room and bade for the property and thus gave rise to a suspicion that he was a puffer, and the agent, employed by the defendant to make the reserved bidding, omitted to do so by reason of a misapprehension, with the result that the property was knocked down to the plaintiff for £1000 less than what he knew the defendant wanted therefor, Lord Erskine ruled that, as the former had obtained an advantage through a mistake, a court of equity would not give him any assistance in that.³ So, where in another sale by auction, the plan annexed to the particulars of the house and grounds put up for sale, showed a shrubbery on the western boundary, and the defendant, on making an inspection with the plan in his hand, found on the western side a belt of shrubs and three large ornamental trees enclosed by an iron fence, and, taking that to be the boundary, he bid for and purchased the property. He afterwards discovered that the said trees and fence stood in the glebe land adjoining the property sold, the real boundary of which was denoted by stumps, which were so covered by the shrubs as not easily to be seen, and he resisted specific performance. The court held with him, upon the ground that his mistake had been increased by at least *crassa negligentia* on

¹ *Swaishland v. Dearsley* [1861] 29 Beav., 430, 1 Ames, 376 (Sir J. Romilly.)

² *Stewart v. Kennedy* [1890] 15 A.C.,

115; *Kerr, Fraud*, 4th, ed. 489.

³ *Mason v. Armitage*, supra.

the part of the vendors.¹ Here there was no actual error in the plan, the trees in question not being shown therein. But there have been other cases where, in the particulars supplied by the plaintiff, there has been such misdescription or ambiguity as to the substance of the contract as to justify the mistake made by the defendant. Thus, where at an auction sale of an estate by lots, lot 5 was described as "an undivided moiety in a valuable piece of free-hold plantation ground,...let to Mr. Godfrey, a yearly tenant. The apportioned rent of this lot is £16 per annum," and the purchaser in answer to a suit for specific performance by the vendor, swore positively that he was deceived into thinking, at the time that he bid for lot 5, that the apportioned rent thereof, and not of the whole of the undivided moiety, was £16 per annum, Lord Romilly held that the mistake was not an unreasonable one and dismissed the suit.² So, again, where the plaintiff in a letter to the defendant, a widow, presumably unaccustomed to the transaction of business, said that he had once offered 40 dollars per acre for her land, but now thought that 35 dollars per acre would be "a big price for it," and added, "to buy the land now and pay cash down, and not get possession until next spring, and have the taxes to pay on it this fall, I would not want to pay over \$2000 for the 60 acres. And counting taxes and interest on the money, that would make it a little over \$ 35 per acre....If that will buy the land, I will take it and pay all the money down;" and the defendant accepted the offer and had a sale-deed prepared, reciting the consideration as \$2,100 (at the rate of \$35 per acre), the Supreme Court of Kansas held that there was reasonable ground for the defendant's mistake, and they refused specific performance to the plaintiff on a tender of \$2000 only.³ Shaw, C. J., has stated

¹ *Denny v. Hancock* [1870] 6 Ch., 1, 2 Keener, 969.

² *Swaisland v. Dearsley*, supra. Cf. *Higginson v. Clowes* [1808] 15 Ves., 516 (the particulars stated that timber on lots 4 & 5 was to be taken at a valuation, and one of the conditions specified generally that purchaser was to take timber at a valuation; Grant, M. R., held express

declaration as to two lots was likely to mislead purchaser).

³ *Burkhalter v. Jones* [1884] 32 Kansas, 5, 1 Ames, 378 (per Valentine, J.: "In strict law, and by the words of the letters of the parties, we think the parties made a contract; but we also think that, in fact and in equity, the minds of the parties never came together; that they really never

the law thus : " A defendant may not only show that the agreement is void, by proof of fraud or duress, which would avoid it at law ; but he may also show that without any gross laches of his own, he was led into a mistake, by any uncertainty or obscurity in the descriptive part of the agreement, by which he, in fact, mistook one line or one monument for another, though not misled by any representation of the other party, so that the agreement applied to a different subject from that which he understood at the time ; or that the bargain was hard, unequal and oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. In either of these cases, equity will refuse to interfere, and will leave the claimant to his remedy at law." ¹

2. Mistake known to plaintiff.

2. Where the plaintiff knows of the defendant's mistake or has good grounds to suppose that a mistake has been made.² *Webster v. Cecil*³ is a good illustration. Here negotiations for the sale of some immoveable property had been going on for some time between the plaintiff and the defendant, the property produced an annual return of £90, was mortgaged for sums amounting in the aggregate to £1800, and the defendants had previously refused to sell it to the plaintiff's agent for £2000. It appears that on October 22, 1860, the defendant totalled the respective values of the lands and cottage in question, but, through inadvertence and in his hurry to save the post, he added them up as amounting to the sum of £1100 (instead of £2100) and, without reflection, inserted that sum in a letter to the plaintiff. The plaintiff by return of post accepted the offer, whereupon the defendant, becoming apprized of the error, immediately gave notice of it to the purchaser. Romilly, M. R., refused specific performance to the plaintiff. Another instructive case " where a person snapped at an offer which he must have perfectly well-known to be made by mistake," ⁴ is *Mansfield v. Sherman*.⁵ The facts here were these : Sherman, living in New

Mansfield v. Sherman.

agreed to the same thing ; and, therefore, in equity, and good conscience, they did not make such a contract as equity should adjudge to be specifically enforced"). Distinguish *Mansfield v. Hodgdon*, 147 Mass., 304.

¹ *Western Railroad Corp. v. Babcock*

[1843] 6 Met., 346, 2 Keener, 941.

² Kerr, *Fraud*, 4th ed. 485.

³ [1861] 30 Beav., 62, 1 Ames, 342.

⁴ Per James L. J., *Tamplin v. James* [1880] 15 Ch. D., 215, 221, Finch, 802.

⁵ [1889] 81 Maine, 365, 1 Ames, 385.

York, owned a tract of land in Bar Harbour, which he had caused to be laid out into avenues and building lots, twelve in number, and a plan to be made by a landscape engineer. Mansfield saw these lots and enquired of a firm of real estate brokers at Bar Harbour about a small lot (no. 7) to the extreme south. These brokers communicated with Sherman, who sent them the plan, a list of prices for the lots and instructions about selling. In this list, the price of lot no. 12, which was near the extreme northern end of the tract, and had no possible connection with lot no. 7, was marked \$ 2500. Mansfield, after learning the prices and examining the lots, said he would take both lots nos. 7 and 12, and Sherman agreed to sell them for \$ 4000, \$ 1500 being the price marked for lot no. 7. Sherman, however, came to Bar Harbour about a couple of months afterwards, and then discovered that he had made a great mistake as to lot no. 12. It contained a valuable building site, which he had supposed was not included, and which he had not intended to bargain at such a price; and he refused to convey it. Evidence was adduced to show that the value of this lot was \$ 12,000, and that Sherman, who lived at a distance, had acted under an erroneous impression and made a mistake about an important and controlling fact. In dismissing an action for specific performance brought by Mansfield, Emery, J. said, "Of course, if there was a valid contract, Mr. Sherman should answer in damages for all the loss his mistake and refusal to convey have occasioned to Mr. Mansfield. The court, when appealed to in an action at law, can only consider whether there was a valid contract and a breach. The mere mistake of one party, however great, will not excuse him from making full compensation.¹ When, however, application is made to the court, not to determine and enforce legal rights, but to do equity between the parties, the court will be careful to do only equity, and will not aid one party to take advantage of the mistake of the other party." We thus see that a mistake, which in itself might not be a sufficient ground to save the defendant from his bargain, may

¹ Cf. I.C.A., s. 22: "A contract is not voidable merely because it was caused by one of the parties to it being under mistake as to a matter of fact."

often protect him when the plaintiff knew of the advantage he was getting when the contract was made.¹

3. Mistake
due to
defendant.

3. Where the mistake is due solely to the defendant.² The language of clause (c), section 28, Specific Relief Act, shows that the mistake which induces the assent of the defendant need not have been *obtained* by any act or conduct on the part of the plaintiff.³ In fact, the Indian legislature clearly contemplates that there may be cases where no blame can be ascribed to the plaintiff, who may have contracted with the defendant in the *bonâ fide* belief that the latter was fully competent to contract, and yet the defendant, by reason of some mistake under which he was labouring, may be entitled to be relieved against the consequences of his act in a court of equity. The illustrations are instructive :

"A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed."

"A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 *bighas* of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement."

The first illustration is founded on the case of *Sneesby v. Thorn*.⁴ the second on that of *Manser v. Back*.⁵ Now, as a matter of law, A, the executor, was competent, if he chose, to have made the sale alone;⁶ so also the revocation of an agent's authority (and an auctioneer is an agent for sale) does not take effect, so far as regards third persons, before it becomes known to them.⁷ And yet, as in neither case the

¹ *Chute v. Quincy* [1892] 156 Mass., 189, 2 Keener, 1002 (lot sold contained 9,230 feet, but by mistake of surveyor was shown on plan as containing 3230 feet, and price had been calculated upon this area, which to plaintiff's knowledge was wrong). Cf. *Calverley v. Williams*, *supra*; *Townshend v. Stan groom*, *supra*.

² *Pomeroy, S. P.*, s. 245; 2 *Eq. J.*, s. 860, p. 1518.

³ Cf. *S.R.A.*, s. 28 (b); also s. 26 (a), (b).

⁴ [1855] 7 DeG. M. & G., 399.

⁵ [1848] 6 Hare, 443 (here a right of way to other land of vendor was reserved). *Pomeroy, S.P.*, 341 n.

⁶ See *Ind. Suc. Act*, s. 271, ill. (c); *Act V of 1881*, s. 92; *Shep. Touchstone*, 484; 1 *Williams, Executors*, 716, 720.

⁷ *I.C.A.*, s. 208.

contract would apparently have been entered into but for the mistake under which the defendant laboured, a court of equity would refuse specific relief. So, where the defendant had given, or he thought he had given, a discretion to an auctioneer to sell but not to let the property go under a reasonable sum, and in consequence of such belief, he abstained from allowing a friend to bid for him, but the auctioneer did not consider that he had any authority to buy it in or to make any reserved bidding, and the property was knocked down to the highest bidder on the spot for nearly two-thirds of the price which the owner had expected to get, the purchaser's bill for specific performance was dismissed, but without costs, as the plaintiff was not at all to blame.¹ An earlier case which came before Lord Langdale arose out of rather peculiar facts. The properties belonging to two different persons, Malins and Davis, were to be sold by auction by the same auctioneer, on the same day, and at the same place. Davis appointed Freeman to bid for him in respect of his property. Freeman arrived at the auction-room when some of Malins' property was under sale. He heard the description of this property, which was in terms wholly inapplicable to Davis's estate, and began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to £1400 and the lot was knocked to him. He shortly after discovered that it was not Davis's property, and subsequently spoke to the auctioneer, and refused to sign the contract and pay the deposit. Upon a bill for specific performance being brought, the Master of the Rolls said: "The question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, leaving the defendant to his legal liability."² His Lordship held that Freeman never did intend to bid for the

*Malins v.
Freeman.*

¹ *Day v. Wells*, [1861] 30 Beav., 220, 1 Ames, 380. Romilly, M.R., here repudiated the proposition, "that a person having given an unlimited authority to an auctioneer may, when dissatisfied with the price at which it is sold, revoke his authority."

² Cf. *per* Cooley, J.: "Denying specific performance does not deny the legality or obligation of the contract: it denies merely that the case is one of equitable cognizance," *Rust v. Conrad* [1882] 47 Mich., 449, 1 Ames, 437.

property in question, that he never meant to enter into this contract, and it would not be equitable to compel him to perform it.¹

Modern
view.

But the tide has turned in England. In 1880 an eminent Lord Justice remarked, "If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, I thought the farm sold contained twelve fields which I knew, and I find it does not include them all, or, I thought it contained one hundred acres and it only contains eighty. It would open the door to fraud if such a defence was to be allowed."² Perhaps some of the cases on this subject go too far, but for the most part the cases where the defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."³ And the next year Mr. Justice Kay said, "I understand the rule to be this: the purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to, that is, in other words, if he was misled by any act of the vendor's; but if he was not misled by any act of the vendor's, if the mistake was entirely his own, then the court ought not to let him off his bargain on the ground of a mistake made by him solely, unless the case is one of considerable harshness and hardship."⁴ Accordingly, where at an auction-sale a bidder, purely through his own inadvertence, bid for lot 1, under the impression that he was bidding for lot 2, and lot 1 was knocked down to him, Kekewich, J., held that he could not resist specific performance on the ground of his mistake.⁵

¹ *Malins v. Freeman* [1837] 2 Ke., 25, 1 Ames, 383. Cf. *Ball v. Storie* [1823] 1 S. & S., 210; *Howell v. George* [1815] 1 Madd., 1.

² "To permit such a defence would be to open the door to perjury and to destroy the security of contracts." Fry, s. 765, p. 336.

³ *Tamplin v. James*, supra, 221 (James, L. J.).

⁴ *Goddard v. Jeffreys* [1881] 51 L. J., Ch., 57.

⁵ *Van Praagh v. Everidge* [1902] 2 Ch., 266, 271. On appeal, this judgment was reversed on another ground. [1903] 1 Ch., 434. Collins, M. R., was disposed to doubt if the parties ever were *ad idem*, but this dictum has been criticised, 2 Williams, V. & P. 679.

Unilateral
mistake and
hardship.

As a result of what has been called "the recent tendency of the English courts to the narrowing of equitable doctrines¹," we find the topic of unilateral mistake reduced to a subdivision of the topic of hardship.² It remains to be seen how far our Indian courts will follow the later English precedents. The Specific Relief Act embodies a more liberal doctrine, and does not mix up the plea of mistake with that of hardship.³ As a matter of fact, however, the consequence of mistake will very often be found to be a hardship. A good illustration is the American case of *Kelly v. York Cliffs Improvement Co.*⁴ That was a bill for the specific performance of an alleged contract for the conveyance of two parcels of land at York Cliffs. It appears that the defendant company was organized to purchase, improve, lease and sell lands at this summer resort, but was not a financial success. It contracted to sell the parcels to Kelly for \$ 38,700, who, taking advantage of a bye-law of the company, which had escaped the memory of the president and the director who were acting for the company, and which provided that the stock of the company should be accepted at not less than its par value in payment for land, tendered such stock for \$38,100 and cash for the balance. Evidence showed that the land was saleable at that time in the neighbourhood at a price in money of \$50,000, while the stock, par value of \$100, was not saleable for over a few dollars per share. The Supreme Judicial Court of Maine found that the officers of the company, supposing they were making an advantageous sale for money, by mistake made a disastrous sale for stock of doubtful value, and it refused specific performance to Kelly, as otherwise the plaintiff would have obtained land of considerable money value for stock of little money value, while the defendant would have suffered loss and been seriously crippled in its resources.

And here it may not be out of place to remark that "there is a wide difference between the cases where the court is

Non-disclosure to defendant by plaintiff of facts known to him.

¹ 2 Pomeroy, *Eq. R.*, 1308, n.

² Kerr, *Fraud*, 4th ed. 479.

³ Cf. S. R. A., s. 28 (c), with s. 22, II. "The principle on which the court in such cases withholds relief from the plaintiff is, that it is against

conscience for a man to take advantage of a reasonable and *bona fide* mistake of another; or, at least, that a court of equity will not assist him in doing so." 2 Dart., *V. & P.*, 1050.

⁴ [1900] 94 Maine, 374, 1 Ames, 402.

called upon to set aside an agreement, and those where it is called upon to enforce an agreement.”¹ “I am not aware of any case in our own courts or in England,” said Walworth, C., “where the simple suppression, by the buyer, of a fact which materially enhances the value of a property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case, this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement, but he will be left to his remedy at law.”² The American courts, accordingly, act consistently upon the rule that, where the plaintiff-purchaser has taken an undue advantage of his position and knowledge and has abstained from disclosing to the vendor material facts of which he was, to the purchaser’s knowledge, ignorant, and which the said purchaser has become apprised of by means of superior facilities of information at his command, and has thus been enabled to purchase the property at an undervalue, the contract for sale is too unfair and unconscionable for specific enforcement.³ Thus, where the plaintiff-purchaser lived near the lot and knew its value, and the defendant-vendor lived at a distance and did not know its value, and, while the plaintiff did not make any misrepresentation, he concealed his knowledge of the recent rise in value of the lot and took advantage of the vendor’s ignorance, and thus got from her a contract to convey him the lot for but a little more than one-third of its value, the New York Court denied specific performance of the contract for sale to the purchaser.⁴ The rule is eminently equitable, and the Alabama Court has extended

¹ *Per Kindersley, V. C., Falcke v. Gray* [1859] 29 L. J., Ch. 28, 31.

² *Livingston v. Peru Iron Co.*, 2 Paige, 390, 391.

³ *Byars v. Stubbs* [1887] 85 Alabama, 256, 1 Ames, 370 (plaintiff living in the vicinity had information of a sort of boom which increased value of land, defendant resided about 100 miles away); *Wooltums v. Horsley* [1892]

93 Ky., 582, 2 Keener, 926 (vendee knew of vendor’s ignorance of value, as mineral land, of farm, worth \$15 an acre, which he purchased for 40 c. an acre); *Hetfield v. Willey*, 105 Ill., 286 (vendor of partnership interest did not disclose large liabilities of the firm, not shown by its books); 2 Pomeroy, *Eq. R.*, s. 784, p. 1306.

⁴ *Margraf v. Muir*, 57 N. Y., 155.

it even to a case where the plaintiff was not shown to possess facilities which the defendant had not. It refused to enforce an agreement to compromise a debt, entered into by a creditor in ignorance of a judgment, execution and levy, made on his behalf on the debtor's lands in another state. These facts were known to the debtor and not to the creditor, though the debtor probably supposed that the creditor was not ignorant of them. The contract under those circumstances, the court remarked, could scarcely be said to be just, fair and reasonable.¹ But the contrary view has been taken, as we have seen, in the recent English case of *Turner v. Green*.²

And the proposition that, although there is nothing misleading in the particulars and the defendant's mistake was not on a point of vital importance and arose entirely from his own negligence, he is yet to be relieved, cannot be maintained.³ Where, therefore, the defendant purchased a lot, described as "all that well-accustomed inn, with the brew-house, out-buildings, and premises known as The Ship, together with a messuage, saddler's shop, and premises adjoining thereto, situate at Newerne, in the same parish, Nos. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. Knowles and Mr. S. Merrick," without caring to look at two plans which were lying on the table in the auction-room, but relying on the fact that he had known the property from a boy, and he then declined to complete the purchase, unless three plots of garden ground adjoining the lot, as above described, were conveyed to him, specific performance was decreed against him. The vendors had done nothing tending to mislead, and James, L. J., remarked, "It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realising their testator's estate and the reckless conduct of the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind, without any reasonable excuse, he ought to be held to his bargain."⁴ Even

Defendant's
mistake due
to his own
negligence.

¹ *Cowan v. Sapp*, 81 Alabama, 525.

² [1895] 2 Ch., 205, criticised in 2 *Pomeroy, Eq. R.*, 1308, n. 83.

³ *Per Brett, L. J., Tamplin v. James*

[1880] 15 Ch. D., 215, 222.

⁴ *Ibid*, 221. *Swaishland v. Dearsley* [1861] 29 Beav., 430.

courts which relieve against unilateral mistake admit that the mistake must not be one due solely to the negligence and want of reasonable care on the part of him who asks for relief.¹ The neglect, however, must be of a serious character, amounting, in some cases, even to the violation of a positive legal duty,² and the broad proposition that a mistake concerning matter, as to which the party had means of knowledge or might have ascertained the truth, will not be relieved from,³ cannot be sustained.⁴

Estoppel.

Mistake regarding vital part of contract.

Moreover, in dealing with cases of unilateral mistake, the rule of estoppel should not be lost sight of. Whatever be a man's real intention, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as *manifested* was his *real* intention.⁵ The mistake, in order to entitle the defendant to equitable relief, must further be of a vital part of the contract, of the *corpus* of the agreement.⁶ If, for instance, provided he gets his price, it is perfectly immaterial to a vendor of immoveable property, who purchases the land, he cannot resist specific performance, if the actual purchaser turns out to be a *benamidar* or an agent.⁷ And we have seen that a difference in quantity or quality can generally be compensated in equity.⁸ It may be that where a person buys one-half the quantity of land that he intended to buy, and the vendor intended to sell, the result may be such a mistake between the parties that the court cannot assess compensation so as to make everything fair between

Difference in quantity.

¹ *Caldwell v. Depew* [1889] 40 Minn., 528, 2 Keener, 1001. Cf. *Duke of Beaufort v. Neeld* [1844] 12 Cl. & F., 248, 286; Kerr, *Fraud*, 4th ed. 475; *New Brunswick & C. Ry. Co. v. Conybeare* [1862] 9 H. L. C., 711, 742.

² 2 Pomeroy, *Eq. J.*, s. 856.

³ 1 Story, *Eq.*, s. 146 and note.

⁴ *Kelly v. Solari* [1841] 9 M. & W., 54, Woodruff, 258; *Dails v. Lloyd* [1848] 12 Q. B., 531; *Willmott v. Barber* [1881] 15 Ch. D., 96, 106. But ignorance of a fact is one thing, and ignorance of the means of proving a fact is another, *Windbiel v. Carroll* [1878] 16 Hun., 101, Woodruff, 263.

⁵ Benjamin, *Sale*, 112; 2 Williams, *V. & P.*, 668, Cf. I. Ev. A., s. 115. In *Mansfield v. Hodgdon*, 147 Mass., 304,

vendor thought he was selling property, subject to mortgage; but the agreement contained no such qualification, and purchaser had no knowledge of vendor's mistake. Holmes, J., said that the vendor's "obligations must be measured by his overt acts."

⁶ I.C.A., s. 20, "a mistake as to a matter of fact essential to the agreement."

⁷ *Smith v. Wheatcroft* [1878] 9 Ch. D., 223; *Nash v. Dix* [1898] 78 L. T., 445. Distinguish *Archer v. Stone*, *ibid*, 34 (here personality of purchaser was a material element in determining vendor's intention). Pothier, *Oblig.*, s. 19.

⁸ *Ante*, 174.

them ; but even in such a case, specific performance may be decreed if the person who is prejudiced by the error be willing to perform the contract without compensation.¹ But a mere mistake in acreage may not be treated as a mistake as to the essential part,² and when the land sold turns out to be less than it is represented to be, the ordinary mode of calculating the compensation³ is, to ascertain the quantity and allow for the deficiency.⁴ Where the contract expressly provides for compensation in case of mistake, such provision, as we have seen,⁵ will give a right generally cumulative to the ordinary right to partial performance with compensation, and compensation may be made for a mistake within the scope of such provision, and a contract may be specifically enforced in other respects, if proper to be so enforced.⁶ Such a clause for compensation may be availed of even after completion of conveyance, and though the extent of the area specified is qualified by some phrase like "more or less" or "or thereabouts."⁷ A mistake even as to quality may be vital, though there is no warranty, where the thing purchased, *e.g.*, is positively noxious or actively harmful in quality. If a house where a plague case has occurred be sold without the vendor intimating this fact to the purchaser, the latter, it is apprehended, may refuse to complete on being informed of the infection.⁸ But the general

Mistake
about quality.

¹ *Earl of Durham v. Legard* [1865] 34 Beav., 611, 1 Ames, 395 ; S. R. A., s. 15.

² *Mackenzie v. Hesketh*, [1877] 7 Ch. D., 675, 682. Cf. *North v. Percival* [1898] 2 Ch., 128. But see *Paine v. Upton* [1882] 87 N. Y., 327, 3 Keener, 228 : "In the absence of any finding of special facts and circumstances, the natural presumption is that in a sale of agricultural land the element of quantity enters into the transaction, and affects the consideration agreed to be paid." Cf. *Hill v. Buckley* [1811] 17 Ves., 394, 401, 34 E. R., 155.

³ S. R. A., s. 14. Kerr, *Fraud*, 4th ed. 519.

⁴ *Hill v. Buckley*, *supra*.

⁵ *Ante*, 183.

⁶ S. R. A., s. 28, (c). Cf. *Brewer v. Brown* [1884] 28 Ch. D., 314.

⁷ *Turner v. Skelton*, [1879] 13 Ch. D., 130 ; *Palmer v. Johnson* [1884] 13

Q. B. D., 351. "The introduction of the words 'more or less,' following the enumeration of the number of acres, is no obstacle to relief in equity, upon the ground of mistake. Those words in a contract or conveyance of land do not import a special engagement that the purchaser takes the risk of the quantity ; their presence may render it more difficult to prove such a mistake as will justify the interference of equity, but they are not equivalent to a stipulation that the mistake, when ascertained, shall not be ground of relief." *Paine v. Upton*, *supra*, citing *Belknap v. Sealey*, 14 N. Y., 143.

⁸ Cf. *Cornfoot v. Fowke* [1840] 6 M. & W., 358, 380-1 ; *Chester v. Powell* [1885] 52 L. T., 722, 723. Distinguish *Lucas v. James* [1849] 7 Hare, 410. 2 Dart., V. & P., 1071.

rule seems to be that, where one has purchased property under a mistaken impression as to its quality, he must abide by the consequences of his own mistake, unless the vendor made, by warranty or representation, some promise as to the quality, or actively concealed some defect which was known to him.¹

Mistake at
time of con-
tract.

The vital mistake must also be made at the time of the contract, and a promisor's disappointment as to the outcome of his bargain is no reason for refusing to enforce the agreement *in specie*.² A court does not grant specific performance where that will impose too great a burden on the party who has made a mistake, but the latter cannot ask for or obtain any advantage beyond a relief from the burden.³

Mistake of
law.

It is usual to say that law relieves against a mistake of fact only,⁴ and in this matter equity follows the law.⁵ Where, therefore, the words of an agreement are quite certain, and the only thing that is not understood by the defendant is the legal effect of certain words which it contains, it has been said "that is no ground for mistake at all," and "the legal effect of a contract upon the true construction of the words, is a matter by which he is bound." The defendant having entered into the agreement cannot say, 'I did not mean the agreement to have its legal effect.'⁶ But high judicial authority has asserted that the court has power to relieve against mistakes in law as well as mistakes in fact,⁷

¹ 2 Williams. V. & P., 688; ante 279-82; P. R. & Co. v. Bhagwandas [1908] 10 Bom. L. R., 1113.

² Morley v. Clavering [1860] 29 Beav., 84, 2 Keener, 949; Mildmay v. Hungerford [1691] 2 Vern., 243 (speculation upon facts); Western R. Corporation v. Babcock [1843] 6 Met., 346, 2 Keener, 937.

³ Kerr, *Fraud*, 4th ed. 482; Burrow v. Scammell [1881] 19 Ch. D., 175; Bailey v. Piper [1874] 18 Eq., 683.

⁴ Cf. I. C. A., s. 21. Pomeroy, S. P., s. 239; Kerr, *Fraud*, 4th ed. 482-3; 2 Pothier, *Oblig.*, App. xviii (Evans); Domat, *Civil Law*, bk. 1, tit. 8, s. 1, art. 13-16.

⁵ Per Lord Chelmsford: "Mistake is undoubtedly one of the grounds for equitable interference and relief; but then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is

clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law." Midland G. W. Railway v. Johnson [1858] 6 H. L. C., 798, 816-1. Fowler v. Black [1891] 136 Ill., 363, 2 Scott, 558.

⁶ Powell v. Smith [1872] 14 Eq., 85, 1 Ames, 391 (lease to be for '7, 14 or—years', which Romilly M. R., interpreted to be a lease for 7 or 14 years determinable at lessee's option at the end of 7 years; here lessee had entered and incurred expense). Kerr, *Fraud*, 4th ed. 470.

⁷ Stone v. Godfrey [1854] 5 DeG. M. & G., 76 (Turner, L. J.); Rogers v. Ingham [1876] 3 Ch. D., 351, 3 Keener, 79. Cf. Daniell v. Sinclair [1881] 6 A. C., 181, 190. Kerr, *Fraud*, 4th ed. 466 sqq.

and probably no lawyer at the present day will deem it accurate to say that relief can never be given in respect of a mistake of law.¹ Lord Westbury, addressing the House of Lords, explained the matter authoritatively thus: "It is said *ignorantia juris haud excusat*,² but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact: it may be the result also of matter of law: but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."³ And in a later case Lord Chelmsford, in the same place, said, the peculiarity of this case is "that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a very well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with the property under the influence of such mistake."⁴ The above statements have been criticised,⁵ and it is difficult to deduce a consistent rule from the authorities.⁶ The true position probably is that no court, whether of law or of equity, will

¹ *Per* Sterling, J., *Alcard v. Walker* [1896] 2 Ch., 369, 381. 1 Story, *Eq.*, 112 n. (Bigelow).

² Broom, *Legal Maxims*, 205. "Ignorance is not mistake", said Lord Rosslyn, *Fletcher v. Tollet* [1799] 5 Ves., 3, 14, and the distinction has been explained to be—"the former is passive, and does not presume to reason, and unless we were permitted to dive into the secret recesses of the heart, its presence is incapable of proof; but the latter presumes to know when it does not, and supplies palpable evidence of its existence," *Lawrence v. Beaubien* [1831] 2 Bailey, 623, 2 Scott, 564; *Culbreath v. Culbreath* [1849] 7 Ga., 64, Woodruff, 415. But the distinction has been repudiated in other jurisdictions, *Jacobs v. Morange* [1871] 47 N. Y., 57, and does not seem to be sound. 1 Page, *Con.*,

s. 171.

³ *Cooper v. Phibbs* [1867] 2 H. L., 149, 170, 3 Keener, 51. But as to this case, see *Alton v. First Nat. Bank* [1892] 157 Mass. 341, 343; Pollock, *Con.* (W. W.), 616.

⁴ *Earl Beauchamp, v. Winn* [1873] 6 H. L., 223, 234. Cf. *Watson v. Marston* [1853] 4 DeG. M. & G., 230 (mortgagee, having power of sale, after decree of foreclosure, contracted to sell the property under the power of sale, not knowing such sale might reopen the foreclosure and make him accountable for any surplus to mortgagor, specific performance was refused), *Sullivan v. Jennings* [1888] 44 N. J., Eq., 11, 1 Ames, 393.

⁵ 1 Story, *Eq.*, 113, n. (Bigelow); 1 Page, *Con.*, s. 172.

⁶ 2 Pomeroy, *Eq. J.*, s. 849; Kerr, *Fraud*, 4th ed., 467-8.

Mistake of judgment.

relieve against a *mistake of judgment*. Where a party has knowledge of two courses open to him, and he deliberates and chooses one of them, he binds himself by the election.¹ But where in truth a choice of ends was not open to the complainant, or where no doubt occurred to him whether the object contemplated could be accomplished by the step to be taken, with nothing besides radically different, then between the intended effect of that step and the actual course of the law no choice was made and, says Dr. Bigelow, equity should grant relief even though the mistake is one of law.²

Indian Law.

It has been thought that, since a contract caused by mistake as to any law in force in British India is not voidable,³ no court in this country can relieve against a mistake of law.⁴ It is true, the courts do not ordinarily undertake to relieve parties from their acts and deeds fairly done "under a full knowledge of the facts, though under a mistake of the law, and it may even be that "every man is to be charged at his peril with a knowledge of the law," and "there is no other principle which is safe and practicable in the common intercourse of mankind."⁵ But the rule is really one of expediency,⁶ and it is quite conceivable that a mistake of law may, quite as much as a mistake of fact, exclude consent "upon the same thing in the same sense."⁷ Whatever may be said of the machinery of the law, the law itself is not a thing external to the contract, and the subject of the bargain is what it is because the law makes it such.⁸ There may be a contract for sale in respect of an extinct thing, both seller and purchaser supposing it to be existent, and both ignorant that from the nature of the case, and as a matter of law,

¹ 1 Story, *Eq.*, 155 n. (Bigelow); *Hunt v. Rousmaniere* [1828] 1 Peters, 1, 17, 2 Scott, 544.

² 1 Story, *Eq.*, 115 n.; *Pullen v. Ready* [1743] 2 Atk. 537, 591. Cf. *Pomeroy, S.P.*, 329.

³ I.C.A., s. 21.

⁴ Collett, 247.

⁵ *Per* Kent, C., *Lyon v. Richmond* [1816] 2 John. Ch., 559. Cf. *per* Davis, J., "It is impossible to uphold the Government and so to maintain its administration as to protect public and private rights, except on the

principle that the rights and liabilities of every one shall be the same as if he knew the law," *Jordan v. Stevens* [1863] 51 Maine, 78, 3 Keener, 40, 2 Austin, *Jur.*, 172.

⁶ "Its application to bar a civil remedy is not demanded by any reasons of public policy, and, in many cases, is a resort to a fiction not for the purpose of, promoting, but of defeating justice," *Renard v. Fiedler* [1854] 3 Duer, 318, 323.

⁷ I.C.A. s. 13.

⁸ Bigelow, 1 Story, *Eq.*, 112 n.

the object could not exist.¹ The promise here is gratuitous and no court will enforce it.² Mistake as to civil rights may often be even ignorance of fact,³ and a mistake as to a law not in force in British India is treated on the same footing.⁴ The true state of the law, whether foreign or domestic, is apparently always a fact,⁵ and the distinction is one of policy rather than of principle.⁶ Our courts act upon the presumption that every one knows the general law of the land, especially the criminal law. But there are legal principles confessedly doubtful, and about which ignorance may well exist⁷ in the untrained mind. If by reason of such ignorance a party be led to enter into a contract with the result that he is subjected to an operation of the agreement entirely different from what he conceived, and hard and oppressive, there is no reason why he should not be relieved by a court of equity from the consequences of his error when the other party seeks a remedy, *viz.*, specific relief, which is in the discretion of the court.⁸ For a contract that a court will not set aside, it may yet decline to enforce *in specie*. And upon principle there is much to be said in favour of Savigny's proposition that where mistake is a special ground of relief, the right to such relief may be excluded by negligence, and ignorance of law may be presumed to be the result of negligence, unless special circumstances, for instance, a real doubtfulness of the law, rebuts the presumption.⁹ In any case, "there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party

¹ *Blakeman v. Blakeman* [1872] 39 Conn., 320, 2 Scott 571.

² 1 Page, *Con.*, s. 173.

³ *Bingham v. Bingham* [1748] 1 Ves. Sr., 126, 3 Keener, 5. Cf. *Eaglesfield v. Londonderry* [1876] 4 Ch. D., 693, 702 (*per* Jessel, M.R., "There is not a single fact connected with the personal status that does not, more or less, involve a question of law.") But see *Dig.*, lib., 22, tit. 6, 1, s. 2

⁴ I.C.A., s. 21.

⁵ Cf. 1 Story, *Eq.*, s. 130, n. 3. See also Collett, 194.

⁶ *Jordan v. Stevens* [1863] 51 Mc., 78, 3 Keener, 39; Markby, *Elem. of Law*, ss. 268-9; *Park Bros. & Co. v. Blodgett & Olapp Co.* [1894] 64 Conn., 28, 3 Keener, 153.

⁷ Waterman, s. 355, p. 478; 1 Story, *Eq.*, ss. 112, 126. This rule is properly restricted to cases of family compromises and settlements. "To permit a distinction between rules said to be clear and those claimed to be doubtful would at once open the door for all the evils in the administration of justice, which the presumption itself is intended to exclude," 2 Pomeroy, *Eq. J.*, s. 846. *Trigg v. Read*, 42 Am. Dec. 447.

⁸ English and American cases will be found fully discussed in Bigelow's notes, 1 Story, *Eq.*, ss. 111, 140. See also Keener, *Quasi-contracts*, ch. 2; 2 Pomeroy, *Eq. J.*, 50, 841-5.

⁹ Lindley, *Jur.*, xx. Cf. Pollock, *Con.*, (W. W.), 575.

concerning the legal effect of a transaction in which he engages or concerning his own legal rights which are to be affected, is induced, procured, aided or accompanied by inequitable conduct of the other parties. "A court of equity," says Pomeroy, "will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct."¹

S.R.A., s. 28.

Misapprehension,
surprise.

In several places, in the Specific Relief Act, no doubt, 'mistake of fact' is pointedly spoken of, but clause (c), section 28, expressly recognises the right of a party to a contract to resist specific performance thereof, if his assent thereto was given under the influence of mistake of fact as well as misapprehension and surprise. The term 'surprise' is now but seldom used in England. At one time it was sometimes employed as almost synonymous with fraud. But the common definition of 'surprise,' says Story, is the act of taking unawares, the state of being taken unawares, sudden confusion or perplexity; and when a court of equity relieves on account of surprise, it does so upon the ground that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions.² Obviously, it is not easy to limit the signification of a vague term like 'surprise' or a non-technical word like 'misapprehension.' It has been suggested that the latter term means mistake in regard to the *effect* or *consequences* (other than mere legal ones), of the contract, as contrasted with 'mistake of fact,' which means mistake in regard to the *terms* of the contract.³ But in my judgment, there is no reason to restrict the meaning either of 'misapprehension' or 'surprise,' so as to exclude mistakes of law; and this conclusion seems to me to be justified by clauses (b) and (d) of section 26, Specific Relief Act. The Allahabad High Court, I also note with pleasure, has recently declared that a court of equity will relieve against a mistake of law, if

¹ 2 Eq. J., s. 847. *Wilding v. Sander-*
son [1897] 2 Ch., 534.

² 1 Eq., s. 120 n. s. 251, n. 4. *Mathews*
v. Terwilliger [1848] 3 Barb., 50, 54, 2
Scott, 255. Lord Somers said it was
"a word of a general signification,
so general and so uncertain, that it

is impossible to fix it. A man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment as it ought to be," *Earl of Bath & Montague's case* [1693] 3 Ch. Cas., 56, 114.

³ Collett, 249-50. Cf. Nelson, 236.

FAMILY SETTLEMENT.

there be any equitable ground, which makes it, under the particular facts of the case, inequitable that a party benefited by the mistake should retain that benefit.¹ But I apprehend that the omission to qualify 'misapprehension' as 'reasonable' in clause (c), section 28, does not imply that any sort of error, however unjustifiable, will entitle a party to equitable relief. Equity in every case requires reasonable diligence, and the policy of courts is to administer relief only to the vigilant, and not where the mistake is imputable to the party's own improvidence and inattention.³ Nor can specific performance be withheld merely upon a vague idea as to the true effect of the contract not having been known.⁴

Reasonable
misapprehension.

Ignorance may sometimes be alleged and even proved in respect of well-known and well-established rules of law. In such cases, other circumstances will also be found present, *e.g.*, undue influence or imposition or abuse of confidence or gross mental incapacity.⁵ Here mistake of law may be said to be not the foundation of relief, but the medium of proof to establish some other proper ground of relief.⁶

Mistake of
law as
medium of
proof.

It will not be out of place to remind you here that family settlements or compromises will be supported even where parties, under a mistake as to particular applications of law, deliberately renounce rights, provided they are deemed doubtful by both.⁷ If on the other hand, they act upon a supposition of right in one of the parties, without a doubt upon it and under a mistake of law, the agreement will not bind.⁸ In the words of Leach, V. C., "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under

Family
settlement.

¹ *Nawab Begam v. Creet* [1905] 27 All., 678.

² Cf. S.R.A., s. 28 (b).

³ *Duke of Beaufort v. Neeld* [1844] 12 Cl. & F., 248, 286; *Caldwell v. Depew* [1889] 40 Minn., 528, 2 Keener, 1000; *Wood v. Patterson*, 4 Md. Ch., 335; *Waterman*, 481. But see *ante*.

⁴ *Watson v. Marston* [1853] 4 DeG. M. & G., 230.

⁵ *Lansdowne v. Lansdowne* [1730] Mosely, 364; *Light v. Light*, 21 Pa. St., 407; *Haviland v. Willets* [1894] 141

N. Y., 35; *Clark v. Clark* [1896] 55 N. J., Eq., 814 (concealment of truth by defendant's attorney).

⁶ 1 Story, Eq., s. 128; *Hardigree v. Mitchum* [1874] 51 Alabama, 151, 153.

⁷ *Ante*, 100. *Stewart v. Stewart* [1839] 6 Cl. & F., 911. Cf. *Latafat Husain v. Badshah Husain* [1905] 8 O. C., 143, P. C.; *Harris v. Loyd*, [1839] 5 M. & W., 432, Woodruff, 245.

⁸ *Stockley v. Stockley* [1812] 1 V. & B., 31.

the name of compromise, a court of equity will relieve him from the effect of his mistake.”¹

Specific
performance
with varia-
tion.

I have so far been dealing with cases where specific performance of a contract may be resisted as a whole. But it may well be that it is only to a part of a contract that the defendant takes exception, and under certain conditions, if the defendant can substantiate his objections, the plaintiff will not be granted a decree for specific performance, unless he submits to the variation set up by the defendant. These conditions, as set forth in section 26, Specific Relief Act, which, by the way, it may be noted, is based upon section 5, Chapter XVII, of Dart's well-known treatise on the Law of Vendors and Purchasers, are, in the case of contracts in writing, five, and in three of them mistake or misrepresentation may be the determining factor. The general features of these I have already indicated.² I will now consider some illustrations, with special

S. R. A., s.
26 (a).

Terms of
contract
different.

reference to the plea of mistake. The first case where the defendant may prove and insist upon the plaintiff submitting to a variation of the contract, which the latter seeks specifically to enforce, is “where by fraud or mistake of fact the contract of which performance is sought is *in terms* different from that which the defendant supposed it to be when he entered into it.”³ The case of *Lord Gordon v. Marquis of Hertford*⁴ is in point. There was an agreement by several persons to give a joint bond in £1500, but, as drawn out, it imposed a several and individual liability upon each contractor. Equity in such a case will give a decree only for a joint bond. So, where a landlord sues for the specific performance of a contract for a lease, if the defendant proves that the agreement was for an abated rent, the lease will be directed only with the abatement.⁵ So, where a written contract for sale shows that the purchaser should bear the expenses of the conveyance, the vendor may show that the former, according to the agreement, is also to pay

¹ *Naylor v. Winch* [1824] 1 S. & S., 555, 2 Scott, 577. Cf. 2 Pomeroy, *Eq.*, J., ss. 850, 855.

² *Ante* 244-8.

³ S.R.A., s. 26 (a).

⁴ [1817] 2 Madd., 106, 56 E. R. 274;

ill. (a), S.R.A., s. 26, is founded upon this case.

⁵ *Clarke v. Moore* [1844] 1 Jon. & Lat., 723. 68 R.R., 368. Cf. *Lord Townsend v. Stangroom* [1801] 6 Ves., 238.

the expenses of making out the latter's title, and in such a case the plaintiff-purchaser may be required to have the contract performed in the way contended for by the defendant.¹

S.R.A., s.
26 (b).
Effect of
document
misappre-
hended.

The second is where the terms as reduced to writing are not at fault, but "by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff."² It may be that the terms of the contract were ambiguous, and they are susceptible of an interpretation, not far-fetched, but plausible, nay reasonable, which will bring about a result that the defendant did not contemplate. The subject-matter of a sale, *e.g.*, may, upon a possible construction of the document, turn out so materially variant from what it was supposed to be, that the substantial object of the contract may be said to have failed. Where, therefore, in a suit to enforce a contract in writing for the sale of a dwelling-house, it is shown that the purchaser-defendant assumed that this contract included an adjoining yard, and the document is so framed as to leave it doubtful whether the yard was so included or not, the court will refuse to enforce the contract, except with the variation set up by the defendant.³ The mistake here is about the right construction of a document, and this may be a question either of law or of mixed law and fact. Relief therefore is given in this case, though the defendant's mistake is one of law, and even though he himself is the author of the ambiguity.⁴ The court will also refuse to make a decree according to the literal terms of the written contract, where it is silent about restrictive

¹ *Ramsbottom v. Gosden* [1812] 1 V. & B., 165, 12 R.R., 207.

² S.R.A., s. 26(b).

³ S.R.A., s. 26, ill. (b), founded on *Moxey v. Bigwood* [1862] 8 Jur. N.S., 803, 10 ib., 597. Cf. *Bloomer v. Spittle* [1872] 13 Eq., 427, 3 Keener, 398. In some English cases, again, an option has been given to the defendant of "having the whole contract annulled or else of taking it in the form which the plaintiff intended," *Harris v. Pepperell* [1867] 5 Eq., 1. "The principle of these cases seems to be that the court will not hold the plaintiff bound by the defendant's acceptance of an

offer which did not express the plaintiff's real intention, and which the defendant could not in the circumstances have reasonably supposed to express it; nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not have consented to accept, but will put the parties in the same position as if the original offer were still open." Pollock, *Con.* (W W.) 600-1.

⁴ *Neap v. Abbott* [1838] C. P. Coop., 333; *Manser v. Mack* [1848] 6 Hare, 447; 2 Dart., V. & P., 1049.

covenants, and extrinsic evidence proves a prior restricted parol agreement.¹

S.R.A., s.
26 (d).
Intended
result not
attained.

The third case, where the defendant may prove a variation is also one of mistake of law. Here "the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce."² For instance, if *A* and *B* enter into negotiations for the purpose of securing land to *B* for his life, with remainder to his issue, but, through their own mistake or that of the draftsman, the contract which they execute contains terms, the legal effect of which is to confer an absolute ownership on *B*, the contract so framed cannot be specifically enforced.³ In this case, both the parties are innocent, but by reason of misapprehension or lack of knowledge or want of skill, they have embodied their intentions in a document which, it turns out, is not drawn in accordance with their agreement, and does not give effect to it.⁴ The aim of the court in giving relief for a mistake is to put the parties as nearly as possible in the situation they would have been in but for the mistake.⁵ Where there is a mistake as to the very nature of the contract, the contract cannot be treated as a contract of the parties; it is something to which they never really agreed. The mistake is fundamental, it goes so completely to the root of the matter as to prevent any real agreement from being formed,⁶ and relief must be given on the ground of want of union of minds.⁷ But, it is worth repeating, specific performance is not to be withheld merely upon a vague idea as to the true effect of the contract not having been known.⁸

Intention,
real and
possible.

The principle underlying these defences is that equity will not interfere for the purpose of carrying out an intention, *which the parties did not have when they entered into a transaction*, but which they might or even would have had if they had been more correctly informed as to the law,—if they had not been mistaken

¹ *Barnard v. Cave* [1858] 26 Beav., 253.

² S.R.A., s. 26 (d).

³ S.R.A., s. 26 ill. (d.).

⁴ *Sandford v. Washburn*, 2 Root, 499;
Springs v. Harven, 3 Jones, Eq., 96.

⁵ *Waterman*, 493.

⁶ *Pollock, Con.* (W. W.), 574.

⁷ *Bigelow*, 1 L.Q.R., 300.

⁸ *Per Turner, L. J., Watson v. Mars-
ton* [1853] 4 DeG. M. & G., 230, 238;
ante, 343.

as to the legal scope and effect of their transaction.¹ But where there is no mistake as to the legal import of *the contract actually made*, but the mistake of law prevents the real contract from being embodied in the written instrument, equity will interfere with the appropriate relief, whether affirmative or defensive.²

It may be mentioned here that a variation may be directed under certain circumstances by the court. Equity in decreeing specific performance may impose upon a party terms not stipulated in the contract, when it finds, for instance, that performance having been partially made, completion, according to the strict terms of the contract, has become impracticable. So, where specific performance was sought of a covenant for renewal of a lease and it appeared that this covenant had for one hundred and fifty years been acted on in a manner different from its terms, *viz.*, by continual increase, not of the rent but of the fine, the court held that it could not be enforced according to its original terms, but only upon the plaintiff's submitting to a conscientious modification of it to conform to the circumstances of the case. "It is the advantage of the court of equity," remarked Lord Redesdale, "that it can modify the demands of parties according to justice."³

Variation according to altered circumstances.

(f) *Want of Mutuality.*

Another defence to an action for specific performance which will be found frequently enforced by English and American courts of equity, is that the contract lacks mutuality. In an old case, Lord Chancellor Guilford said, "both (parties) must be bound or neither of them in equity."⁴ So, in a much later case, Lord Redesdale observed, "This would not be equity, that a party not bound by the agreement itself, should be permitted, at his option, and when he finds it to his advantage to do so, to compel the other party to perform, when, if the advantage were the other way, he could not himself be coerced to performance on his part."⁵ Specific performance of a contract has, accordingly,

(f) Mutuality wanting.

¹ 2 Pomeroy, *Eq. J.*, s. 843, p. 1487; *S. P.*, s. 232, p. 329.

² 2 Pomeroy, *Eq. J.*, s. 845; *S. P.*, s. 234.

³ *Davis v. Hone* [1805] 2 Sch. & Lef., 341 (here acquiescence was the

ground of the variation, not mistake).

⁴ *Hatton v. Gray* [1684] 2 Cas. Ch. 164, 1 Ames, 421.

⁵ *Lawrenson v. Butler* [1802] 1 Sch. & Lef., 13, 18.

been refused to an infant suing through his next friend,¹ for "you cannot get specific performance against an infant."² So, in cases of valid bilateral contracts, where a plaintiff has promised to render personal services,³ or to build or perform continuous acts,⁴ or to care for and support the defendant,⁵ or to secure the assent of third persons,⁶ a decree for specific performance against a defendant may be refused to him, because such a promise, so long as it is executory, cannot be enforced *in specie* at the instance of the defendant. But the exact scope of this doctrine of mutuality has been the subject of dispute,⁷ and the cases have established so many and important exceptions or apparent exceptions⁸ to it, that the doctrine itself, based as it largely seems to have been upon notions of expediency rather than principles of abstract justice, has in modern times undergone material modifications.⁹ And if it were permissible to refer to proceedings in the legislative council,¹⁰ an argument could be based thereupon that it was not the intention of the Indian legislature, when enacting the Specific Relief Act, to introduce a principle which was said to have found its place in English courts of equity rather from a desire for symmetry than from its inherent utility.¹¹ Besides, so far as the application of the doctrine of mutuality may be attributed to the severance of equitable and legal remedies recognised in Anglo-American courts, it is clear that the same is out of place in a country where this severance is not

Indian law.

¹ *Flight v. Bolland* [1828] 4 Russ., 290, 1 Ames, 422. *Distinguish Clayton v. Ashdown* [1714] 9 Vin. Ab., 393, 1 Ames, 421.

² *Per Lindley, L.J., Lumley v. Ravenscroft*, 1895] 1 Q.B., 684. But see *Khairunnessa v. Loke Nath* [1899] 27 Cal., 276; *Trevelyan, Minors*, 196-7.

³ *Pickering v. Bishop of Ely* [1843] 2 Y. & C., C. C., 249; *Johnson v. Shrewsbury Co.* [1853] 3 DeG. M. & G., 914; *Stocker v. Wedderburn* [1857] 3 K. & J., 393, 2 Keener, 801.

⁴ *Waring v. Manchester Co* [1849] 7 Hare, 482, 492; *Blackett v. Bates*, [1865] 1 Ch. Ap., 117, 2 Keener, 154; *Hills v. Croll* [1845] 2 Ph., 60, 1 Ames, 427; *Marble Co. v. Ripley* [1870] 10 Wallace, 339, 358; *Iron Age Pub. Co. v. Western Union Tel. Co.* [1887] 83 Alab., 498, 2

Keener, 834.

⁵ *Chadwick v. Chadwick*, 121 Alab., 580.

⁶ *Cf. Fennelly v. Anderson* [1851] 1 Ir. Ch. R., 706, 1 Ames, 423; *Avery v. Griffin* [1868] 6 Eq., 606; *Ten Eyck v. Manning*, [1893] 52 N. J., Eq. 47, 2 Keener, 849.

⁷ See articles on "Defence of Lack of Mutuality" by Prof. W. D. Lewis, 40-1 American Law Register, N. S., 1901-2; article by Prof. Ames, 3 Columbia Law Rev., 1.

⁸ *Peterson v. Chase*, 115 Wis., 239.

⁹ *Lompvey v. St. Paul etc. Railway Co.*, 89 Minn., 187; 4 Pomeroy, Eq. J., s. 1405; 2 Pomeroy, Eq. R.; 1291, n.

¹⁰ *Admr. Gen. of Bengal v. Prem Lal Mullik* [1895] 22 Cal., 788, P.C.

¹¹ 1 Stokes, A.-I. Codes, 931.

known.¹ But the Specific Relief Act, as framed, does not anywhere expressly repudiate the doctrine. On the contrary, the language used in respect of the last nine illustrations of clause (b), section 21, supports the position that the doctrine is part of the Indian law. For, while of the first three illustrations of that clause it is said, 'B cannot enforce specific performance of these contracts', of the last nine it is said, 'the above contracts cannot be specifically enforced'; this apparently implies that those contracts cannot be so enforced either by A or B.² Not unnaturally, judicial opinion on this question has differed. The Calcutta Court at first followed *Flight v. Bolland*, and refused specific performance of a contract to a minor.³ The Madras Court dissented and said the doctrine of mutuality had no application in British India.⁴ Then the Full Bench of the Calcutta High Court ruled that if a contract was validly entered into on behalf of a minor, *and there was mutuality in such contract*, it might be specifically enforced.⁵ The Privy Council in appeal upheld the doctrine of mutuality, but reversed the Calcutta view as to the validity of a contract made for a minor by the manager of his estate. The Judicial Committee held that it was not within the competence of such a manager or of a guardian of a minor to bind the latter or his estate by a contract for the purchase of immoveable property, and the minor in such a case not being bound by the contract, *there was no mutuality in it*, and he could not therefore, on attaining majority, obtain specific performance of it.⁶

Under the circumstances, it is necessary to explain, even briefly, this equitable doctrine of mutuality, for, in so far as it

Equitable
doctrine of
mutuality.

¹ Cf. 2 Wh. & T., 8th ed., 538: "It must be remembered that since the Judicature Act, damages may now be claimed in the alternative in an action for specific performance; so that an action could not now, as formerly, be dismissed for want of mutuality, leaving the plaintiff to bring his action for damages."

² Cf. Collett, 152.

³ *Fatima Bibi v. Debnauth Shah* [1893] 20 Cal., 508.

⁴ *Krishnasami v. Sundarappayar* [1894] 18 Mad., 415. But both these decisions were before *Meheri Bibi v.*

Dharmadas Ghose [1903] 30 Cal., 539 P.C. which has exploded the doctrine previously entertained in India that the contracts of infants were only voidable and not void. Contracts by guardians stand on a different footing, *ante*, 200n.

⁵ *Mir Sarwar'an v. Fakharuddin* [1906] 34 Cal., 163, F.B.

⁶ *Mir Sarwarjan v. Fakhruddin* [1911] 39 Cal., 232, P.C. In *Ulfat v. Gouri* [1911] 38 All. 657, minor was allowed to enforce guardian's contract of sale against latter's heirs, but *query*.

purports to be and in effect is, an application, or possibly extension, of the fundamental doctrine that equity relieves against inequality in contracts, no Indian court will be justified in totally disregarding it.¹ The doctrine, though a technical one, is, as Kekewich, J., explained, founded on common sense, and simply amounts to this, that one party to a bargain should not be held bound to that bargain, when he could not enforce it against the other.² If, for instance, in a case where an executory contract for personal service on the part of the plaintiff is the consideration for the defendant's promise, the court refuses specific relief to the former, the reason is clear and eminently equitable, *viz.*, that specific performance as against the defendant should not be given to the plaintiff, where the said defendant would be left in the unjust position of having no assurance of performance on the plaintiff's part.³ So, where there is an option, which is really a bilateral contract, for a privilege (for instance, of mining or prospecting) which may be exercised by the promisee, but which he is under no obligation to exercise, specific performance may be refused to him.⁴ For, he may not exercise it at all or within a definite period of time, and so specific performance will press harshly and unequally upon the promisor.⁵ A distinction has to be taken between 'mutuality of obligation of the contract' and 'mutuality of remedy.' Where mutuality of obligation is lacking by reason, *e.g.*, of some technical defect in the form, or absence of consideration, or the abnormal status of the plaintiff,

Mutuality of
obligation
and of
remedy.

¹ "The principle would seem to be an illustration of the judicial discretion to which the remedies of a court of equity are subject: *viz.*, that a defendant ought not to be harassed with litigation founded on an agreement which he himself could not enforce against the plaintiff," 2 Dart, V. & P., 1064.

² *Wylson v. Dunn* [1887] 34 Ch. D., 569, 576. "Whenever the contract was intended to bind both of the parties; and for any reason one of them is not bound, he cannot compel performance by the other," Pomeroy, S.P. 240 n. *Measures Bros. v. Measures* [1910] 2 Ch. 248.

³ 2 Pomeroy, Eq. R. s. 771, p. 1295

Per Wigram, V. C., "The court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the court cannot give him, it has been the generally understood rule that that is a case in which a court will not interfere," *Waring v. Manchester &c. Railway Co.* [1849] 7 Hare, 492.

⁴ *Federal Oil Co. v. Western Oil Co.*, 121 Fed. R., 674; *Rust v. Conrad* [1882] 47 Mich., 449, 1 Ames, 435.

⁵ 2 Pomeroy, Eq. R., 1298.

or of the offer not having been accepted, or the performance having been left optional, a court of equity will not ordinarily feel called upon to interfere. But a lack of mutuality of remedy may not necessarily be deemed to be fatal.¹ The validity of the agreement is open to question in the former case, but the mutuality of the equitable remedy does not belong to the essence of the contract.²

"The rule is fundamental," said an American judge, "that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties *at the time it is executed* have the right to resort to equity for the specific enforcement."³ Sir Edward Fry supports the same position.⁴ But the better view seems to be that want of mutuality to be fatal to a claim for specific performance must exist *at the time the action is brought*.⁵ The rule that will probably meet most, if not all, of the cases, may be enounced thus: If, at the time of the institution of the suit for specific performance, the contract be yet executory on both sides, but the defendant, free from fraud or other personal bar, cannot enforce execution *in specie* against the plaintiff of the latter's promise, then the contract may be deemed so lacking in mutuality that equity will not require the defendant being compelled to perform specifically.⁶ If after performance by the defendant damages would be his sole security for the performance of the plaintiff's side of the contract, then the court may well deem it equitable to leave the plaintiff also to a remedy of damages.⁷ Where, therefore, the plaintiff has entered into a contract which at the time he was not in a position to perform, but subsequently his inability is cured, there is nothing to prevent his enforcing specific performance against the defendant.⁸ A person may have contracted to sell an estate, to which he cannot at the time establish his title. But if the obligation of the contract be

Mutuality
at time of
suit.

¹ 3 Page, *Con.*, ss. 1615-1623.

² Pomeroy, *S.P.*, 244 n.

³ *Norris v. Fox*, [1891] 45 Fed. R., 406, 1 Ames, 426.

⁴ Fry, s. 460, p. 203; Pomeroy, *S.P.*, s. 166, p. 243.

⁵ *Hawkes v. Eastern Counties Ry. Co.*, [1852] 1 DeG. M. & G., 737, 755,

[1855] 5 H. L. C., 331, 365. 2 Williams, *V. & P.*, 1000-2, where the question is well discussed, Ashburner, *Eq.*, 558.

⁶ 2 Pomeroy, *Eq. R.*, s. 769.

⁷ Ames, 3 Col. Law Rev., 1.

⁸ 2 Pomeroy, *Eq. R.*, s. 772, and cases cited, n. 44. But see *Hope v. Hope* [1857] 8 DeG. M. & G., 731.

mutual, and the seller is able in season to comply with its requirements on his part, and to make good the title which he has undertaken to convey, there is apparently no ground on which the purchaser ought to be permitted to excuse himself from its acceptance.¹ So, where the plaintiff's promise was not of a character to be enforceable *in specie* at the instance of the defendant, but before the former institutes his suit, he has actually performed it, he may obtain a decree for the performance of the defendant's promise.² For, where the time for specific performance does not come until the contract is fully performed by the one seeking it, and the contract has been fully performed by such party, the objection of want of mutuality disappears.³

Terminable
contracts.

It has been said that "a court of equity never interferes where the power of revocation exists,"⁴ and some courts have refused to enforce contracts, which were terminable at the will of the plaintiff.⁵ But it seems certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable.⁶ So long, therefore, as the contract is actually kept alive by the plaintiff's continued performance, there is nothing to prevent the specific enforcement of the defendant's part of the contract.

Unilateral
contracts.

The doctrine of mutuality is obviously inapplicable to unilateral contracts.⁷ Before the offer has been accepted, there is no contract, and after it has been accepted and a unilateral contract brought into existence, the promisor has already

¹ *Dresel v. Jordan* [1870] 104 Mass., 407; *Hoggart v. Scott* [1830] 1 R. & M., 293. Ch. *Salisbury v. Hatcher* [1842] 2 Y. & C., 65; *Murrel v. Good-year* [1860] 1 DeG. F. & G., 432.

² *Howe v. Watson* [1901] 60 N.E.R., 415. 1 Ames, 429; *Wilkinson v. Clements* [1872] 8 Ch., 96; 2 Keener, 823; *Pomeroy, S. P.*, ss. 167-8.

³ *Howe v. Watson*, *supra*. 3 Page, Con., s. 1623, p. 2460. Cf. *Yerkes v. Richard*, 34 Am. St. R., 721 (performance by infant).

⁴ *Express Co. v. Railroad Co.*, 99

U. S., 191.

⁵ *Marble Co., v. Ripley* [1870] 10 Wallace, 339, 359; *Rust v. Conrad* [1882] 47 Mich., 449, 1 Ames, 437.

⁶ *Per Lowell, J., Singer Sewing Machine Co. v. Union Buttonhole Co.* [1873] 1 Holmes, 253, 1 Ames, 439.

⁷ *Palmer v. Scott* [1830] 1 Russ. & M., 391; *Chesterman v. Mann* [1861] 9 Hare, 206 (discretion exercised with great care). *Pomeroy, S. P.*, s. 168. Cf. *Wylson v. Dunn* [1867] 34 Ch. D., 569 (conditional contract).

obtained his advantage, and he alone remains bound to perform his part.¹ So, where a lease is renewable at the option of the lessee, the option is only a binding offer on the part of the lessor. As soon as the lessee exercises his option, a binding contract for the renewal comes into existence, and he may demand specific performance of this contract.² But there can be no specific enforcement of a contract, the performance of which is optional with both parties.³ "If performance of a contract by one party is not compulsory, but is only to be rendered in case of his election so to do, specific performance cannot be enforced against him as long as he has not made his election to perform; since this would be denying to him a right which, by the terms of the contract, he has reserved."⁴

It may be finally observed that mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced.⁵ And we have already seen that, where a vendor of immoveable property has undertaken to convey more than he can, he cannot always compel partial performance with abatement, but the purchaser can compel him to convey what he can.⁶

Waiver of
mutuality.

(g) *Inability of Court to enforce part of Contract.*

A kindred objection is that the court cannot, at the time of suit, enforce the contract on both sides, or, at all events, such part of it as the court can ever be called upon to enforce, and therefore the court should refuse specific performance. A good illustration is furnished by the case of *Gervais v. Edwards*,⁷ which was decided by Lord St. Leonards, when Lord Chancellor of Ireland. The parties there possessed estates in Tyrone, separated by a stream, which frequently during wet seasons overflowed its banks, to the injury of the said lands. The defendant proposed to the plaintiff that they should join in some measure for the remedy of this evil. They, accordingly,

(g) Court
unable to
enforce part
of contract.

*Gervais v.
Edwards.*

¹ 2 Pomeroy *Eq. R.*, s. 773, p. 1296.

² *Hersey v. Giblett* [1854] 18 Beav., 174; *Moss v. Barton* [1866] 1 Eq., 474; *Watts v. Kellar* [1893] 56 Fed. R. 1., 2 Keener, 844; and other American cases cited in 1 Ames, 432. Cf. *Weeding v. Weeding* [1861] 1 J. & H., 424 (option of purchase duly exer-

cised).

³ *Tryce v. Dittus*, 190, Ill., 189.

⁴ 3 Page, *Con.*, s. 1619, p. 2455.

⁵ *Ex parte Lacey* [1802] 6 Ves., 625; Fry, ss. 468-69, 207-8.

⁶ S. R. A., ss. 14, 15; *ante*, 174-80.

⁷ [1842] 2 Dr. & War., 80, 6 R. C., 64.

entered into articles with intent to change the course of the stream, and, *inter alia*, agreed that, should any damage arise to the defendant's lands by reason of the erection of a mill-dam, the plaintiff should give an equivalent in land to the former by way of compensation, the amount of damage and the quantity of land to be determined by the arbitrators, who were appointed to adjust differences and give effect to the arrangement. The defendant, not having complied with the terms of the agreement, the plaintiff sued for specific performance. Sugden, C., found the merits to be altogether on the side of the plaintiff, but did not see his way to decree specific relief, inasmuch as the stipulation about exchange of lands was not a matter to be presently ascertained, but was dependent upon the operation of works contracted to be erected, and could only be ascertained after the works had been in operation, and it was not the agreement of the parties that the stipulation should merely be made the subject of covenant. His Lordship said: "The court acts only when it can perform the very thing in the terms specifically agreed upon; but when we come to the execution of a contract depending upon many particulars and upon uncertain events, the court must see whether it can be specifically executed; nothing can be left to depend upon chance; the court must itself execute the whole contract. There are cases, where some of the acts to be done, consequent upon the specific execution of the contract, may be performed subsequently. Thus a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time, or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the things sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for.¹ Here part of this contract is at once capable of a specific

¹ "If a man agree to do a certain act, for example, to dispose of an estate, with a covenant for something to be done hereafter, the court can carry such a contract into specific execution. The decree would give all that was presently contracted for, the immediate transfer of the estate

itself, and compel the party to enter into the covenant to do the particular thing. But here there is an entire contract, which must be executed. Certain things were to be done at once, and certain other things were dependent upon future contingencies." 2 Dr. & W. 84.

execution; this admits of no doubt. But, then, by the rule of the court, if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract."¹ "The real principle is," remarked Romilly, M.R., "that where the stipulation sought to be enforced is really a part of the contract itself, this court cannot specifically perform the contract piecemeal, but it must be performed in its entirety, if performed at all; and when the court cannot perform it in its entirety, neither can it perform any particular portion of it."²

So, wherever that which the plaintiff is to give as the consideration moving from him is something to be done at a future time, and which the court cannot enforce, specific performance of the contract will be refused.³ Exceptions to this rule will be found in cases where (i) there is an agreement *in præsentia* which can be effectively executed at the time, though future acts are dependent on it,⁴ or which may be satisfied by the execution of deeds covenanting for the prospective performance of those acts,⁵ and (ii) where past transactions under the contract have created a right perfect in itself, upon which relief may be grounded.⁶

Consideration future act.

Exceptions.

Other instances, where the rule has been applied, are where the defendants had agreed to form themselves into a company with the plaintiff, who was to work for it for two years and do his best to improve a patented invention of his for the benefit of the

Further illustrations.

¹ *Ibid*, 82-3.

² *Merchants' Trading Co. v. Banner* [1871] 12 Eq., 18.

³ *Per Wigram, V.C., Waring v. Manchester etc. Ry. Co.* [1849] 7 Hare, 492.

⁴ *Gervais v. Edwards*, *supra*.

⁵ *Granville v. Betts* [1848] 18 L. J., Ch., 32. Cf. *Wilson v. West Hartlepool Harbour Co.* [1864] 34 Beav., 187 [1865] 2 DeG. J. & S., 475. In *Stocker v. Wedderburn* [1857] 3 K. & J., 393, 2 Keener, 807, Wood, V.C., concurred in the view that "where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically per-

formed; and that it will in such cases consider it to be the substantial part of the agreement, that a deed should be executed so as to vest in the parties the legal rights which they have mutually agreed to confer."

⁶ *Waring v. Manchester Ry. Co.* *supra*, (account of work done allowed before completion, engineer having withheld certificates). *Wigram, V.C.*, instanced case of a partnership contract, stipulating for half-yearly accounts, where a partner is to have salary proportioned to profits so ascertained. "He might from time to time institute actions to have the accounts so taken according to the contract, though its other terms might not be the subject of an action for specific performance," p. 496.

Sale of property in one lot.

said company ;¹ and where an award was made which was only partially proper to be specifically enforced.² So, where there is a single contract to convey land by several persons to several other persons, the court will not enforce specific performance at the instance of some of the vendors only or against some of the vendees only.³ But where, in India at any rate, part of the contract may be specifically enforced, and damages may be given for breach of the rest, there is no ground for dismissing the whole action.⁴ Nor can the rule have any application where the contract is not entire, but is divisible into separate and independent parts, of which separate and piecemeal performance is appropriate or is contemplated,⁵ nor where the contract is alternative in character,⁶ or comprises an agreement that is partly legal and partly illegal,⁷ impossible,⁸ or honorary.⁹ But the question, whether a contract is to be treated as single or divisible, is one of construction, depending upon the intention of the parties, as gathered from the language used and the subject of the agreement.¹⁰ A contract for the sale of property in one lot may be entire,¹¹ even if the property consists of several kinds and is purchased at different prices.¹² But if the property consists of distinct parts of different quality, there may be a presumption that the contract is divisible,¹³ though it is all included in one writing, and an entire sum is named as the

¹ *Stocker v. Wedderburn* [1857] 3 K. & J., 393, 2 Keener, 801. Cf. *Merchants' Trading Co. v. Banner* [1871] 12 Eq., 18; *Downs v. Collins* [1848] 6 Hare, 418.

² *Nickels v. Hancock* [1855] 7 DeG. M. & G. 300. *Vansittart v. Vansittart* [1858] 4 K. & J. 62.

³ *Safiur Rahman v. Maharamunessa Bibi* [1897] 24 Cal., 832; *Koripaki v. Sajja* [1912] 11 M. L. T., 192.

⁴ S.R.A., s. 16: "When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

⁵ *Wilkinson v. Clements*, [1872] 8 Ch., 96, 2 Keener, 823; *Odessa Tramway Co. v. Mendel* [1878] 8 Ch. D., 235.

⁶ *Green v. Low* [1856] 22 Beav., 625

(lease, with an independent option to lessee to purchase).

⁷ Cf. I.C.A. ss. 24, 57, 58. *Pickering v. Ilfracombe Ry. Co.* [1868] 3 C. P., 250.

⁸ Cf. *Barkworth v. Young* [1856] 4 Drew., 1 Fry, s. 1011 sqq.

⁹ *Carolan v. Brabazon* [1846] 3 Jon. & Lat., 200, 213, 72 R.R., 50.

¹⁰ *More v. Bonnet*, 40 Calif., 251; *Waterman*, 526.

¹¹ *Roffey v. Shatcross* [1819] 2 Bro. C.C., 118 n.; *Price v. Griffith* [1851] 1 DeG. M. & G., 80; *Lumley v. Ravenscroft* [1895] 1 Q.B., 685; *contra* where distinct lots, *Lewin v. Guest* [1826] 1 Russ., 325.

¹² *Baldey v. Parker*, [1823] 2 B. & C., 37 (goods in a ship); *Crosse v. Lawrence*, [1852] 9 Hare, 462 (land and timber).

¹³ *Johnson v. Johnson* [1802] 3 Bos. & P., 162 (two parcels at different prices and not necessary to occupation of each other).

consideration.¹ No hard and fast rule can be laid down,² and a party may prove, from the nature of the contract or of the property, or other special circumstances known to both parties, that the transaction was entire, forming one contract, although there be no express statement to that effect.³

Executory contracts.

The rule is further restricted to cases of executory contract. "Where the mutual rights of the parties rest in covenant, each party is *prima facie* entitled to enforce his right in equity or at law, according to the nature of the covenant which may be broken."⁴

Act or omission of defendant.

And, where the inability of the court to perform a part of a contract may be attributed to some act or omission on the defendant's part, it will see that he does not benefit by his own wrong, and decree specific performance against him, so far as it deems proper.⁵

The case of a contract that contains both positive and negative stipulations will have to be considered in a later lecture.⁶

(h) Want of Title in Property sold or let.

(h) No title to property assigned.

In a private sale in India, the vendor warrants the title,⁷ and in jurisdictions where a public sale is put upon the same footing,⁸ he may be required to show at least a holding title.⁹

¹ *Mestaer v. Gillespie* [1804] 11 Ves., 621, 629.

² Cross contracts for the sale of land, e.g., were held independent in *Croome v. Lediard* [1833] 2 M. & K., 251, whereas the contrary was held in respect of cross contracts for the sale of goods in *Atkinson v. Smith* [1845] 14 M. & W., 695. Judicial opinion was equally divided in *McDaniels v. Whitney*, 38 Iowa, 60; *Waterman*, 529, n. 3.

³ *Cusumajor v. Strode* [1834] 2 M. & K., 706, 722; *Poole v. Shergold* [1786] 2 Bro. C.C., 118.

⁴ *Per Wigram, V.C., Rigby v. Great Western Ry. Co.* [1846] 15 L. J., Ch., 266. Cf. *Wolverhampton etc. Ry. Co. v. London etc. Ry. Co.* [1873] 16 Eq., 433; *Kemble v. Kean* [1829] 6 Sim., 333 (partnership).

⁵ *Fry, s. 849; Great Western Ry. Co. v. Birmingham etc. Ry. Co.* [1848] 2 Ph., 597, 605; *Soames v. Edge* [1860] Johns., 669.

⁶ Lect. XII.

⁷ T. P. A., s. 55.

⁸ E.g., *Pennsylvania, Robb v. Mann*, 1 Pa. St., 300. There is a warranty of title in sales by the Registrar, Calcutta High Court. *Kishory v. Kali Charan* [1896] 1 C. W. N. 106; *Ram Narain v. Dwarka Nath* [1900] 27 Cal., 264 (Sheriff's sale); *Admr.-Gen. v. Aghore Nath* [1902] 29 Cal., 420.

⁹ Cf. *Williams, V. & P.*, 435. In England, a distinction is made between open and not open contracts for sale. *Fry, J.*, said, "When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor, that he could

Where, therefore, the vendor fails to make out a good title, the purchaser is justified in refusing to complete. And the vendor must show a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance: he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser.¹ The reason of the rule will equally apply to cases of lease and of sale of goods, and we find section 25 of the Specific Relief Act :

S.R.A., s. 25.

“ A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of vendor or lessor—

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the same ;

(b) who, though he entered into the contract, believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.”²

Knowledge
of vendor of
absence of
title.

Where the vendor has, to his knowledge, not got what he contracted to sell, he has no equity to enforce against the purchaser.³ “ I am of opinion,” said Romilly, M. R., “ that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, ‘ I will have nothing to do with it.’ The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold.”⁴ And even if he does induce a third party to join or procures a title before the time fixed for

not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title.” *Re Gloag and Miller* [1883] 23 Ch. D., 327.

¹ *In re Bryant & Birmingham* [1890] 44 Ch. D., 218 ; Fry, s. 878, p. 380. Cf. S. R. A., s. 25, ill. (a).

² *Mahomed Mithu v. Musaji Esaji* [1891] 15 Bom., 657.

³ *Bellamy v. Debenham* [1891] 1 Ch., 412, 1 Ames, 325 ; *Dalby v. Pullen* [1829] 3 Sim., 29, 39 (“ I cannot think this was fair dealing.”)

⁴ *Forrer v. Nash* [1865] 35 Beav., 167, 171. Cf. *Tendring v. London*, [1731] 2 Eq. Ca. Ab. 680 ; *Brewer v. Broadwood*, [1833] 22 Ch. D., 105.

completion, he cannot compel specific performance by the vendee.¹ The vendor's obligation to make a good title is not removed by the purchaser's knowledge at the date of the contract that the title was bad by reason, *e.g.*, of a breach of covenant,² though that may sometimes be a reason for refusing specific performance to the purchaser.³

Where, however, the vendor has acted under a mistake or misapprehension, he may be entitled to more indulgence, and the doctrine of equity has even been stated to be that "when time is not of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of the decree, unless there has been bad faith, or an improper speculation attempted."⁴ But he must make a good title, "a reasonably clear, marketable title," about which there is not "a considerable, a rational doubt."⁵ The title must be valid in fact, and such as can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.⁶ A marketable title, said Turner, V. C., is "one which, so far as its antecedents are concerned, may, at all times and under all circumstances, be forced upon an unwilling purchaser."⁷ Therefore it does not much advance matters to say that equity requires a vendor seeking specific performance to show a marketable title.⁸ It is more helpful to be told that "the court will not compel a purchaser to take a title which will expose him to litigation or hazard."⁹ So Baron Alderson

Mistake of
vendor.

Marketable
title.

¹ S. R. A., s. 25, ill. (a); *Noel v. Hoy* [1820] cited, Sugden, V. & P. 217. This learned author doubted "whether there is any case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report" (ed. 12, 241, n. (p).) But see 2 Dart, V. & P., 1066, where it is pointed out that in such cases the material question seems to be "whether the purchaser has, on discovering that the estate is not bound, at once refused on his part to be bound, or has continued to negotiate upon the footing of the contract being still valid and subsisting." Cf. 2 Pomeroy, *Eq. R.*, 1330.

² *Re Highett and Bird's Contract* [1903] 1 Ch., 287.

³ *Sellers v. Greer*, (Ill.) 40 L. R. A., 589.

⁴ *Musselman's Appeal*, 65 Pa., 480, 488; *Hepburn v. Dunlop*, 1 Wheat., 179, 196.

⁵ *Per Eldon, C., Stapylton v. Scott* [1809] 16 Ves., 272, 1 Ames, 266-7. Cf. *Williams v. Scott* [1900] A. C., 499, 508; *Re Scott and Alvarez's Contract* [1895] 2 Ch., 603, 613.

⁶ *Moore v. Williams* [1889] 115 N. Y., 586, 2 Keener, 1151.

⁷ *Pyrke v. Waddingham* [1850] 10 Hare, 1, 1 Ames, 270.

⁸ *Pomeroy, S. P.*, 292.

⁹ *Per Turner, V. C.*, "Every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying,

said, "I quite agree that a purchaser ought not to be compelled to take such a title as on a reasonable ground might be litigated; but then there must be a reasonable, decent, probability of litigation."¹ Where the contingency of an attack upon the title is very remote, the court may deem the title marketable.² In the words of an American judge, "There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged."³ And the reason is that it is impossible to measure a flaw in a title by a money standard.⁴

Doubtful
title.

It has been said that every title is good or bad, and the court ought to know nothing of a doubtful title.⁵ But in an action for specific performance of a contract for sale, parties interested in denying or disputing the validity of the vendor's title are not impleaded, and a judgment passed in such a cause cannot operate *in rem* and will not be *res judicata* as against them. How can then the court adjudicate satisfactorily upon objections behind the back of persons who may raise and support them?⁶ And since the court has to administer a discretionary, if not extraordinary, relief, why should it force a lawsuit upon an unwilling purchaser?⁷ He is therefore entitled to resist specific performance where there are claimants adverse to the vendor and their claims are not purely illusory nor manifestly unmaintainable.⁸

Question of
law.

The doubt affecting a title may be about a matter either of law or of fact. If a question of law, it may arise upon the

if not successful, suits be brought against him and probably take from him the land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value." *Pyrke v. Waddingham*, *supra*. *Dobbs v. Norcross*, 24 N. J. Eq., 327; 3 Parsons, Con. 348.

¹ *Cattell v. Corral* [1840] 4 Y. & C. Ex., 228, 237. Cf. *Lyddall v. Weston* [1739] 2 Atk., 19; *Grasser v. Blank*, 110 La., 493; 2 Williams, V. & P., 1007.

² *Empire Realty Corp. v. Sayre* [1905] 107 N. Y., App. D., 415, 2 Scott, 365.

³ *Per Andrews, J., Fleming v. Burnham* [1885] 100 N. Y. 1, 2 Keener, 1141.

⁴ *Langdell, Eq., J.*, 58; *Pomeroy, S. P.*, s. 347.

⁵ *Sloper v. Fish* [1813] 2 V. & B., 145, 149 (Grant, M. R.).

⁶ *Cook v. Dawson* [1861] 3 DeG. F. & J., 127, 130. Fry, s. 881, pp. 381-2: "The court, when fully informed, must know whether a title be good or bad; when partially informed, it often may and ought to doubt." Cf. *Cooper v. Denne* [1792] 4 Bro. C. C. 80; *Sheffield v. Lord Mulgrave* [1795] 2 Ves., 526; *Fleming v. Burkham* [1885] 100 N. Y. 1, 2 Keener, 1140; *Hunting v. Damon* [1894] 160 Mass., 441, 2 Keener, 1158.

⁷ *Rose v. Calland* [1800] 5 Ves., 186, 187; *Sharp v. Adcock* [1828] 4 Russ., 374, 375.

⁸ *Ahmedbhai v. D. M. Petit* [1911] 13 Bom., L. R., 1061.

words of a statute, or it may involve some peculiar doctrine of personal or territorial law, or it may be concerned with the true construction and legal operation of a written instrument. If the question is one of general law, or one of construction that turns on a general rule of interpretation, the court will be disposed to determine it.¹ But in making an examination of the question, the court should have regard not for its own opinion only, but it should take into account what the opinion of other competent persons might be.² Specific performance will not therefore be decreed "if there is a reasonable ground for saying that the question is not settled by previous authorities, or if there are decisions or *dicta* of weight which show that another judge or another court having the question before it might come to a different conclusion."³ And where the document is ill-expressed and inartificial, doubt will more readily be acknowledged.⁴ English decisions have not in recent years been uniform, but in view of illustration (b) to section 25, Specific Relief Act,⁵ I apprehend, one may safely say that where a superior court has expressed an opinion upon a point, there is not much room for judicial doubt; otherwise, where two courts of co-ordinate jurisdiction have differed. But the adverse decision of an inferior court will not always render a title doubtful,⁶ for

¹ *Per James, L.J.*: "As a general rule and almost universal rule, the court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined." *Alexander v. Mills* [1870] 6 Ch., 124, 131. *Per Chitty, J.*: "I take it as a general principle of law with regard to specific performance, that the court does decide on general matters of law about which there cannot be fairly said to be any judicial doubt." *Re Thackwray and Young* [1888] 40 Ch. D., 34, 38 *Pomeroy, S.P.*, 294 n.

² *Per Turner, V.C.*, *Pyrke v. Waddingham*, *supra*. *Palmer v. Locke* [1881] 18 Ch. D., 381.

³ *Per Ewery, V.C.*, *Lippincott v. Wikoff*, 54 N. J., Eq., 107, 120, citing *Chitty, J.*, who also said, "The court, I take it, must feel such confidence in its own opinion as to be satisfied

that another court would not adopt another conclusion." *Re Thackwray and Young*, *supra*.

⁴ *Alexander v. Mills*, *supra*; *Lincoln v. Ardeckne* [1844] 1 Coll., 98; *Cook v. Dawson*, *supra*.

⁵ "A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustee cannot specifically enforce the contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt." *Cf. Hawkins v. Kemp* [1803] 3 East, 410; *Lewin, Trusts*, 502; *Rede v. Oakes* [1864] 4 DeG. J. & S., 505.

⁶ *Cf. Collier v. M'Bean*, [1865] 1 Ch., 81.

the judge of the appellate court would still be bound to exercise his own discretion and decide according to his own judgment.¹

Question of fact.

Where it is a question of fact which gives rise to a doubt as to the title, the fact may or may not admit of satisfactory proof.² It may be a positive fact, which, by reason of lack of evidence, has not been satisfactorily proved.³ It may be a negative fact, *e.g.*, absence of notice of, say, an incumbrance⁴ or a defect in the title,⁵ which it is never easy conclusively to prove. Circumstances may raise a presumption in favour of⁶ or against⁷ the title. But the court will apparently not act upon mere suspicion.⁸ There is always a presumption against fraud and *mala fides*. A purchaser, however, is not bound to take a title which he can defend only by a resort to parol evidence, which time, death or some other casualty may place beyond his reach.⁹

Cases where purchaser may resist specific performance.

I have already dealt with cases of defect in the title which a purchaser may disregard or claim compensation for.¹⁰ But if the purchaser be unwilling to complete with an abatement, he may resist specific performance on the ground of want of title,

(i) when the estate is (a) of different tenure,¹¹ or (b) is held in a different manner,¹² or

(ii) when no title can be shown (a) to the extent of the

¹ *Per* Lord St. Leonards, *Sheppard v. Doolan* [1842] 3 Dr. & War., 8. *Beioley v. Carter* [1869] 4 Ch. 230; *Osborne v. Rowlett* [1880] 13 Ch. D., 781 (Jessel, M.R.). In any case, it is only the principle of a decision which binds, and even then it is for the subsequent court to say if it is a right principle and applicable to the facts of the case. Cf. *Quinn v. Leathem* [1901] A.C., 495, 506.

² Fry, s. 889, p. 385.

³ S. R. A., s. 26, ill. (c); "A being in possession of certain land, contracts to sell it to Z. On enquiry, it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract." *Smith v. Death*, [1820] 5 Madd., 371.

⁴ *Freer v. Hesse* [1855] 4 DeG., M. & G., 495.

⁵ *Re Handman & Wilcox* [1902] 1 Ch., 599.

⁶ *Prosser v. Watts* [1821] 6 Madd., 59; *Causton v. Macklew* [1828] 2 Sim., 242.

⁷ *Warde v. Dixon* [1859] 28 L. J., Ch., 315.

⁸ *Green v. Pulsford* [1829] 2 Beav., 70; *M'Queen v. Farquhar* [1805] 11 Ves., 467. The dictum of Leach, V. C.,—"assuming the deed not to be fraudulent *ex facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchasers nor of this court to reach,"—in *Hartley v. Smith* [1819] Buck, Bankr. C., 368, 380, must not be pushed too far. *Cattell v. Corral* [1840] 4 Y. & C., Ex., 228, 236. But see 2 Williams, V. & P., 1011.

⁹ *Moore v. Williams* [1889] 115 N. Y., 536, 2 Kcener, 1150.

¹⁰ S.R.A., ss. 14, 15; *ante*, 181.

¹¹ *Drewe v. Corps* [1803] 9 Vcs., 368; *Vancouver v. Bliss* [1805] 11 Ves., 458.

¹² *Madeley v. Booth* [1848] 2 DeG. & S., 718; *Sugden, V. & P.*, 299.

interest contracted for,¹ or (b) to a material part of the estate,² or (c) to one of two estates sold,³ or

(iii) where incumbrances or liabilities exist which will interfere with the enjoyment of the estate,⁴ or

(iv) where other matters exist which (a) increase the liability of the purchaser,⁵ or (b) affect the enjoyment of a material part.⁶

Where the defendant did not bargain for an estate fettered by a perpetual restriction upon the enjoyment, but for an absolute and unqualified ownership, and if that which is offered to him is not that which he bargained for, and is incapable of being made such, he ought not in equity to be compelled to accept it.⁷ Where, however, the restriction is inoperative, the plaintiff may have a decree for specific performance.⁸

The above is the result of a careful analysis of English cases made by Mr. Dart.⁹ But as those cases will often be found to turn upon peculiarities of the real property law of England, I abstain from further discussing them here.

The right of a purchaser to repudiate the contract on account of a defect in title which the vendor cannot remove, says Parker, J., is merely an equitable right arising out of want of mutuality and affecting the equitable remedy by way of specific performance, and is distinct from the legal right of rescission. The right of repudiation must be exercised as soon as the defect is ascertained; and if, after ascertaining it, the purchaser continues to treat the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose, and must give the vendor a reasonable time to cure the defect. If a decree for specific performance has been obtained, there can *à fortiori* be no repudiation, so long as the decree is not

Purchaser's
right to
repudiate.

¹ *Dalby v. Pullen* [1830] 1 Russ. & M., 296; *Roffey v. Shallicross* [1819] 4 Madd., 227; *Weston v. Savage* [1879] 10 Ch. D., 736; *Sugden, V. & P.*, 308.

² *Portman v. Mill* [1826] 2 Russ., 570; *Brewer v. Brown* [1884] 28 Ch. D., 309; *Sugden, V. & P.*, 316.

³ *Prendergast v. Eyre* [1828] 2 Hog., 78, 81.

⁴ *Jones v. Rimmer* [1880] 14 Ch. D., 588; *Heywood v. Mallalieu* [1888] 25 Ch. D., 357; *Nottingham Brick Co. v.*

Butler [1886] 16 Q. B. D., 778; *Sugden, V. & P.*, 311-2, 321, Cf. *Wetmore v. Bruce* [1890] 118 N. Y., 319, 2 Keener, 1136.

⁵ *Nouaille v. Flight* [1844] 7 Beav., 521; *Cresswell v. Davidson* [1886] 56 L. T. 811.

⁶ *Sugden, V. & P.*, 315.

⁷ *Per Thayer, J., Lesley v. Morris* [1873] 9 Pa., 110, 2 Scott, 378.

⁸ *Millburn v. Lyons* [1914] 1 Ch., 34.
⁹ 2 Dart, V. & P., 1086-90.

discharged.¹ It is proper to note here that courts of law in England did not always adopt the equitable doctrine regarding unmarketable titles.² But in India there is no conflict of jurisdiction, and consequently where a court thinks fit to deny specific performance on the ground that the title is doubtful and unmarketable, it will not, I believe, permit the vendor to retain the purchase-money because the title is, in fact, good.³ The court will proceed upon the same principles, whether the relief sought be legal or equitable.

(i) *Incapacity of Defendant.*

(i) Defendant unable to perform contract.

Where the defendant is not in a position to perform his part of the contract when called upon to do so, it is obvious that no court will stultify itself by passing an empty decree. There is no question of justice or injustice here, the court simply cannot help itself. It can award damages, but not compel specific performance.⁴ The defendant may have contracted to sell certain property, but he has it not. He may never have had it,⁵ or he may have sold it,⁶ or he may have lost it.⁷ In any case, a decree for specific performance against him will be *brutum fulmen*. And it does not matter that he is the author of his own incapacity. "Put the extreme case of a vendor burning a title-deed," said Kindersley, V.C., "the court could not make a decree that he should deliver it up, and be imprisoned if he does not."⁸ It should be noted, however, that a contract to perform something which the defendant at the time was not in a position to do is not, in the absence of fraud, necessarily invalid.⁹ If he subsequently acquires the power to perform it, he must do so.¹⁰ "A perfect title by the vendor,"

¹ *Halkett v. Earl Dudley* [1907] 76 L.J., Ch., 330.

² Sugden, V. & P., 400.

³ Cf. *Moore v. Williams*, supra, 2 Keener, 1155.

⁴ *Green v. Smith* [1788] 1 Atk., 572. Per Walton, J., "A court of equity will never knowingly decree an impossibility; it will never knowingly require a party, under the pains and penalties of perpetual imprisonment, to do an act which it is out of his power to do." *Snell v. Mitchell*, 65 Me., 48, 50.

⁵ *Columbrine v. Chichester* [1846] 2 Ph., 27.

⁶ *Denton v. Stewart* [1786] 1 Cox. 258.

⁷ *Hallett v. Middleton* [1826] 1 Russ., 243.

⁸ *Seawell v. Webster* [1860] 29 L. J., Ch., 73.

⁹ Cf. *Hibblethwaite v. M'Morine* [1839] 5 M. & W., 462; *Browne v. Warner* [1808] 14 Ves., 412; *Walker v. Barnes* [1818] 3 Madd., 247. *Pomeroy, S. P.*, 385.

¹⁰ *Holroyd v. Marshall* [1862] 10 H.L.

said Earl, J., "is no part of the vendee's cause of action, he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether the title of the vendor was perfected before or after the commencement of the action."¹ And it should be remembered that it is not enough for the defendant to show that he cannot perform his promise literally. If he can perform it substantially, equity will grant execution *cy pres*.² Where, *e.g.*, a person who had contracted to build and maintain a bridge on the Tyne, built one which was washed away by flood, and it appeared that no bridge could be maintained on the particular site, he was permitted to build a bridge on a neighbouring and securer site.³ Where a person agreed to sell certain specified shares of a corporation to the plaintiff, and afterwards sold these shares to a *bonâ fide* purchaser, but had other shares left upon his hands enough to fill the contract with the plaintiff, the latter was granted a decree for specific performance⁴. So long as the vendee receives the proper number of shares in the same corporation, it does not apparently matter that he does not receive the specific shares contracted for.⁵

Upon this ground of incapacity, a vendor, who cannot make out a good title to the property he has contracted to convey, has sometimes been allowed to resist a claim for specific performance.⁶ It has, *e.g.*, been said that, in the absence of misrepresentation or misconduct, the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share.⁷ But the question

Vendor's inability to convey.

C., 191; *Carne v Mitchell* [1846] 15 L J., Ch., 387. See Williston's article, "Transfer of After-acquired Personal Property," 19 Harv. Law Review, 557. Cf. *Bansidhar v. Sant Lal* [1887] 10 All. 133.

¹ *Halfey v. Lynch* [1894] 143 N. Y., 241, 2 Keener, 1218 (vendor's title was defective at commencement of trial, but became perfect pending trial).

² Fry, s. 1001, p. 433.

³ *Errington v. Aynesly* [1882] Bro. C.C., 341.

⁴ *Draper v. Stone*, 71 Me., 175.

⁵ *Hardenbergh v. Bacon*, 33 Calif.,

346.

⁶ Cf. *Thomas v. Dering* [1837] 1 Keen, 729; *Avery v. Griffin* [1868] 6 Eq., 606.

⁷ *Lumley v. Ravenscroft* [1895] 1 Q. B., 685. But see *Hooper v. Smart* [1874] 18 Eq., 683, 2 Keener, 1204; *Burrow v. Scammell* [1881] 19 Ch. D., 175; *Hexter v. Pearce* [1900] 1 Ch., 341. See also *Mortlock v. Buller* [1804] 10 Ves., 315. Cf. *Govinda v. Apathsahaya*, [1912] 22 M. L. J. R., 257; *Jadu v. Adal* [1912] 11 I. C., 892. The California Court holds that, where a contract to convey land owned by

seems to be really governed by sections 14 and 15, Specific Relief Act, here, and this defence will not apparently be favoured,¹ unless impossibility to enforce the court's decree,² or material mistake on the vendor's part³ can be established. I have discussed some of these cases before, and the result of the authorities I may now state in Mr. Dart's words: "Except where there is a good defence on the ground of hardship, mistake, or injury to third parties, the court will insist on a vendor making good his contract to the extent of his ability, and on his submitting to a proportionate reduction of the purchase-money, if the purchaser was ignorant of the defect at the date of the contract,⁴ and is willing to complete on these terms; and that, in applying this rule, no distinction will be drawn between cases where a vendor has contracted to sell an entire estate, when he has only part of it, and cases where he has contracted to sell undivided shares in the estate, and has not so many shares as he contracted to sell."⁵

Poverty.

The court's power is thus limited by the defendant's ability to perform. But mere poverty is not an inability which any court can recognize; inability, therefore, is never an excuse for not performing a decree for payment of money.⁶

Alternative contracts.

Where a contract is in the alternative, the promisor may elect to perform one of the alternatives. On such election, the contract becomes single, and supervening impossibility may excuse non-performance.⁷ But before such election, the impossibility of one alternative, whether original⁸ or superinduced by act of some stranger⁹ or even of God,¹⁰ will not excuse performance of the other and possible alternative. The question is really one of intention, and if the intention of the parties is

tenants in common, fails to bind one of them, the other cannot be compelled to convey his own undivided share, *Olsen v. Lovell*, 91 Calif., 506; *Pomeroy*, S. P., 387 n

¹ *Browne v. Warner*, supra, 413.

² *Seawell v. Webster*, supra.

³ *Williams v. Bland* [1846] 2 Col., 575, and other cases cited in 2 Dart, V. & P., 1074.

⁴ But knowledge is not always fatal to a claim for abatement, 2 Dart, V. & P., 1084-5. Neither s. 14 nor s. 15, S.

R. A., says anything about knowledge or notice.

⁵ 2 Dart, V. & P., 1081.

⁶ Langdell, *Eq. J.*, 53.

⁷ *Brown v. Royal Insurance Co.* [1859] 1 El. & El., 853.

⁸ *Simmonds v. Swaine* [1809] 1 Taunt., 549.

⁹ *Grenningham v. Ewer* [1596] Cro. Eliz., 396, 78 E. R., 641.

¹⁰ *Stodholmes v. Mandell* [1697] 1 Ld. Raym., 279, explg. *Laughter's case* [1595] 5 Co. Rep., 21 b, 77 E. R., 82.

clear that one of them shall do a certain thing, but he is allowed his option to do it in one or other of two modes, where one of these modes ceases to be practicable, he is bound to perform it in the other mode. Where, therefore, a father, at the time of his daughter's marriage promised to leave her, at his death, an equal portion with his other children, Kindersley, V.C., held that the prior death of the daughter did not discharge the promise, and that her husband was entitled to claim an equal share in the residuary estate of the father (since deceased).¹ Where, however, the obligee himself disables the obligor from performing one part of a contract in the alternative, the law discharges him from the other part.²

(j) *Plaintiff's Conduct disentitling him to Relief.*

There are few cases in which a court of equity will insist on the maxim that he who seeks equity must do equity, with more rigour than in those for specific performance.³ A plaintiff, therefore, who seeks the assistance of this court must show, first, that he has discharged or is willing to discharge all the obligations that lay upon him, and, next, that no *laches* is imputable to him. The terms of a contract performable by the plaintiff may be of two kinds, *viz.*, some that have to be performed before the other side can be called upon to fulfil his promise, and others that may have to be subsequently performed.⁴ The actual performance of or a readiness to perform, the former must be shown, and an offer to perform the latter must be made.⁵ If the plaintiff's obligations have been disregarded, or are incapable of being substantially carried out, a court of equity will not interfere in his behalf.⁶ The defendant may therefore plead and prove that the plaintiff

(j) Plaintiff's
inequitable
conduct.

¹ *Barkworth v. Young* [1856] 4 Drew 1. Distinguish *Jones v. How* [1848-50] 7 Hare, 267, 9 C. B., 1.

² *Greuningham v. Ewer*, *supra*.

³ Per Sargent, J., *Eastman v. Plummer*, 46 N. H., 464; *Waterman*, 576, n. 2. As to this maxim, see *Hanson v. Keating* [1844] 4 Hare, 1; *Gibson v. Goldsmidt* [1854] 5 DeG. M. & G., 757.

⁴ *Wells v. Smith* [1833] 2 Edward, Ch., 78, 2 Scott, 317 (conditions prece-

dent and subsequent discussed); *Griggs v. Lundis* [1870] 2 N. J., Eq., 494.

⁵ Fry, s. 922, p. 404; *Walker v. Jeffreys* [1841] 1 Hare, 341; *More v. Skidmore*, 6 Litt., 453. Cf. *Bodwell v. Bodwell* [1894] 66 Ver., 101, 2 Keener, 1174.

⁶ *Marble Co. v. Ripley* [1870] 10 Wallace, 339. *Srikrishan v. P. N. Bank* [1913] 149 P. L. R.

has forfeited his rights under the contract by his conduct in respect of the estate or towards the other party.¹ He may, *e.g.*, have violated any essential term of the contract that on his part remains to be performed,² he may have done acts in contravention of or at variance with the contract and tending to subvert the relation established by it,³ or he may have refused to fulfil some stipulation on his part, which adds to the contract, but which was a part of the inducement to it.⁴ A vendee of land, who has announced that he would not perform, cannot subsequently have specific performance against the vendor who has acquiesced in the breach of contract and has made improvements on the property and leased it to others.⁵ So will specific relief be denied to the vendee if he refused to perform the contract on his part, unless the vendor would do what in equity he was not bound to do, and the vendor subsequently sold the premises to another.⁶ And the acts with which the plaintiff is charged may be either of omission or of commission. Where, *e.g.*, the vendor of a house and garden, after contracting to sell the same, fells some ornamental trees which formed a material element in the value of the property as a residence, he cannot enforce specific performance of the contract, for he can no longer give to the purchaser that which was substantially the subject-matter of the contract.⁷ So generally in cases of leases, where the would-be tenant has committed some act involving a forfeiture, the court will refuse to create a legal relation which, if created, would be immediately dissoluble.⁸ If the contract is such that the plaintiff, by reason of his acts, is liable to be deprived of the benefit of it in case it were enforced, it would be an idle ceremony for the court to enforce it.⁹ Where, therefore, a person holding land under a contract for a lease, commits waste or treats the land

Acts of omission and commission.

¹ 2 Dart, *V. & P.*, 1099.

² S. R. A., s. 24 (b).

³ Fry, s. 957, p. 417. *Srish Chandra Roy v. Banomali, Rai* [1904] 2 A. L. J. R. 31, 31 Cal., 584, P.C.

⁴ S. R. A., s. 26 (c).

⁵ *Hapwood v. McCausland*, 120 Iowa, 218.

⁶ *Pyatt v. Lyons* [1893] 51 N. J. Eq.

308, 2 Keener, 1169.

⁷ *Magenis v. Fallon* [1829] 2 Molloy, 561, 584, 2 Keener, 1128; S. R. A., s. 24, ill. 2 to cl. (b).

⁸ *Gregory v. Wilson* [1852] 9 Hare, 683, 687 (Turner, V. C.).

⁹ *Lewis v. Bond* [1853] 18 Beav., 85, 87 (Romilly, M. R.)

in an unhusbandmanlike manner, he cannot enforce specific performance of the contract.¹ So, where a contract for the renewal of a lease provided that the demised premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose," and the assignee permitted them to be occupied for a public boarding-house, specific performance was refused, although it was shown that the lessor had consented to its being used in connection with a school for young ladies.² But a gross and wilful breach of a covenant must be shown,³ and if the lessor insists upon his covenant, it is no defence to prove that he has sustained no damage.⁴ So, again, where *A* contracts to let, and *B* contracts to take, an unfinished house, *B* contracting to finish the house and the lease to contain covenants on the part of *A* to keep the house in repair, and *B* finishes the house in a very defective manner, he cannot enforce the contract specifically, though *A* and *B* may sue each other for compensation for breach of it.⁵ To finish a house means to finish it, so that the house shall be in proper repair.⁶

Other
illustrations.

Similarly, where a grantor has made an unlawful and fraudulent re-entry, he cannot ask for specific performance.⁷ So, where property was sold upon the condition that the vendee should be put into immediate possession, but dispute having arisen as to the title to twelve acres sold, the vendors turned the vendee out of possession and thus deprived him substantially of the benefit which he should have obtained upon the contract, the conduct of the vendors was held to be a bar to their subsequent suit for specific performance. The question, Lord Eldon said, was simply this: "Whether the vendors can insist that the purchaser shall specifically execute the contract, when, if he were to specifically execute the contract, it is rendered impossible for him to have the full benefit intended

¹ S.R.A., s. 24, ill. 3 to cl. (b); *Gourlay v. Duke of Somerset* [1815] 1 V. & B., 68. Cf. *Thompson v. Guyon*, [1831] 5 Sim., 65.

² *Gunnelt v. Albrece* [1869] 103 Mass., 372, 1 Ames, 321.

³ *Parker v. Taswell* [1858] 2 DeG. & J., 559, 573; *Gregory v. Wilson* *supra*.

⁴ *Hill v. Barclay* [1811] 18 Ves., 56. Cf. *Doherty v. Allman* [1878] 3 A. C., 709, 719.

⁵ S.R.A., s. 24, ill. 4 to cl. (b); *Til-desley v. Clarkson* [1862] 30 Beav., 419.

⁶ *Fry*, s. 926, p. 405.

⁷ *Marble Co. v. Ripley*, *supra*.

him by the contract, and that, through the act of the vendors themselves."¹

Inconsistent
positions.

In another case, Lord Cranworth doubted if a bill could be maintained for the specific performance of an award, after the plaintiff had taken proceedings to set it aside.² But the Judicial Committee has recently refused to lay down as an abstract proposition that there is any necessary inconsistency in a person, who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it.³

Ambiguous
agreement.

Where an agreement was ambiguous or capable of two constructions, Jessel, M.R., said, "It would be a very singular thing that a man who had always insisted on one construction of the agreement, and had refused to take possession because that was its proper construction, should then come to a court of equity insisting that the construction for which he had hitherto contended was wrong, and that the agreement had a totally different meaning, and should ask the court to attach that meaning to it, and grant on that footing specific performance, the granting of which is in the discretion of the court."⁴ But the court of appeal held, in a later case, that the mere fact that a party to a contract in writing had put an erroneous construction on it and had insisted that it included what in fact it did not, was no ground for saying that there was no contract.⁵ It would be otherwise where there is fraud. "I never will," said Sugden, L. C., "execute a contract for a plaintiff one way, when with his eyes open he insists in his bill on a different construction against good faith. If he undertakes to perpetrate a fraud, and fails, I shall take care

¹ *Knatchbull v. Grueber* [1815-7] 1 Madd., 153; 3 Mer. 124, 17 R.R., 35, 6 R. C., 668. The Lord Chancellor added, "I cannot see how it would be possible for the vendors, if nothing more had passed subsequently, to say that the title shall be good as far as we choose, and bad as far as we choose; you shall not have the benefit of the original contract, but you shall be bound to take the estate with a compensation for so much of it to which we are unable to make a title; and to say this, after they have,

by their own act, placed him in a situation different from that in which he was entitled to stand, by the terms of that very contract."

² *Blackett v. Bates* [1865] 1 Ch., 117, 2 Keener, 154.

³ *Srishi Chandra Roy v. Banomali Rai* [1904] 2 A.L.J.R., 31, 1 L.R., 31 Cal. 584, P.C.

⁴ *Murshall v. Berridge* [1881] 19 Ch. D., 233, 241.

⁵ *Preston v. Luck* [1884] 27 Ch. D., 502, 507, 2 Keener, 985.

that he fails altogether, and does not obtain the aid of the court at all.¹

Where the plaintiff's conduct had operated as a trap to the defendant, the latter may resist specific performance. You will remember the case of *Dowson v. Solomon*,² where the vendor of leaseholds renewed an insurance thereon so as to expire just about the time of the completion of the contract, with the result that, completion having been delayed, when the actual time for it came the lease had become liable to forfeiture. Kindersley, V. C., refused specific performance against the purchaser.

Defendant trapped by plaintiff's conduct.

If the plaintiff has become unable to perform a material stipulation under the contract, specific performance may be refused. *E.g.*, where the vendor in a contract for sale of a house agreed to become tenant thereof, for a term of fourteen years from the date of the sale, at a specified yearly rent, and he then became insolvent, the court refused to assist him.³ But where the agreement is only for a yearly tenancy and the purchaser is shown to be aware of the vendor's embarrassed circumstances, a different conclusion may be deemed more just.⁴

Plaintiff unable to perform material stipulation.

So, where covenants regarding the use of property is entered into with reference to a certain state of things and this is altered by the acts of one party, he may thereby be taken voluntarily to waive and abandon all that control which was applicable to the property in its former state. Suppose there is a large mansion belonging to a noble family, and some grounds of this are sold to another noble family, in order that the latter may erect a second mansion thereupon, and at the time of sale some covenants restricting the use of these grounds are imposed with the object of securing ample enjoyment of both the mansions, with their appendages of gardens and offices. But, subsequently, both noble families quit their residences and from the alterations which take place with the efflux of time,—the first mansion having been pulled down to make room for streets and buildings,—a new set of interests and rights become applicable

Conditions altered by act of one party.

¹ *Molloy v. Egan*, 7 Ir. Eq., 590, 593.

² [1859] 1 Dr. & Sm. 1; *ante*, 303.

³ *Lord v. Stephens* [1853] 1 Y. & C., Ex. 228; *Neale v. Mackenzie* [1837] 1

Keen, 474. Cf. *Rice v. D'Arville* [1895] 162 Mass., 2 Keener, 107.

⁴ *Lord v. Stephens*, *supra*.

to the subject-matter of the covenants. Upon an assignee of the original vendor applying for specific relief in respect of these covenants, a court of equity may well refuse to assist a party to do that which neither party contemplated, and rule it inequitable, unreasonable and unjust to enforce the covenants specifically in the existing state of the property.¹

Representations not fulfilled.

Where, again, representations are made at the time of the contract on the faith of which it is entered into, the plaintiff has to show that the future acts have been performed to which those representations related. If, for instance, the defendant agreed to accept a lease upon the plaintiff undertaking orally that he would put the premises agreed to be let in a proper condition for a wine-seller, but the plaintiff failed to perform this stipulation, he was refused specific performance, though the lessee had entered and had delayed in raising any objection on this score.² "A representation, deliberately and intentionally made, for the purpose of influencing the conduct of another, and then acted upon by him," said Lord Cottenham, "is generally the foundation of a right which a court of equity will enforce."³ So, where the defendant had purchased a building-ground in a street, on the faith of representations made by the plaintiff's agent as to his principal's intention to make the approach to the site wide and commodious, and this was not done, the plaintiff was refused specific performance of the contract to purchase. The representations had enhanced the price, which, Plumer, M. R., said he could not cut down and say how much would have been given if this had not been done.⁴ And this is eminently just, for otherwise great injustice would often be done, as such promises frequently have a controlling influence in the transaction, without which the

¹ *Duke of Bedford v. Trustees of British Museum* [1822] 2 My. & K., 552, 6 R. C., 702. Distinguish *Sayers v. Collyer* [1884] 28 Ch. D., 103; *Osborne v. Bradley* [1903] 73 L. J., Ch., 49. Cf. *Elliston v. Reucher* [1908] 2 Ch. 374.

² *Lamare v. Dixon* [1873] 6 H. L., 414. Cf. *Oxford v. Proband* [1868] 2 P. C., 156. *Reeves v. Greenwich Tanning Co.* [1864] 2 H. & M. 54 (defend-

ant had agreed to accept a lease upon plaintiff agreeing to procure a license to carry on a certain trade there).

³ *Hammersley v. De Btel* [1845] 12 Cl. & F., 45, 61, n. 3. *Pomeroy, Eq. J.*, s. 1294.

⁴ *Beaumont v. Dukes* [1822] Jacob, 422, 1 Ames, 324. Cf. *Myers v. Watson* [1851] 1 Sim. N. S., 523; *Rose v. Watson*, [1864] 10 H. L. C., 672.

bargain would probably have fallen through.¹ The matter of defence in such a case will often be one outside the contract, if it has been reduced to writing, and where the plaintiff is yet in a position to carry out the stipulation, the defendant may insist upon his submitting to a variation, if he seeks specific performance.² The effect of clause (c), section 26, Specific Relief Act, has been said to be that a party claiming specific performance must be ready and willing to perform the whole of what he undertook on his part, whether the whole agreement appears on the face of one document or not; and the defendant must always be at liberty to show what the whole and every part of the agreement really was.³ Where, therefore, *A* has contracted in writing to let to *B* a wharf, together with a strip of *A*'s land delineated in a map, but, before signing the contract, *B* proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of *A*'s land of the same dimensions, and to this *A* expressly assented, whereupon *B* signed a written contract, *A* cannot obtain specific performance of this written contract, except with the variation set up by *B*.⁴ The effect of the exhibition, at the time of the contract, of a map or plan of the premises, on the rights and obligations of the respective parties, will, it may be noted, depend upon the mode and object of the exhibition, and upon what then transpired. The proposed division of the property on such a map may be set up to prevent the vendor from subsequently dividing the land in a way so different as to attract a wholly different class of residents from that originally contemplated.⁵ But the map exhibited need not be strictly followed,⁶ and where no allusion is made in the contract to the map or plan, the court will not be disposed to infer a binding promise from an exhibition thereof.⁷

S.R.A., s.
26 (c).

Map or plan.

¹ Waterman, s. 426, p. 579.

² S.R.A., s. 26 (c).

³ Pollock, *F. M. M.*, 3rd. ed. 155-6. Cf. *Cutts v. Brown* [1880] 7 C.L.R., 171 (defendant allowed to prove "certain terms and conditions agreed upon" which had not been entered in the written articles of sale).

⁴ S. R. A., s. 26, ill. (c). Cf. *Clarke v. Grant* [1807] 14 Ves., 519; *Micklethwait v. Nightingale* [1845] 12 Jnr., 638.

⁵ *Peacock v. Penson* [1848] 11 Beav., 355, 361. *Cumming v. Houldsworth* [1910] A. C., 537.

⁶ *Nurse v. Lord Seymour* [1851] 13 Beav., 254.

⁷ *Feoffees of Heriot's Hospital v. Gibson* [1814] 2 Dow, 301; *Randall v. Hall* [1851] 4 DeG & Sm., 343. Cf. *Re Lindsay Forder's Contract* [1895] 72 L. T., 832; *Eastwood v. Ashton* [1914] 1 Ch., 68 (*fa'sa demonstratio*).

Stipulation
deliberately
omitted.

Where a stipulation has been deliberately left out in the written contract, English courts decline to interfere.¹ If, therefore, a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted, equity will hold the omission binding.² It may be doubted, however, if the wording of clause (c), section 26, is not wide enough to cover such a case. Nothing is said there about mistake or deliberation, but apparently every stipulation on the plaintiff's part, in reliance upon which the contract has been entered into and which adds to it, may be proved and enforced.³

Independent
stipulations.

Of course, if the stipulation is separate and independent, even if the fact is that it was made contemporaneously with the written contract and with reference to the subject-matter thereof, yet the non-performance of this stipulation cannot be pleaded in answer to a suit for specific performance of the contract.⁴ Such is, *e.g.*, a parol agreement by the seller of a flooded mine that he will pump it dry. This agreement may, however, be made the subject of a separate suit by the defendant.⁵

Substantial
performance
enough.

And, generally, it is worth while to remark, equity requires substantial, and not literal, fulfilment of an agreement, and looks beyond mere matters of form to do complete justice between the parties.⁶ The principle is well settled, that where either party has performed a valuable part of his contract, say, for the sale and purchase of real estate, and is in no default for not performing the residue, he is entitled to performance by the other party to the contract.⁷ The default must be of an important or essential term, and minor breaches of good faith will be excused. So also may be a non-performance owing to unexpected events beyond the plaintiff's control.⁸ The case is much

¹ *Lord Innam v. Child* [1781] 1 Bro. C. C., 92; Sugden, *V. & P.*, 173.

² *Shelburne v. Inchiquin* [1784] 1 Bro. C. C., 350; 2 Part, *V & P.*, 1658.

³ *Cf. Collett*, 228-9.

⁴ *Green v. Low* [1856] 22 Beav., 625, *Cf. Croome v. Lediard* [1833] 2 M. & K., 251, 260.

⁵ *Phipps v. Child* [1857] 3 Dr., 709.

⁶ *Davis v. Hone* [1805] 2 Sch. & Lef., 347, 9 R. R., 89; *Lord v. Stephens*

[1835] 1 Y. & C. Ex., 222. *Cf. Secombe v. Steele* [1857] 20 Howard, 94, 2 Scott, 321 (failing to deposit money in two banks named by defendant, plaintiff deposited money in another bank of solvency and credit).

⁷ *Hays v. Hall*, 4 Porter, 374.

⁸ *Holmes v. Eastern Counties Ry. Co.* [1857] 3 Jur. N. S., 737. *Langdale, Eq. J.*, 56.

⁹ *Walker v. Jeffreys* [1841] 1 Hare,

stronger where the non-performance has to be attributed to the defendant's own action.¹

Laches.

Finally, the plaintiff must not be guilty of *laches*, for neither law nor equity will aid one who has slept upon his rights and not been vigilant. "A party cannot call upon a court of equity for specific performance, unless he has shown himself ready, desirous, prompt, and eager."² So said Lord Cranworth: "Specific performance is relief which this court will not give, unless in cases where the party seeking it come promptly, and as soon as the nature of the case will permit."³ Accidents, mistakes, infirmities, and inequalities belong to all human transactions,⁴ so a strict and punctual performance of engagements cannot always be expected. But delay may affect the value of the subject-matter of the contract, it may make the contract itself less beneficial or more onerous to one of the parties thereto; it may bring into existence rights of third parties, purchasers for value without notice, for instance. Allen, J., accordingly said, "A party may not trifle with his contracts and still ask the aid of a court of equity. Neither will the law be administered in a spirit of technicality, and so as to defeat the ends of justice."⁵

Elements of
laches.

Mere lapse of time is not, in general, a sufficient ground in equity for the refusal of relief.⁶ Time, as we have seen before,⁷ may be either essential, or material, or immaterial. Where time is essential, no question of delay properly arises; in such a case, the stipulation of the contract must be exactly complied with, and it is failure to perform at the exact day, and not the *delay*, which cuts off the rights of the defaulting party.⁸ Where time is immaterial, no question of delay again arises. It is only when time is material, that delay may affect the remedial right. But delay so to affect the right must amount

341 (mine not worked by lessee in consequence of flood, covenant for renewal enforced).

¹ *Narain v. Mohendra* [1012] 15 C. L. J., 332.

² *Per Alvanley, M.R., Milward v. Earl Thanet* [1801] 5 Ves., 720 n.

³ *Eads v. Williams* [1854] 4 DeG. M. & G., 691. Cf. *Levy v. Stogdon* [1899] 1 Ch., 5.

⁴ 2 Story, *Eq.*, s. 780.

⁵ *Hubbell v. Von Schoening* [1872] 49 N.Y., 326, 2 Scott, 351; *Clark v. Sears* [18 6] 3 Iowa, 104, 106.

⁶ *Vernon v. Stephens*, [1723] 21 P. Wms., 66; *Edgerton v. Peckham*, 11 Paige, 352. *Kedarnath v. Manu* (1912) 16 C. W. N. 247.

⁷ *Ante*, 269-70.

⁸ *Pomeroy, S.P.*, s. 329.

to *laches*, that is, there must be unexplained delay for an unreasonable time, and such delay must prejudice the party against whom relief is sought.¹

Delay and
laches.

"Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another," said Stinness, C. J. "So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."² So, Sir Barnes Peacock observed: "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, perhaps, not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time is most material. But in every case, if an argument against relief which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other."³

Limitation
and laches.

The above quotations make it clear that the doctrine of

¹ 3 Page, *Con.*, s. 1707.

² *Chase v. Chase*, 37 Atl., 804; *O'Brien v. Wheelock*, 184 U. S., 450; 3

Page, *Con.*, s. 1706.

³ *Lindsay Petroleum Co. v. Hurd* [1873] 5 P.C., 221, 239-40.

laches is not dependent on those general considerations of public utility and the 'repose of society,' which are, in legal theory, the legislative motives for statutes of limitation, but is, for the most part, merely an application of the broader maxims of equity I have referred to previously, *viz.*, 'He who seeks equity must do equity,' and 'He who comes into equity must come with clean hands.'¹ "Laches is not, like limitation, a mere matter of time," says the Supreme Court of the United States, "but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."² It has accordingly been thought that the doctrine can be invoked only where no statute of limitations directly governs the case.³ "So far as laches is a defence, said Lord Wensleydale, "I take it that where there is a statute of limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute."⁴ In British India, there is a statutory period of limitation prescribed for suits for equitable relief like specific performance;⁵ and so long ago as 1864, the Madras High Court held that "lapse of time, as a defence to such suits, can only be relied upon when under the Act it has become a bar,"⁶ and that when laches and indirect acquiescence "go merely to the remedy, it is quite clear that the courts have no power arbitrarily to substitute an extinguishing prescription, different from that determined by the legislature."⁷ The legislature, apparently, took the same view when enacting the Specific Relief Act, for in the Statement of Objects and Reasons these Madras cases were referred to and it was stated: "The right to enforce a contract specifically may, in England, be lost by delay in resorting to the court, and a large mass of cases exists relating to this doctrine. The Bill contains no

¹ 1 Pomeroy, *Eq. R.*, s 21, p. 43. *Cf. Hall v. Otterson* [1894] 52 N. J. Eq., 522, 2 Scott, 636.

² *Gulliver v. Caldwell*, 145 U. S., 368, 373.

³ *Ludington v. Patton*, III. Wis., 208; *Wagner v. Baird*, 7 Howard, 234, 258; *Abraham v. Ordway*, 158 U. S., 416, 422.

⁴ *Archbold v. Scully* [1861] 9 H. L.

C., 360, 383.

⁵ Act XIV of 1859, s. 1, cl. 9; Act IX of 1871, sch. II, art. 113; Act XV of 1877, sch. II, art. 113; Act IX of 1908, sch. I, art. 113.

⁶ *Rama Rau v. Raja Rau* [1864] 2 Mad H.C.R., 114, 116.

⁷ *Peddammuthulaty v. Timma Reddy*, *ibid.*, 270, 275.

rules on the subject, for, in India, the provision of the Limitation Act (IX of 1871), Schedule II, no. 113, that suits for specific performance must be brought within three years from the day on which the plaintiff has notice that performance is refused, renders the doctrine of laches inapplicable to this kind of litigation."¹ The Madras High Court has therefore quite recently ruled that, "in the absence of anything to show an abandonment or a sleeping over rights to the detriment of third parties, delay short of the limitation period does not matter in suits for specific performance."² In the same spirit, Woodroffe, J., holds in Calcutta, "In my opinion delay is not material so long as matters remain *in statu quo*, and it does not mislead the defendant or amount to acquiescence."³ It must be shown that delay has prejudiced the defendant.⁴ To operate as a bar to relief, the delay should be such as to amount to a waiver⁵ of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would be not reasonable to place him, if the remedy were afterwards to be asserted.⁶ When such is not the case, any lapse of time, short of the period allowed under the Limitation Act, should not disentitle the claimant to relief, to which he is otherwise entitled."⁷

Delay short of limitation ordinarily immaterial.

It is clear then that "mere submission to the injuries for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of 'laches,' it may afford a ground for

¹ App. B. *infra*. Cf. Pollock, *F. M. M.*, 37.

² [1908] 18 M. L. J. 21 (notes of recent cases.)

³ "Acquiescence, properly speaking, relates to inaction during the performance of an act, *laches* relates to delay after the act is done," *Hall v. Otterson* [1894] 52 N. J. Eq., 522, 3 Keener, 409. *Archbold v. Scully* [1861] 9 H. L. C., 360, 383, 388. Banning, *Limitation*, ch. iv; Darby & Bosanquet, *Lim.*, 452.

⁴ *Abdul v. Nagasarupu* [1912] M. W. N., 1004.

⁵ Mere delay, apart from other facts or circumstances, does not amount to

waiver or abandonment, *Surioprakasa v. Lakshminara* [1914] 26 M. L. J. R., 518.

⁶ *Lindsay Petroleum Co. v. Hurd*, *supra*; *Jamnadass v. Atmaram* [1878] 2 Bom., 133. "The lapse of time, where no material inconvenience has been suffered by the appellant, can be urged only on the ground that the agreement has been dormant; and that this is evidence of the abandonment of it by the parties," *Waters v. Travis* [1812] 9 Johns., 450, 460.

⁷ *Kissen Gopal v. Kally Prosonmo* [1905] 33 Cal., 633, 636; *Kedar v. Manu* [1912] 16 C. W. N., 247.

refusing relief under some peculiar circumstances."¹ No right should be lightly allowed to be defeated. Delay or no delay, a right should be respected and enforced, so long as the law permits its enforcement and so long as supervening circumstances do not render such enforcement clearly and indubitably inequitable.² Since, however, specific relief is not a matter of right and the courts have a discretion to exercise, they should not overlook special facts which might make laches exist within a period shorter than that of limitation.

The question must be decided in each suit, although brought within the statutory limit as to time, whether under its peculiar circumstances, equity and good conscience require that the contract shall be performed *in specie*, or whether the party should be left to the ordinary remedy of damages.³ Obviously no rigid rule can be laid down, and each case must depend on its own circumstances.⁴

But the doctrine of laches is as applicable to the promisor as to the promisee,⁵ to a person, for instance, who has contracted to sell an estate, as to one who has contracted to buy it. Covenants and acts to be performed by either must be executed promptly, the institution of a suit where necessary should not be unduly delayed, and, when instituted, it must be vigorously prosecuted.⁶ The plaintiff's pecuniary condition will not as a rule avail to condone his delay,⁷ though his ignorance will.⁸ Undue delay, specially when the subject-matter of the contract is of a speculative or fluctuating value, may make the bargain a hard one for the defendant,⁹ or it may even amount to an

Applica-
tions of doc-
trine of
laches.

¹ *DeBussche v. Alt* [1877] 8 Ch. D., 286, 314; *Whitney v. Fox*, 166 U.S., 637, 647; *Sena v. United States*, 189 U.S., 233; *Mokund Lall v. Chotay Lall* [1884] 10 Cal., 1061. Cf. *Uda Begam v. Imamuddin* [1875] 1 All. 82, 86; *Haradhan v. Bharabati* [1914] 19 C. L. J., 420.

² 4 A. L. J., 61 (article). The unreported decision of the Allahabad Court referred to on p. 60, n. 2 *ibid.*, is clearly wrong.

³ *Peters v. Delaplaine* [1872] 149 N. Y., 362, 2 Keener, 1188.

⁴ *Mokund Lall v. Chotay Lall* [1884] 10 Cal., 1061, 1068.

⁵ *Rich v. Gale* [1871] 24 L. T., N. S., 745.

⁶ *Moore v. Blake* [1808] 1 Ball. & B., 62; *Johnson v. Mining Co.*, 148 U.S., 360.

⁷ *Leggett v. Standard Oil Co.*, 149 U.S., 294.

⁸ *Halstead v. Grinnan*, 152 U.S., 412; *Re Garnett* [1885] 31 Ch. D. 1; 1 Pomeroy, *Eq. R.*, s. 26.

⁹ *Pollard v. Clayton* [1855] 1 K. & J., 462; *Mills v. Haywood* [1877] 6 Ch. D., 202; *Cornwall v. Henson* [1899] 2 Ch., 710 [1900] 2 Ch., 298; *Nawab Begum v. Creet* [1905] 27 All., 678; *Davison v. Davis*, 125 U.S., 90 (corporate stock); *Combs v. Scott* [1890] 45 N. W., 532, 2 Keener, 1194 (realty).

abandonment of the contract by an aggrieved party,¹ especially where the plaintiff has acted in reference to the estate in a manner inconsistent with the existence of the contract.² When either party has been guilty of gross negligence, the court may refuse to lend its assistance to the completion of the contract.³ The vendor or purchaser of land might have a special purpose in view known to the other party, and if the latter's delay prevent this from being accomplished, he cannot claim a decree for specific performance of the contract.⁴

Delay excused.

Delay may be capable of explanation,⁵ or it may have been induced⁶ or at least sanctioned by the other party.⁷ Where, for instance, a party has raised an unfounded objection, say, to the title of the property sold and thereby caused delay, the plea of *laches* is not open to him.⁸ Nor does time run when a negotiation is pending between the parties, even though the treaty be conducted without prejudice to a notice given by one party that he holds the contract rescinded.⁹ So, where the contract has been substantially executed, *e.g.*, where a purchaser has taken possession under a contract for sale and the vendor has notice of this, the question of *laches* does not arise.¹⁰ And if both parties are in the default, each may be taken impliedly to

¹ In *Barkhardar v. Munawar* [1910] 7 I. C. 568, plf. slept over his rights for nearly 12 years. *Nawab Begum v. Creet*, *supra*. Cf. *Mackreth v. Marlar* [1786] 1 Cox, 259. A contract once abandoned by the party in default, cannot afterwards be revived. *Baldwyn v. Salter*, 8 Paige, Ch., 473. *Lloyd v. Collett* [1793] 4 Bro. C. C., 469. In this connection, s. 39, I. C. A., should be borne in mind, as to which see *Rashbehari Shaw v. Nritya Gopal Nundy* [1906] 3 C. L. J., 249.

² *Chambers v. Betty* [1815] Beat., 488. As a general rule, to sustain an implication of the abandonment of the contract, the conduct of the party ought to be such as to lead the mind of a reasonable person to arrive at that conclusion, *e.g.*, the vendor should have attempted to resell the property or exercised, without explanation, an unequivocal act of ownership over it, showing that he did not consider the contract as still in force. *Garnet v. Macon*, 6 Call., 308; *Waterman*, 660.

³ *Fordyce v. Ford* [1794] 4 Bro. C. C., 494, 498. *Willard v. Wood*, 164 U. S., 502.

⁴ *Prate v. Carroll*, 8 Cranch, 471; *Pomeroy, S. P.*, s. 410.

⁵ *Brown v. Guarantee Trust Co.*, 128 U. S., 403; *Hubbell v. Von Schoening* [1872] 49 N. Y., 326.

⁶ *Townsend v. Vanderwerker*, 160 U. S., 171; 3 Page, Con., s. 1711.

⁷ *Morse v. Merest* [1821] 6 Madd. 26; *Ridgway v. Wharton* [1857] 6 H. L. C., 238, 292.

⁸ *Monro v. Taylor* [1852] 3 M. & G. 713, 723. A curious case is *Williamson v. Dils*, 24 Ky. L. R., 292 where, the vendor threatened to kill the plaintiff if he went on the land to make surveys necessary to fix the price.

⁹ *Southcomb v. Bishop of Exeter* [1847] 6 Hare, 213.

¹⁰ *Crofton v. Ormsby* [1806] 2 Sch. & Lef., 604; *Clarke v. Moore* [1844] 1 Jon & Lat., 723, 68 R. R., 368; *Burke v. Smyth* [1846] 3 ibid, 193; *Shepherd v. Walker* [1875] 20 Eq., 659;

waive strict performance as to time, and the contract will remain in force.¹ But where the delay of the vendor or vendee in seeking performance is for a speculative purpose, where, for instance, he has entered into the contract without the present means of performing it,² or desires to wait until time shall determine whether or not it is to his advantage to have the benefit of the contract, there is authority for holding that equity will not aid him by any relief against his failure to perform, whatever the situation otherwise.³

Speculative delay.

Where the value of the property has materially changed, or great financial events have essentially altered the relative value of money and land, a party will not be permitted to lie by until the change sets in his favour and then ask for specific performance.⁴ A case in point is *McCabe v. Matthews*,⁵ where the result of a delay for speculative purpose had the result of increasing the value of the property sold from \$150 to \$7,500. In such a case, the court will be entirely justified in exercising its discretion against the granting of specific relief.

No person, however, can be deprived of his remedy in equity on the ground of *laches*, unless it is shown that he had knowledge of his rights. "As one cannot acquiesce," said Green, V.C., "in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge is not the result of his own culpable negligence."⁶

Knowledge and laches.

Miller v. Bear, 3 Paige, Ch., 466. Distinguish *Mills v. Haywood* [1877] 6 Ch. D., 196. Remaining in possession under an arrangement to that effect, or leaving the deposit to remain in vendor's hands, does not affect the question of *laches*, *Southcomb v. Bishop of Exeter*, supra, 224.

¹ *Van Campen v. Knight*, 63 Barbour, 205.

² *Gee v. Pearse* [1848] 2 De G. & Sm., 325, 346, 64 E. R., 155. *Aberaman Iron Works v. Wickens* [1868] 5 Eq., 485, 507.

³ *Marshall v. Perry*, 90 Ill., 289, 294; *Alley v. Deschamps* [1806] 13 Ves., 224; *Benedict v. Lynch* [1815] 1 John., Ch., 370, 2 Keener, 1081; *Kirley v. Harrison* [1853] 2 Ohio St., 326, 2 Scott, 343. 2 Pomeroy, *Eq. R.*, 1339.

⁴ *Merritt v. Brown*, 21 N. J. Eq., 401; *Combs v. Scott* [1890] 76 Wis., 662, 2 Scott, 359.

⁵ [1895] 155 U. S., 550, 2 Keener, 1199. *Per* Brewer, J.: "It seems to us to be a case of a purely speculative contract on the part of the plaintiff; doing nothing himself, he waits many years to see what the outcome of the purchase by defendant shall be. If such purchase proves a profitable investment, he will demand his share; if unprofitable, he will let it alone. Under those circumstances, the long delay is such laches as forbids a court of equity to interfere."

⁶ *Hall v. Otterson* [1894] 52 N. J. Eq., 522, 3 Keener, 410. Cf. *In re Garnett* [1885] 31 Ch. D., 1, 16, 3 Keener, 250.

LECTURE VIII.

MATTERS INCIDENTAL AND OF PRACTICE.

Executed
contracts.

Award.

I have so far dealt specially with the case of executory contracts, in respect of which alone specific performance has been said to be an appropriate remedy.¹ But specific relief may be granted in respect of executed contracts too. *E.g.*, an award, which springs from a contract and may in that sense be deemed to be the upshot of an agreement between the parties whose differences it purports to settle, is, as we have seen, capable of enforcement either by suit or by motion.² In one sense, an award duly rendered amounts to an agreement by the parties on the terms pointed out by the arbitrator, and so it may be enforced against a party as his own agreement.³ It may, therefore, be objected to on the ground of uncertainty or palpable mistake; and if a part of it is open to objection and is separable from the remainder, the defective part may be rejected.⁴ The court is to take the terms of the award before it and to see whether, if the same terms had been embodied in a contract between the parties, a claim for specific performance ought to have been decreed.⁵ In another sense, as the decision of the judge or judges chosen by the parties themselves, it deserves the same finality as the judgment of a court of ultimate resort, and it is not for any other judge to weigh and consider the justice of this decision.⁶ But if it can be shown that the agreement embodied in the submission to arbitration is so unreasonable, unfair or improvident that it does not deserve to be specifically enforced, the court

¹ *Wolverhampton &c. Ry. Co. v. London &c. Ry. Co.* [1873] 16 Eq., 433. *Ante*, 21.

² *Ante*, 03-5 S.R.A., s. 30; C.P.C., s. 528. The previous sections of Ch. XXXVII of the Code provide for reference to arbitration by the court, and in such case the court has the power to modify or remit for reconsideration an award. Act V of 1908,

Sch. II

³ *Wood v. Griffith* [1818] 1 Sw., 43, 54; *Russell, Arb.*, pt. III, ch. 3, s. 5.

⁴ *Russell, Arb.*, 383.

⁵ *Kuldip Dube v. Mahant* [1911] 34 All., 43.

⁶ *Ives v. Metcalfe* [1737] 1 Atk., 64; *Wood v. Griffith*, *supra*. Cf. D.C. Banerjee, *Arb.*, ch. x, xi.

will refuse to interfere in favour of an award founded upon this submission.¹

Settlement.

So, again, a settlement may be either executed or executory. As defined in the Specific Relief Act, "settlement" means any instrument (other than a will or codicil² as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or agreed to be disposed of.³ Where, therefore, there is a disposal of property *inter vivos* in favour of two or more persons who take successive interests, *i.e.*, one after the other, we have a settlement.⁴ Where such a disposal is effected *in præsentia*, there is an *executed* settlement; where it is agreed upon but some other act, *e.g.*, the execution of a conveyance, is still required to perfect the disposal, there is an *executory* settlement or (as an English lawyer would prefer to call it) articles for settlement.⁵ Another distinction worth noting is between a settlement for value and a voluntary settlement. Where valuable consideration has been given for a disposal of property,—and marriage is such consideration,—there is a settlement for value, and all persons, including issue expected of a marriage, on behalf of whom benefits are secured thereby, are within the consideration, and may be termed 'purchasers' thereunder. But when a settlement is made at the time of a marriage between, say, A and B, provisions may be made for the benefit of other relations, and particularly the issue of any former marriage. Such relations are termed 'volunteers' by English lawyers; and so are all who claim under a settlement made out of love and affection, for meritorious consideration (to adopt a technical

Settlement,
voluntary
and for
value.

¹ *Nickels v. Hancock* [1855] 7 DeG. M. & G., 300. But see *Pomeroy, S. P.*, 271 n.

² Ind. Suc. Act, 1865, s. 3: "'Will' is a legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death. 'Codicil' means an instrument made in relation to a will, and explaining, altering or adding to its dispositions."

³ S. R. A., s. 3.

⁴ "It is not clear," very justly observes Collett, "what is the distinction between the destination

and the devolution of successive interests; but perhaps it means that in the former, the subsequent interest is taken on the failure, or in substitution, of a prior interest; and in the latter, the subsequent interest is taken on the expiration or exhaustion of the prior interest; so that in the former, the subsequent claimant takes against the prior claimant, and in the latter he takes through him," *S. R.*, 57.

⁵ The leading case upon this distinction is *Glenorchy v. Bosville* [1733] 2 Wh. & T., 8th. ed., 778.

phrase). A voluntary settlement, however, by registration may become a legal enforceable contract in India,¹ and if it takes the shape of a gift actually made, even the formality of registration may apparently be dispensed with.² Otherwise the general rule seems to be that the equities of a purchaser for value without notice will prevail over those of a volunteer claiming under a voluntary settlement, and even as against the settlor and subsequent volunteers, this settlement can be enforced only if an executed one.³ But the absence of notice is the equity of the purchaser and not of the seller, and, as we have seen, a voluntary settlor is not permitted to force on an unwilling purchaser a title depending on the invalidity of the settlement.⁴ As between the settlor and the objects of the settlement, it is a perfectly binding settlement,⁵ and the settlor has no equity to defeat the act which he has done himself.⁶ And the Indian law recognises no distinction between a voluntary settlement of personal chattels and one of land.⁷

Specific enforcement of settlement.

An executed settlement may be specifically enforced like any other deed of trust. An executory trust may be enforced under section 12, clause (a), Specific Relief Act. A declaration of trust does not require any express form of words,⁸ but it may be indicated by the character of the instrument,⁹ and it is, in form and substance, a complete transaction. An agreement or an attempt to assign, on the other hand, is in form as well as in nature incomplete.¹⁰ Where directions are given in a will or codicil to execute a particular settlement,¹¹ there is an express executory trust by way of settlement. Such a trust, if the settlement actually directed offends against any rule of law, *e.g.*, is void as creating a perpetuity, may be executed *cy pres*, that is, with such modification as would keep the

¹ See I. C. A., s. 25 (1).

² Ibid, expln. 1. Cf. *Kalidas v. Kanahya Lal* [1884] 11 I. A., 218, 232, 11 Cal. 121.

³ *Ellison v. Ellison* [1802] 2 Wh. & T., 8th. ed., 853; S. R. A s. 24 (d).

⁴ S. R. A., s. 25 c, ill. (d); *In re Briggs* [1891] 2 Ch., 127. But the purchaser may compel performance by the vendor, *Rosher v. Williams* [1875] 20 Eq., 210.

⁵ *Smith v. Garland* [1817] 2 Mer.,

128, 1 Ames, 440.

⁶ *Johnson v. Legard* [1822] T. & R., 281, 294. Ante, 211.

⁷ 1 Stokes, A I. Codes, 931-2.

⁸ *Re Williams, Williams v. Williams* [1897] 2 Ch., 12, 18.

⁹ *Kekewich v. Manning* [1851] 1 DeG. M & G., 176.

¹⁰ *M'Fadden v. Jenkins* [1842] 1 Hare, 458, 462.

¹¹ S. R. A., s. 30.

settlement legal and yet give effect to the testator's intention so far as may be.¹ But questions of construction that arise in respect of executory trusts in a will are not always easy to solve, because a testator may give what estate he chooses, and there is no presumption of any special intention to be taken as a guide.² In the case of executory trusts by deed, however, the nature of the transaction may raise a presumption as to the intention of the parties. *E.g.*, marriage articles may be taken to intend the benefit and advancement of the issue of the marriage.³ But this is not the place to discuss the law of settlements generally, and so I refrain from pursuing further these interesting questions.⁴

Construc-
tion.

It may not be out of place to mention here that marriage with some classes of people, *e.g.*, the Mahomedans, is matter of civil contract. A suit for restitution of conjugal rights in such a case may be treated as an action for specific performance of a contract. Neither the Specific Relief Act nor the Contract Act will probably apply, yet the plaintiff in such a suit cannot be said to have an absolute right to insist upon the assistance of the court. The court has a discretion to exercise, and the leading case of *Buzloor Ruheem v. Shumsoonnissa Begum*⁵ illustrates how, under special circumstances, the court may impose terms upon the plaintiff or refuse to him relief.

Contract of
marriage.

There is another class of agreements which deserve special mention here. These I have sometimes referred to before in general terms as "restrictive covenants." On a demise of land, covenants may be entered into stipulating, *e.g.*, that the land is to be used in a particular way and is not to be used in certain other specified ways. The leading authority in the case of leases is *Spencer's case*,⁶ the effect of the first resolution in which is that when the covenant extends to a thing *in esse*, parcel of the demise,

Restrictive
covenants.

Leases.
Spencer's
case.

¹ *Humberston v. Humberston* [1716] 1 P. Wms., 332.

² *Cf. Blackburn v. Stables* [1814] 2 V. & B., 367, 369.

³ *Taggart v. Taggart* [1803] 1 S. & L., 88; 2 Story, *Eq.*, ss. 984-5. *Sackville-West v. Viscount Holmesdale* [1870] 4 H. L., 543, is an instructive case on the general principles of construction applicable.

⁴ The reader may usefully consult *Vaizey on Settlements* and *Underhill & Strahan on Wills & Settlements*; also *Norton on Deeds*.

⁵ [1867] 11 M.I.A., 551; *Aisha Bi v. Muhammad Sadiq* [1891] P. R. no. 5. *Cf. Husaini Begum v. Rustam Ali* [1906] 29 All., 222; *Bai Jina v. Jinalia* [1907] 31 Bom., 366.

⁶ [1583]. 1 Sm. L. C., 12th. ed. 62.

Other
transfers.

the thing to be done by force of the covenant is, so to say, annexed to the thing demised, and shall go with the land, and shall bind the assignee, though he be not expressly named.¹ As to other covenants relating to land and not between a landlord and his tenant, where entered into *with* the owner, the benefit thereof, according to the common law of England, runs with the covenantee's estate and so enures to the benefit also of his assignees, but where entered into *by* the owner, the burden thereof does not appear to run with the land.² And no covenant will apparently so run unless it "touch or concern"³ or "extend to the support of the thing" conveyed,⁴ and be "for the benefit of the estate."⁵ "It is not competent for an owner of land to render it subject to a new species of burden at his fancy or caprice," said Martin, B.⁶ The doctrine, however, has been modified or extended at equity. Holmes, J., has said, "Equity will no more enforce every restriction that can be devised, than the common law will recognise as creating an easement, every grant purporting to limit the use of land in favour of other land,"⁷ and Rigby, L.J., has remarked, "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it."⁸ It may be, as Sir F. Pollock puts it, the equitable jurisdiction in this matter is "a strictly personal and restraining one," and "equity does not trouble itself to assist intentions which have no legal merits."⁹ But the doctrine seems to be well established, with regard to covenants relating

¹ It was also laid down in *Spencer's case*, that when the covenant extends to a thing which is not in being at the time of the demise made, it will not bind the assignee unless he be expressly named. But this rule has subsequently been qualified, *Minshull v. Oakes* [1858] 27 L.J., Ex., 194. No distinction can be made between covenants by lessees and covenants by lessors, *Jones v. Parker* [1895] 163 Mass., 564, 2 Scott, 85.

² Pollock, *Con.* (W. W.), 300, Woodfall, *L & T.*, 172 sqq. *Austerberry v. Corp of Oldham* [1885] 29 Ch., D. 750, 781; *Rogers v. Hosegood* [1900] 2 Ch., 394, 403.

³ 2 Hen. VIII. c. 34; 1 Sm. L. C., 12th. ed., 76; *Mayor of Oundleton v. Pattison*

[1808] 10 East, 130, 135, 138. *Fleetwood v. Hull* [1889] 23 Q.B.D., 35; *White v. Southern Hotel Co.* [1897] 1 Ch., 767; *Horsley Estate v. Steiger* [1899] 2 Q.B., 89; *Rogers v. Hosegood*, *supra*; *Brown, Covenants*, 18; *Dyson v. Forster* [1908] 78 L. J. K. B. 24.

⁴ 5 Co. Rep., 16a, 24b.

⁵ *Cookson v. Cock* [1807] C 10. Jac., 125, 79 E.R., 109 *Badger v. Boardman* [1860] 16 Gray, 539, 560.

⁶ *Nuttall v. Bracewell* [1866] 2 Ex., 10, 36.

⁷ *Norcross v. James* [1885] 140 Mass., 188, 1 Ames, 182. Cf. *Keppel v. Bailey* [1834] 2 M. & K., 517, 39 R.R., 264.

⁸ *Rogers v. Hosegood* [1900] 2 Ch., 388, 401.

Pollock, *Con.* (W. W.), 306.

to land and entered into by a tenant in fee with a former owner, from whom he purchased, or with an adjoining landowner, that in so far as such covenants bind the covenantor to some forbearance restrictive of the free use of his land, and were made with the object of benefiting the owners and occupiers of some other land retained by the former owner or belonging to the adjoining landowner, as the case may be, the burthen thereof practically runs with the land in equity.¹ The facts of the leading case of *Tulk v. Moxhay*² were briefly these. The plaintiff had sold a piece of ground described as "Leicester Square Garden or Pleasure Ground" to one Elms, who covenanted for himself, his heirs and assigns to "from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in a neat and ornamental order." The land passed by divers mesne conveyances to the defendant, who had notice of the covenant, though his purchase-deed did not mention it. He manifested an intention to build upon and alter the character of the Square Garden, whereupon the plaintiff sued to restrain him. Lord Cottenham, C, said, "That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.....It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not, whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased³..... If an

*Tulk v.
Moxhay.*

¹ Williams, V. & P. 426 7.

² [1848] 2 Ph. 774, Finch, 777. Privy of estate. "*Doyal v. Chunilal* [1910] 12 A. L. J. 259.

³ Cf. *per* Chelmsford, L. C., "Where a man by gift or purchase acquires property from another, with know-

ledge of a previous contract lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third party, in

Negative
easement.

equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."¹ Jessel, M. R., suggested that the doctrine of *Tulk v. Moxhay*, was an extension in equity either of the doctrine of *Spencer's case* to another line of cases, or of the doctrine of negative easements, such, *e.g.*, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light.² In some later cases, the right has been assimilated to an easement. *E.g.*, in *Rogers v. Hosegood*,³ the court said, "In equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land..... When the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case, it runs, not because the conscience of either party is affected but because the purchaser has bought something which inhered in or was annexed to the land bought." And the still later case of *Formby v. Barker*,⁴ supports the position that the burthen imposed in equity by restrictive covenants cannot exist in the absence of what may be called a *quasi* dominant tenement. Still more recently it has been said, "An obligation created by a restrictive covenant is in the nature of a negative easement,

opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." *De Mattos v. Gibson* [1859] 4 DeG. & J., 276, 285. The rule does not apply to personal or collateral covenants, not imposed for the benefit of the covenantee's property, *Formby v. Barker* [1903] 2 Ch., 539; *Groves v. Loomes* [1885] 53 L. T., 592 (covenant not to take proceedings to restrain use of land for fever hospital); *Kettle R. R. v. Eastern Ry.* [1889] 44 Minn., 461, 2 Scott, 489.

¹ *John Bros. A. B. Co., v. Holmes* [1900] 1 Ch., 188; *Holloway Bros. v. Hill* [1902] 2 Ch., 612.

² *London & S. W. Ry., Co. v. Gomm* [1882] 20 Ch. D., 562.

³ [1900] 2 Ch., 388, 1 Ames, 168 (Col-

lins, L. J.)

⁴ [1903] 2 Ch. 539. In *Peck v. Conaway* [1871] 119 Mass., 546, 1 Ames, 162, a covenant not to build on parcel sold was treated as a reservation creating an easement, or servitude in the nature of an easement, upon the land conveyed. And in *Norcross v. James*, supra, a covenant by vendor of quarry not to quarry stone in his adjoining land was thus observed upon by the same court: "In what way does it extend to the support of the plaintiff's (vendee's) quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products."

creating a permanent right in the person entitled to it over the land to which it relates."¹

Burden and
benefit in
equity.

Lord Cottenham's decision in *Tulk v. Moxhay*, however, proceeded upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced created easements or were of a nature to run with the land, and, it is conceived, a court of equity may in a proper case impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title.² It has, accordingly, been held by the New York Court of Appeals that a covenant by a purchaser not to sell sand taken from the land conveyed, entered into for the protection of the covenantee in the enjoyment of his business, may be enforced against an assignee with notice.³ Danforth, J., said, "The principle which favours freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family, or if, as in the case before us, the instruments or means are susceptible of several uses one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it." And the court laid down the broad proposition—"where the agreement is a just and honest one, its judgment should not be in favour of the wrong-doer."⁴

¹ *Re Nisbet & Pott's Contract* [1906] 1 Ch., 386. Cf. *Trustees Columbia College v. Lynch* [1877] 70 N. Y., 440, Finch, *Cas. Prop.*, 1193.

² *Brewer v. Marshall* [1868] 19 N. J. Eq.; 537, 2 Keener, 561-2. *De Gray v. Monmouth B. C. H. Co.* [1892] 50 N. J. Eq., 329, 332, 2 Scott, 534. See art. by Ames, 17 Harv., L. R., 181.

³ Cf. *Francisco v. Smith* [1894] 143 N. Y., 488, 1 Ames, 186, where Earl, J., said, "Such an agreement is a

valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it just as the assignor could have enforced it, if he had retained the business. The agreement can have no independent existence or vitality aside from the business."

⁴ *Hodge v. Sloan* [1887] 107 N. Y., 244, 1 Ames, 184.

Lewis
v.
Gollner.

Another instructive case before the same court may be here referred to. The plaintiff in this case resided in a wealthy and respectable quarter of Brooklyn city, and paid \$ 6,000 to one Gollner, a builder of flats and tenement-houses,¹ upon the condition that the latter "would not construct or erect any flats in plaintiff's immediate neighbourhood or trouble him any more." Gollner obtained title to a lot in the neighbourhood and commenced the erection of a seven-story flat thereon. Upon remonstrance by the plaintiff, he transferred his equity in this lot to his wife (who was fully acquainted with all the facts), and continued the construction nominally as her agent and architect. Upon the plaintiff bringing a suit to enforce the covenant, it was contended in vain for Gollner and wife that the covenant was a personal one and the plaintiff not being the vendor or original owner of the lot in question was not entitled to relief in respect of it. The covenant was held to be restrictive, not collateral to the land, but relating to its use. The moment Gollner bought or leased any land in the plaintiff's neighbourhood, "he came under an obligation," said Finch, J., "not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor, who imposed the restraint as a vendor. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated."² Here, however, we can see the idea that a restrictive covenant creates something like an easement over the lands.³ This is doubtful.

Principle.

As Professor Ames points out, the passing of the benefit and burden of restrictive covenants is not to be explained by any single analogy or principle. The burden, according to him, is imposed upon a subsequent possessor of the *res*, whether real

¹ These buildings "bring together a changing and floating population under one roof, having no ownership of their own, and caring little for anything beyond their personal com-

fort and immediate needs "

² *Lewis v. Gollner* [1891] 129 N. Y., 227, 1 Ames, 152.

³ Cf. *Beals v. Case*, 138 Mass., 140.

or personal, upon the same principle that the grantee of a guilty trustee, or the grantee of one already under contract to sell the *res* to another, is bound to convey the *res* to the *cestui que trust* or the prior buyer; the purchaser with notice, or the volunteer, is not allowed to profit unjustly at the expense of the *cestui que trust* or promisee. The right of third persons to the benefits of restrictive agreements is, on the other hand, the result of the equally just and simple principle, that equity will compel the promisor to perform his agreement according to its tenor. The assignee's situation is analogous to that of the buyer of land from one to whom it has been previously sold with warranty.¹

Building
schemes.

The question of the burden or benefit of a restrictive covenant passing beyond the persons of the actual contracting parties and becoming attached, as it were, to the land in respect of which it was entered into, arises mostly in connection with the demise thereof as part of a general scheme for building upon or for the benefit and improvement of all the lands included in a larger tract. The estate as a whole may in such a case be deemed to be "bound by one general law."² "Any one who has acquired land," said Hall, V.C., "being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established."³ So, whether the restrictive covenants be entered into by a vendor as to the use of other land retained or simultaneously sold, for the benefit of the land sold by him, or by a purchaser as to the use of the land

¹ 17 Harv. L. R., 182-4 (article).

² Per Lord Macnaghten, *Spicer v. Martin* [1888] 14 A.C., 12, 20, 2 Keener, 542.

³ *Renals v. Cowlshaw* [1876] 9 Ch. D., 125, 1 Ames, 161. Cf. *Keates v.*

Lyon [1869] 4 Ch., 218, 2 Keener, 493; *Master v. Hansard* [1876] 4 Ch. D., 718; *Mackenzie v. Childers* [1889] 43 Ch. D., 265; *Knight v. Simmonds* [1896] 2 Ch., 294.

purchased by him, for the benefit of other land retained or simultaneously sold by the vendor, equity purports to determine the intent of the parties and to give effect to the same. It is a question of intention, said Wills, J., "whether the restrictions are merely matters of agreement between the vendor and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."¹ And the fact that the lots were not all sold together will not apparently matter. "Lapse of time is not of itself a bar to the liability of the purchasers *inter se*: it is a matter to be taken into consideration."²

Negative
covenants.

Lord Cairns ruled that if parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done. It is not in such a case a question of the balance of convenience or inconvenience or of the amount of damage, or of injury; but of the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves.³ It may be that through the acts or license of the plaintiff, or

¹ *Nottingham Brick & Tile Co. v. Butler* [1885] 15 Q.B.D., 261, 268. Cf. *Osborne v. Bradley*, supra; *Mann v. Stephens* [1846] 15 Sim., 377; *Coles v. Sims* [1854] 5 DeG. M. & G., 1; *Whatman v. Gibson* [1838] 9 Sim., 196; *Rowell v. Satchell* [1908] 2 Ch., 212; *Whitney v. Union Ry.* [1855] 11 Gray, 359, 2 Keener, 547; *Parker v. Nightingale* [1863] 6 Allen, 341, 2 Keener, 475; *Barrow v. Richard* [1840] 8 Paige 351, 1 Ames, 173; *King v. Dickeson* [1889] 40 Ch.D., 596, 1 Ames, 178; *Cooverji v. Bhimji* [1882] 6 Bom., 528, 533. Covenants are not mutually enforceable by purchasers

inter se if the estate, the lots, and the persons to be bound are not defined, *Osborne v. Bradley* [1903] 2 Ch., 446. The law is well summarised in *Elliston v. Reacher* [1908] 2 Ch. 374, *affd.*, 665.

² *Per Esher, M. R., Nottingham Brick Co. v. Butler* [1886] 16 Q. B. D., 778, 1 Ames, 172. *Master v. Hansard* [1876] 4 Ch. D., 718; *Ashby v. Wilson* [1900] 1 Ch., 66 (successive leases).

³ *Doherty v. Allman* [1878] 3 A. C., 709, 720. *Collins v. Castle* [1887] 36 Ch. D., 243, 254. See also *Cooke v. Gilbert* [1892] 8 T. L. R., 382; *Farmby v. Barker*, supra, 554.

those under whom he claims, the circumstances may be so altered that his enforcing the covenant may become unreasonable and inequitable, but the contractual obligation will not disappear.¹ Nor can a passive acquiescence in one breach of covenant be considered to be a waiver for all future time of the right to complain of any other breach.² The true test seems to be whether the general condition, in view of which the covenant was made, has so changed that enforcement will simply annoy the defendant without really benefiting the plaintiff.³ And the validity of these negative covenants cannot apparently be affected by the rule against perpetuities, which applies only to limitations of property and not of user.⁴

All the above cases, I apprehend, are within the purview of section 40, Transfer of Property Act, which provides that the burden of an obligation imposing a restriction on the use of land or of an obligation annexed by contract to such ownership, but not amounting to an interest or easement, may be enforced against a transferee with notice or a gratuitous transferee,⁵ but not against one for value without notice.⁶ Notice, it appears does not create the right, but absence of it gives rise to a countervailing equity.⁷ T.P.A., s. 40.

The doctrine of equity has not been extended in England to covenants that are not restrictive but affirmative, and compel the covenantor to do some positive act, *e.g.*, building or repairing. "Only such a covenant," said Lindley, L. J., "as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice."⁸ The American courts

Affirmative covenants.

¹ *Sayers v. Collier* [1884] 28 Ch. D., 103, 110; *Knight v. Simmonds* [1896] 2 Ch., 294; *Hooper v. Bromet* [1904] 90 L. T., 234.

² *Western v. Macdermott* [1866] 2 Ch., 72.

³ 17 Harv. L. R., 138. Cf. *Millburn v. Lyons* [1914] 1 Ch., 34.

⁴ *London & S. W. Ry. Co. v. Gomm*, supra; *Mackenzie v. Childers*, supra; 2 Dart, V. & P., 771, 783. Cf. *Tobey v. Moore* [1881] 130 Mass., 448, 2 Keener, 516.

⁵ In *Mander v. Falcke* [1891] 2 Ch., 534, 2 Keener, 609, an injunction was issued against a simple occupier.

⁶ This section has been applied to a

covenant of pre-emption, *Ramaswami v. Chinnan* [1901] 11 M. L. J. R., 132, 135. As to notice, see *Mulji v. MacLeod* [19 3] 5 Bom. L.R., 931, 995; *Hira Singh v. Narain*, 10 C. P. L. R., 110, 112; 2 Pomeroy, *Eq. J.*, s. 689.

⁷ *London etc. Co. v. Gomm*, supra, 583; 2 Dart, V. & P., 769 Cf. *Carter v. Williams*, [1870] 9 Eq., 678, 2 Keener, 565.

⁸ *Haywood v. Brunswick P. B. Building Society* [1881] 8 Q. B. D., 403, 410, 1 Ames, 176; Sugden, V. & P., 590; *Austerberry v. Corp. of Oldham* [1885] 29 Ch. D., 750; *Olegg v. Hands* [1890] 44 Ch. D., 503, 519, 2 Keener, 597 (covenant affirmative in form,

seem to have taken a different view,¹ and the language of section 40 of Indian Transfer Act, it is conceived, is large enough to justify a similar doctrine in this country.

Contracts
regarding
goods.

In general, contracts do not by the law of England run with goods.² A restrictive agreement as to the use of chattels, therefore, cannot be enforced against a sub-purchaser, even though he has notice.³ A contrary view, however, has found favour with some American courts,⁴ and a covenant, *e.g.*, restricting the use of its copyrights and electrotype plates by a company of publishers has been enforced against their assigns.⁵ It is not easy to see any distinction in principle. In all these cases, if no relief is given, the original promisee is unjustly impoverished, while the purchaser who takes with notice or without giving value is correspondingly enriched.⁶

Adjective
law.

I have so far endeavoured to define the jurisdiction of a court of equity in the matter of the specific performance of contracts, and have also examined the grounds peculiar to the nature of the contract in-suit or to the conduct of the parties upon which such relief may be refused. I have also tried to show you that even where contracts are executed, specific relief may be granted in respect thereof. I will now consider an action for specific performance from the standpoint of a practical lawyer who is called upon to institute it. Let us take it for granted that the contract is *prima facie* such that an action will lie. This lawyer then will have to consider, first, where to institute the suit, secondly, on whose behalf to institute it and as against whom, and, thirdly, what to say and what to ask for in his plaint.

Forum.

The first question is about the *forum*. A suit should be

negative in substance); *Re Nisbet & Potts* [1905] 1 Ch., 397.

¹ *Whittenton Mfg. Co. v. Staples*, 164 Mass., 319 (covenant by grantee of mill site with all streams, dams, water power, privileges, etc., to pay grantor and assigns 1/5th of flowage damages caused by reservoir); *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa., 284 (covenant to give traffic to railway); 3 Pomeroy, *Eq. J.*, s. 1295, pp. 2597-8. But see 17 Harv. L. R., 176 (Ames).

² Blackburn, *Sale*, 276.

³ *De Mattos v. Gibson* [1859] 4 DeG. & J., 276, 295; *Taddy v. Sterions*

[1904] 1 Ch., 306; *McGruther v. Titcher* [1904] 2 Ch., 306; *Bobbs Merrill Co. v. Snellenburgh*, 131 Fed. R., 530; *Garst v. Hall & Lyon*, 179 Mass., 588.

⁴ *N. Y. Bank Note Co. v. Hamilton Bank Note Co.* [1895] 83 Hun., 593, 2 Keener, 618; *Littlefield v. Perry*, 88 U. S., 205. Cf. *Badische A. S. Fabrik v. Isler* [1906] 1 Ch., 605, 611 (patented article); *Messageries Imperiales v. Baines*, [1863] 11 W. R. (Eng.), 322.

⁵ *Murphy v. Christian P. A. Publishing Co.* [1899] 38 N. Y. Ap. Div., 426, 1 Ames, 157. But see *Garst v. Hall*, 179 Mass., 588.

⁶ 17 Harv. L. Rev., 416.

ordinarily instituted where the cause of action arose.¹ The "cause of action," it may be explained, is an expression which generally includes both a right and its infringement.² Every fact which it would be necessary for the plaintiff to prove, if traversed by the defendant, in order to support his right to the judgment of the court, has been said to constitute the plaintiff's cause of action.³ The third explanation to section 17, Civil Procedure Code, 1882, enumerates the places where the cause of action may arise by reason of the breach of a contract: "In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:--

C. P. C., s. 17.

(i) the place where the contract was made;

(ii) the place where the contract was to be performed or performance thereof completed;

(iii) the place where in the performance of the contract any money to which the suit relates was expressly or impliedly, payable."⁴

Where, however, the relief asked for is a personal one, as in most cases of equitable jurisdiction, there is nothing to prevent the suit being filed in the court, within the territorial jurisdiction of which the defendant ordinarily resides.⁵ Where there are several defendants and they have different places of ordinary residence, the suit may, if they do not object or if the court permits, be instituted in a court which has jurisdiction over at least one of these places.⁶

A suit for specific relief cannot be instituted in a court of small causes.⁷ It must be instituted in one of the ordinary civil courts, the valuation of the suit generally determining which, where there are several of different grades in the same station.⁸ In British India, there are two classes of subordinate

Civil Courts.

¹ C. P. C., (Act V of 1908,) s. 20 (c).

² *Huramoni v. Hari Churn* [1895] 22 Cal., 883, 889.

³ *Read v. Brown* [1888] 22 Q. B. D., 128; *Murti v. Bhola Ram* [1893] 16 All., 165, F. B.; *Ramaswami v. Vythinatha* [1901] 26 Mad., 760.

⁴ *Llewellyn v. Chunni Lal* [1882] 4 All., 423; *Bishunath v. Ilahi Baksh* [1883] 5 All., 277; *Kalidhun v. Shibunath* [1882] 8 Cal., 433; *Banke Behari v. Pokhe Ram* [1902] 25 All., 48.

⁵ C. P. C., s. 17 (b); cf. s. 16, prov.; Act V of 1908, s. 20 (a).

⁶ C. P. C., s. 17 (c). Act V of 1908, s. 20 (b).

⁷ Prov. S. C. Ct. Act (IX of 1887), sch. ii, art. 15, 16, 17; *Naragiri v. Suthapalli*, [1908] 19 M. L. J. R., 220; *Nga Hla v. Nsa Aung*, [1908] U. B. R., 3rd. Qr., 3.

⁸ C. P. C., s. 15: "Every suit shall be instituted in the court of the lowest grade competent to try it."

civil courts in most districts. They are presided over respectively by Subordinate Judges and Munsiffs or, as they are called in Bombay, Subordinate Judges of first class and of second class. The former have jurisdiction to entertain all original suits and proceedings of a civil nature, the latter have generally a pecuniary limit fixed to their jurisdiction.¹ The higher courts clearly have jurisdiction, however low or high the valuation of a suit, and no provision of the Code of Civil Procedure can detract from it.² Consequently, if a suit which according to section 15 of that Code³ should have been filed in the court of a Munsiff has been instituted in the court of a Subordinate Judge, the latter may either return the plaint for presentation to the former court,³ or dispose of the cause himself.⁴ And though the pecuniary limit of the jurisdiction of a court may be defined, that will not prevent it from making a decree for a larger amount, provided the claim as laid is within its jurisdiction.⁵ A plea regarding absence of

Jurisdiction. jurisdiction cannot be waived and may be taken for the first time in appeal;⁶ but an objection to an irregularity in procedure may be abandoned or not pressed.⁷ The distinction was thus stated by the Judicial Committee in the leading case of *Ledgard v. Bull*⁸: "When a judge has no inherent jurisdiction over the subject-matter of suit, the parties cannot by their mutual consent, convert it into a judicial process, although they may constitute the judge their arbiter and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without any objection join issue and go to trial upon the merits, the

¹ In Bengal and Upper India, it is usually Rs. 1,000, Act XII of 1887, s. 19; in Bombay, it is Rs. 5,000, Act XIV of 1869, s. 24; in Madras, Rs. 2,500, Act III of 1873, s. 12.

² *Matra Mondal v. Hari Mohan* [1899] 17 Cal., 155; *Ram v. Miria* [1897] 25 Cal., 46, 48; *Krishnasami v. Kanakasabai* [1890] 14 Mad., 183.

³ Now Act V of 1908.

⁴ Act V of 1908, Sch. I, Or. 7, r. 10.

⁵ *Nidhi Lal v. Mazhar Hussain*, [1884] 7 All., 280, F.B.

⁶ *Madho Das v. Ramji* [1894] 16

All. 286. Distinguish *Golap Singh v. Indra Kumar*, [1909] 9 C. L. J., 367.

⁷ *Bishemmun v. Land Mortgage Bank* [1884] 11 Cal., 244, 248, P. C.; *Minakshi v. Subramaniya* [1887] 11 Mad., 26, P. C. But see Act V of 1908, s. 21 (territorial jurisdiction); Act XII of 1887, s. 12 (pecuniary jurisdiction).

⁸ *Ledgard v. Bull* [1886] 9 All., 191, P. C.

⁹ *Ibid*, 203. Cf. *Lalmoney v. Juddoonauth* [1866] 1 Ind. Jur. N. S., 319.

defendant cannot subsequently dispute the jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

Next, as to the array of parties.

Parties.

Section 26, Civil Procedure Code, 1882, lays down that all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action.¹ The proper person to bring an action is the person whose right has been violated,² and an old English case formulates the rule that the remedy in equity shall be either between the parties who stipulated what is to be done, or those who stand in their place.³ We shall probably be safe in saying now that those who entered into the contract, or who stand in their place, or are interested in the subject-matter, are, as a rule, the only proper parties to the suit.⁴ Section 23, Specific Relief Act, mentions categorically the persons by whom the specific performance of a contract may be obtained. We have, first, any party to the contract, and, next, the representative in interest, or the principal of any party thereto.⁵ The parties to a contract are primarily bound to perform their respective promises.⁶ This obligation may be discharged either by death or sometimes by delegation (with the consent of the promisee). In the case of death before performance, promises will bind the representatives of the promisor, unless a contrary intention appears from the contract.⁷ This means that where personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of services, after the death the contract is dissolved, unless there be a stipulation, express or implied, to the contrary.⁸ The learning, skill, taste, solvency,

C. P. C., s. 26.

S. R. A., s. 23.

Legal representative.

Personal considerations.

¹ *Lingammal v. Chinna Venkutammal* [1882] 6 Mad., 239, 243; *Fakirapa v. Rudrapa* [1891] 16 Bom., 119; *Haramoni v. Hari Churn* [1895] 22 Cal., 833. Cf. Act V of 1908, Sch. I, Or. I, r. 1.

² *Per Willes, J., Gray v. Pearson* [1870] 5 C. P., 568.

³ *Burgess v. Wheate*, [1759] 1 W. Bl. 129. Cf. *Tasker v. Small* [1837] 3 My.

& Cr., 63.

⁴ *Waterman*, 74. Cf. *Fry*, s. 192, p. 77. *Ahmedbhai v. D. M. Petit* [1911] 13 Bom. L. R., 1061.

⁵ S. R. A., s. 23 (a), (b).

⁶ I. C. A., s. 37.

⁷ *Ibid.*

⁸ *Farrow v. Wilson* [1869] 4 C. P., 744, 746.

or any personal quality of a party,¹ or the confidenee that the promisee reposes in him,² may be a material ingredient in the contract. *E.g.*, where a painter undertook to paint a picture,³ or an author to write a book,⁴ or an architect to build a lighthouse,⁵ or a master to teach an apprentice,⁶ since the contract could not be performed in precisely the same way by any heir, executor, administrator or assign, it would be determined by the death of the original promisor before performance. So the parties to a contract may expressly stipulate that the interest thereof shall not be assigned, but that the promise contained in it shall be performed by the promisor himself.⁷ Here the contract cannot be discharged except by personal performance, unless the benefit of the clause is waived.⁸ Where, however, these special circumstances do not exist, the maxim *actio personalis moritur cum persona* has no application to contractual obligations.⁹ So also, when considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which could not be assigned without the promisor's consent, so as to entitle the assignee to sue him on it.¹⁰ In a contract of sale, *e.g.*, where payment of a portion of the purchase-money is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement to the contract, and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person for the obligation of the one with whom the contract was made.¹¹ The law as to assignment of contracts¹² has been recently stated

Assignee of contract.

¹ S. R. A., s. 23 (b), prov. *Mohendra v. Kali* [1902] 30 Cal., 265.

² Cf. *Robson v. Drummond* [1831] 2 B. & Ad., 303, 36 R. R. 569.

³ I.C.A., s. 37, ill. (b); s. 40, ill. (b).

⁴ *Marshall v. Broadhurst*, [1830] 1 Tyrw., 349; *Griffith v. Tower Publishing Co.* [1897] 1 Ch., 21.

⁵ *Wentworth v. Cock* [1839] 10 A. & E., 45.

⁶ *Baxter v. Burfield* [1747] 2 Str., 1266.

⁷ S.R.A., s. 23 (b) prov. Cf. I.C.A., s. 40.

⁸ Cf. *Dowell v. Dew* [1842] 1 Y. & C. Ch., 345 (lessee's assign recognised as tenant by lessor.)

⁹ *Broom, Legal Maxims*, 681; U.G. Mitter, *Leg. Max.*, 15. *Hill v. Bedaput* [1897] 1 C. W. N. lxxi (master and servant.)

¹⁰ *Toomey v. Rama Sahi* [1890] 17 Cal., 115, 121; *Navasinaya v. Kadir Annal* [1894] 17 Mad., 168.

¹¹ *Rice v. Gibbs* [1894] 40 Neb., 264, 2 Keener, 1172.

¹² For agreement to assign lease

in these terms by Collins, M. R. : "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else ; this can only be brought about by the consent of all three, and involves the release of the original debtor....On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice.... There is, however, another class of contracts, where there are mutual obligations still to be enforced, and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person....To suits on these contracts, therefore, the original contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract."¹ Even in what may be called a personal contract, therefore, where the part of the promisor has already been performed, there is no reason why his representative should not enforce the benefit of the contract.²

Generally speaking, then, the plaintiff may be either a party to the contract or his assignee,³ or, if he really contracted as an

Plaintiff.

not assignable without license, see *Weatherall v. Geering* [1806] 12 Ves., 504, 511; for agreement to purchase entered into for the purpose of acquiring the right to complain of a fraud, see *De Hoghton v. Money* [1886] 2 Ch., 164, 169.

¹ *Tolhurst v. Associated Cement Manufacturers* [1902] 2 K. B., 660, 668-9. The learned judge added, "This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps loosely, not to be assignable."

² Mr. Nelson's note, "if in one of

these events [i.e., those mentioned in proviso, S.R.A., s. 23 (b)], the representatives or undisclosed principals have already performed their part of the contract, they can maintain the suit," S.R.A., 203, is not supported by any authority, and is apparently based on a misapprehension of the language of the proviso.

³ Specific performance of (a) an agreement to lease has accordingly been decreed in favour of the lessee's assignee, *Crosbie v. Tooke* [1833] 1 My. & K., 431, 1 Ames, 135; and of (b) an agreement to sell in favour of the

agent, his principal,¹ or, if he is dead, his legal representative. As to this last,² I may mention in passing that in India we are not troubled by the complicated rules of property law in England which make realty and personalty devolve in different ways, and the successor in interest of a decedent here is generally either his personal heir, or, if he has left a duly executed will, his devisee.³

Agent.

An agent, as a general rule, cannot personally enforce contracts entered into by him on behalf of his principal, unless where (1) the contract is for the sale or purchase of goods for a merchant resident abroad, or (2) the principal is undisclosed, or, (3) though disclosed, he cannot be sued.⁴ But where the principal requires the performance of a contract entered into by his agent with a party who neither knew nor suspected he was an agent, this party will have against the principal the same rights as he would have had as against the agent if the latter had been the principal.⁵ Where credit has been given personally to an agent, who has not contracted as such, the principal may not get specific performance. And where a self-styled agent has contracted as such, he is not entitled to require the performance of the contract if he was in reality acting, not as an agent, but on his own account.⁶ He cannot recover compensation for the breach of such a contract, *a fortiori* he cannot sue for specific performance.⁷

vendee's assignee, *Lowes v. Bennett* [1875] 7 Ves., 436 (cited); *House v. Jackson* [1893] 24 Oregon, 89, 1 Ames, 137; *Comstock v. Hitt* [1865] 37 Ill., 542 1 Ames, 139. So an assignee of a business has been allowed to enforce by injunction a promise to his assignor not to carry on a competing business, *Benwell v. Limes* [1857] 24 Beav., 307; *Diamond Match Co. v. Roeber* [1887] 106 N. Y., 473; *Francisco v. Smith*, supra, 1 Ames, 186.

¹ Cf. *Hook v. Kimear*, 3 Sw., 417 n. 36 E. R., 931.

² Cf. I.C.A., s. 37, ill. (a); s. 40, ill. (a).

³ As to the position of an executor in the case of the will of a Hindu, see *Lallubhai v. Mankuverbhai* [1876] 2 Bom., 388; *Kherodumoney v. Doorgamoney* [1878] 4 Cal., 468; *Admr.-Genl. v. Premlal* [1895] 22 Cal., 796, P. C.; *Jagmohandas v. Palloujee* [1896] 22 Bom., 1; *Sarat v. Bhupendra* [1897] 25 Cal., 103; and in that of a Mahomedan, see *Kurrutulain v. Nuzbatud-dowla* [1905] 33 Cal., 116, P. C. Act V

of 1881, ss. 4, 90.

⁴ I. C. A., s. 230. *Higgins v. Senior* [1841] 8 M. & W., 834, 58 R. R., 884. But if an agent, contracting as such, has an interest in the contract, he may sue in his own name. *Subrahmanya v. Narayanan* [1900] 24 Mad., 130.

⁵ I. C. A., ss. 231, 232. *Marriott, J.*, attempted to explain the difference between these two sections in *Premji v. Mudhooji* [1880] 4 Bom., 447, 456, but without much success.

⁶ I. C. A., s. 236. Cf. *Bickerton v. Burrell* [1816] 5 M. & S., 383. Where the principal is not named, the English law is probably different, *Schmaltz v. Avery* [1851] 16 Q. B., 655; *Bowstead, Agency*, art., 128.

⁷ S. R. A., s. 24 (a). The decision in *Fellows v. Lord Gwydyr* [1826-9] 1 Sim., 63, 1 R. & M., 83, 2 Keener, 889, which has been criticised in England (*Pollock, Con.*, W. W., 118) and America (1 Ames, 354 n.), is not law in India.

An execution-creditor of a party to a contract who seeks to reach his debtor's interest and enforce the contract specifically, cannot so enforce the contract where his debtor cannot do so.¹

As a right to sue may arise out of a transfer by succession or otherwise of the contract itself, so it may sometimes arise where there is a title by succession to an object affected by the contract.² Clauses (e) and (f) of section 23, Specific Relief Act, refer to such a case. The language of these clauses is not happy, for neither the expression "reversioner in possession" nor the expression "reversioner in remainder" is technically accurate.³ Reversioner. But the meaning is not difficult to gather. The case contemplated is that of a successor to an estate who originally has only a title in expectancy to it. Now, a covenant may have been entered into in respect of this estate with his predecessor-in-title, which covenant may be said to bind the estate in equity, if not in law, and to the benefit of which covenant the expectant heir claims to be entitled. This successor or heir may be either a reversioner or a remainderman or even an assignee.⁴ In one case, the succession has already opened out and he has entered into possession of the estate; in the other case, he has not yet come into possession, but there is a covenant running with the land which is being transferred to his material injury. We have already seen how the benefit of such a covenant, especially if of a restrictive character, may be claimed by the person in possession of, or entitled to, the estate concerned for the time being. If, however, the plaintiff has not a present interest,—there may be an intervening life-estate, e.g., which has not yet determined,—the proper person to sue for an enforcement of the covenant is the owner in possession. But where the breach of the covenant amounts to waste or is calculated to cause material injury either to the property

¹ 3 Page, *Con.*, 2480; *Costello v. Friedman*, 71 *Pac.*, 935 (conditions precedent not performed by debtor).

² Collett, 5th. ed. 210.

³ 'Reversion' is properly "the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." 2 Blackstone, *Com.*, 175. 3 Stroud, *Judl.*

Dict., 1753. "A 'remainder' is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it," 4 Kent, *Com.*, 197; Coke, *Litt.*, 41a.

⁴ Collett, 5th. ed., 217; Nelson, *S. R. A.*, 206.

itself or to the title of the party suing as reversioner, even the latter may invoke the aid of a court of equity.¹ "In a case resting simply upon covenant," said Wood, V. C., "if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property *modo et forma*, according to his covenant; but if he be entitled in remainder only, I think he must show that he has sustained some material damage by reason of the breach to entitle him to relief of this nature." Where, therefore, there was no case of anything like waste, but only a possibility of the respectability of the neighbourhood being in some measure affected, by reason of premises, which the tenant had covenanted to use solely as a private dwelling-house, being used as a school for the education of girls, his Honour declined to interfere at the instance of a remainderman.²

Amalgamated company.

A special case of assignment is where a public company becomes amalgamated with another public company. A contract entered into by the former company may be sued upon by the new company which has arisen out of the amalgamation.³

Promoter and public company.

And we have already seen that the promoters of a public company, before its incorporation, may enter into contracts for the purposes of the company, which if not *ultra vires*, the company may adopt after it has been formed.⁴ A promoter, it must be remembered, is not an agent of a company which is not yet in existence.⁵ Consequently, an offer to take shares in the proposed company made to a promoter, if accepted by him, does not give rise to a contract which the company, when subsequently formed, may enforce, unless, after such formation, the offer is renewed to the company and accepted by it.⁶ But a contract for the working purposes of the contemplated company, which is warranted by the terms of its incorporation,

¹ Cf. *Garth v. Cotton* [1753] Dick, 183.

² *Johnstone v. Hall* [1856] 2 K. & J., 414, 1 Ames, 187.

³ S. R. A., s. 23 (g). Cf. *Stanley v. Ohester & Berkenhead Ry. Co.* [1888] 9 Sim., 264; *Earl of Lindsey v. G. N. Ry. Co.* [1853] 10 Hare, 664.

⁴ *Ante*, 207 *Earl of Shrewsbury v. North Staffordshire Ry. Co.* [1866] 1 Eq., 593.

⁵ *Lydney & Wigpool Iron Co. v. Bird* [1886] 33 Ch. D., 91.

⁶ *Imperial Ice Co. v. Munchershaw Wadia* [1889] 13 Bom., 415.

may be recognised by the company, after it has been established.¹ It then may be said in a sense to succeed to the benefit of the contract made on its behalf by the promoters, and it may sue to enforce such contract.²

Another case of succession to the benefit of a contract is where, for the better management and enjoyment of the estate, a tenant for life is empowered to enter into contracts regarding the same, *e.g.*, to grant a lease which may extend beyond his own life-time, and the remainderman, after determination of the life-estate, succeeds to the title or enters into possession. If, say, the lease was made in the due exercise of a power vested in the intermediate holder, the remainderman is within the scope of the benefit of such power,³ and he may sue to enforce the covenants in the lease, though, strictly speaking, he is neither the assignee nor the successor in title of the lessor.⁴

Remainderman and life-tenant.

So, again, where a person takes a benefit under a contract, though he is not a party to it, he may in exceptional cases maintain a suit for its specific performance. In England, the rule seems to be well established that no stranger to a contract can sue upon it, however great may be his beneficial interest thereunder.⁵ In America, a contrary doctrine has found favour in many jurisdictions,⁶ and upon principle there seems to be good ground for affirming the right to sue in favour of a third person, who is the sole beneficiary under a contract.⁷ In India, the right to sue for specific performance of a contract has been recognised by statute in favour of any persons beneficially

Stranger benefited by contract.

¹ Fry, s. 259. Cf. *Eastern Counties Ry. Co. v. Hawkes* [1855] 5 H. L. C., 301, 356; *Caledonian & D. J. Ry. Co. v. Magistrates of Helensburgh* [1856] 2 MacQ., 391.

² S. R. A., s. 23 (h). Cf. *Bedford & Cambridge Ry. Co. v. Stanley* [1862] 2 J. & H., 746.

³ Collett, 5th ed. 217. Cf. S. R. A., s. 23(d).

⁴ *Rogers v. Humphrey* [1835] 4 A. & E., 299; *Shannon v. Bradstreet* [1803] 1 Sch. & Lef. 52, 64, 9 R. R., 11.

⁵ Pollock, *Con.* (W. W.), 233; Fry, s. 197; *Moss v. Bainbridge* [1854] 18 Beav., 478; *Tweddle v. Atkinson* [1861] 1 Best. & Sm., 393; *Colyear v. Mulgrave* [1836] 2 Keen, 81, 98. Where, however, a

contract is enforced on the application of other parties, it will be enforced altogether and throughout, 3 Parsons, *Con.*, 328; *Davenport v. Bishopp* [1843] 2 Y. & C. Ch., 451, 461.

⁶ Pollock, *Con.* (W. W.), 237 sqq.; *Harriman, Con.*, 212, 26.

⁷ Pollock, *Con.* (W. W.), 242. Cf. *per Cotton, L. J.*, "If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract." *Gandy v. Gandy* [1885] 30 Ch. D., 57, 66; *Weiss v. Meyer* [1886] 1 S. W., 679, 680.

Family settlement of doubtful rights.

entitled thereunder, where the contract is (i) a settlement on marriage or (ii) a compromise of doubtful rights between members of the same family.¹ In respect of marriage settlements, it has been much debated in England as to who may be regarded within the matrimonial consideration,² and how far the benefits stipulated for them in such settlements may be enforced in a court of law by collaterals and volunteers.³ In India, we may take it that all persons for whose benefit provision is made in a settlement on marriage may enforce the same by suit, quite irrespective of the question whether they are the issue of the marriage or their parents, or are otherwise within the consideration.⁴ The nature of a family settlement of doubtful rights, I have already to some extent discussed.⁵ It is looked upon with much favour by a court of equity,⁶ and even in England it has been said, "an agreement entered into to secure the peace of a family, though resting on contract, will be supported and enforced at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed any portion of the consideration; the doctrine as to volunteers is not applied to such cases."⁷ And Turner, L. J., repelled the contention that the cases extended no further than to arrangements for the settlement of doubtful or disputed rights. "This, I think," said his Lordship, "is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of

¹ S. R. A., s. 23 (c). *Protap v. Sarat* [1900] 5 C. W. N., 386; *Avadh Sar'u v. Sita Ram* [1904] 1 A. L. J. R., 329.

² Cf. *Mackie v. Herbertson* [1884] 9 A. C., 303; *Price v. Jenkins* [1877] 4 Ch. D., 492, 5 Ch. D., 619; *Green v. Paterson* [1886] 32 Ch. D., 95; *In re Cameron & Wells* [1887] 37 Ch. D., 32.

³ Cf. 2. Story, *Eq.*, s. 986.

⁴ Cf. Fry, s. 202; *Re D'Angibau* [1880] 15 Ch. D., 228, 242; *Davenport v. Bishop* [1843] 2 Y. & C., Ch. 451,

460.

⁵ *Ante*, 100.

⁶ Cf. *Hoblyn v. Hoblyn*, [1889] 41 Ch. D., 200 (resettlement of family estates between father and son supported, though son had no independent advice); *Stewart v. Stewart* [1839] 6 Cl. & F., 911 (knowledge of agent held sufficient to bind principal, a widowed lady).

⁷ 2 Spence, *Eq.*, 288.

its property.”¹ The court does not inquire into the *quantum* of consideration, nor relieve against a mistake as to the subject-matter of the compromise. For there can be no doubt, without mistake or ignorance, and if there is no doubt, there is nothing to compromise. The claim which is compromised may not in reality be a doubtful one,² but there must be a *bona fide* claim made, a claim which is honestly believed in, and if honestly and with full knowledge of all the material facts, the disputing parties agree to settle this claim, the agreement shall bind, though the ultimate result of this agreement is to secure greater advantage to the one party than the other.³ But fraud will vacate this agreement, as any other, and omission to make a full disclosure of all material circumstances, including legal opinions obtained,⁴ on the part of either party, will apparently amount to fraud.⁵ And, where there is a mistake as to a matter which furnishes the motive to either party to compromise, and the agreement thus proceeds upon a supposition of right without a doubt upon it, the settlement will not be maintained.⁶ Thus, where the parties proceed upon the footing that the claim made by one of them is indisputable and determine the amount payable for settlement of this supposed valid claim, which afterwards is found to have been baseless, the agreement will be rescinded; for what is compromised is not the liability, but something collateral to it, the liability is all along assumed, and the arrangement is limited to matters flowing out of what is taken to be undoubted.⁷ There must

¹ *Williams v. Williams* [1867] 2 Ch., 294, 304, (arrangement, evidenced by conduct, between a widow and two sons, whereby business and estate of decedent was treated as common property, equally belonging to the sons, with the concurrence of the widow, who did not claim dower or $\frac{1}{3}$, upheld and enforced); *Krishnendra v. Devendra* [1908] 12 C. W. N., 793.

² *Ex parte Banner* [1881] 17 Ch. D., 480; *Miles v. New Zealand etc. Co.* [1886] 32 Ch. D., 266.

³ *Gibbons v. Count* [1799] 4 Ves., 840, 849; *Ram Nirunjun v. Prayag* [1881] 8 Cal., 138; *Rameshwar v. Lachmi* [1903] 31 Cal., 111; *Birbhadra v. Kalpataru* [1905] 1 C. L. J., 388. *Lin-*

gappa v. Sangara [1910] 12 Bom. L. R. 370.

⁴ *Harvey v. Cooke* [1827] 4 Russ., 34, 58.

⁵ *Gordon v. Gordon* [1819] 3 Sw., 400 (compromise between two brothers, upon doubt as to legitimacy of the elder, set aside after 19 years, on its being shown that at the time the younger brother had information, which he did not disclose, of a private ceremony of marriage between their parents which legitimised the elder brother).

⁶ *Stockley v. Stockley* [1812] 1 V. & B., 23, 31.

⁷ *Lawton v. Campion* [1854] 18 Beav., 87.

be a "compromise of doubtful rights," in the words of the statute.¹

Cestui que trust.

In view of the language employed in clause (c), section 23, however, it may be doubted if, upon a compromise between persons who are not members of the same family, a stranger to the agreement, though beneficially entitled thereunder, may sue in respect thereof. But it is apprehended that there is nothing to prevent a *cestui que trust* suing to enforce a contract entered into by his trustee with a third person.² And where, by reason of a contract between two parties, a third person, being the beneficiary thereunder, has so acted as to bring about a change in the condition of his life, he may be permitted to sue for enforcement of the contract.³ Such a case was presented in *Hill v. Gomme*,⁴ where a rich man had contracted with a poor man to bring up the latter's son as a gentleman and leave him some property, if he came to live with him, which he did, and there was part performance on the part of the contractor. Here the court considered the terms of the contract, the conduct of the promisor, and also the wrong which the boy would sustain, if the contract were carried out in part and not in whole, and allowed the claim of the adopted child. So in New Jersey, a little boy went to live with his uncle, under an agreement between the former's father and the uncle, that the latter should adopt the child as his own. The child lived with his uncle twenty-five years and had no share of his father's estate, by reason of the expectations founded on this agreement. The court held that the boy might maintain a suit to enforce a fulfilment of the agreement on the part of the uncle.⁵

¹ S. R. A., s. 23 (c).

² Cf. *Touche v. Metropolitan Ry. Warehousing Co.* [1871] 6 Ch., 671; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1901] 1 Ch., 196 affd. [1902] 1 Ch., 146; *Miller v. Whittier* [1850] 32 Me., 203. As to a benamidar's right of suit, see *Nandkishore v. Ahmad* [1895] 18 All., 69; *Yad Ram v. Umrao* [1899] 21 All., 380; contra, *Ravji v. Mahadev* [1897] 22 Bom., 672; *Mohendra v. Kali* [1902] 30 Cal., 265, s. n. *Mohendra v. Sannu*, 7 C. W. N.,

229; *Kuthaperumal v. Secy. of State* [1906] 30 Mad., 245; *Sheo Lal v. Goor Narain* [1910] 7 I. C., 218.

³ *Surendra v. Doorgasoondery* [1892] 19 Cal., 513, 536, P. C.

⁴ [1839] 1 Beav., 540, affd. 5 My. & Cr., 250. Cf. *Lyons v. Blenkin* [1821] Jac., 245; *Coles v. Pilkington* [1875] 19 Eq., 174.

⁵ *Van Dyne v. Vreeland*, 11 N. J. Eq., 370; *Anderson v. Anderson* [1907] 9 L. R. A. (N. S.), 229. *Waterman*, 78.

It must be here observed that a person cannot be the plaintiff in a suit for specific performance of a contract who could not or should not recover compensation for its breach.¹ For damages form the universal remedy in cases of a breach of contract, and it is only in special cases, as we have seen, that, with the object of doing more complete justice, the court decrees specific performance. And "there are very few cases," remarked Lord Hardwicke, "in which a court of equity can decree a performance of a covenant or agreement upon which there can be no action at law, according to the words of the articles, and the events which have happened."² Cases in which specific performance is decreed with compensation to the plaintiff, probably mark the most important exception;³ but even here the modern tendency seems to be to hold people to the actual bargains they have made.⁴

Party not entitled to damages.

Another personal ground which will disqualify the plaintiff is that he has become incapable of performing any essential term of the contract that on his part remains to be performed.⁵ This incapacity may be physical or mental, or even legal. Some contracts, *e.g.*, those for personal service, are conditional on the continuance of the ability, mental or corporeal, to perform them,⁶ and specific relief will be rendered unavailable by, say, supervening lunacy or illness. An incapacity in law may be due to bankruptcy.⁷ Conviction of felony,⁸ and destruction of title-deeds in the case of a vendor⁹ have been also held in England to create personal incapacity. But marriage creates no disability in India, and even an English woman here may do any act in respect of her property after marriage which she could have done before coverture.¹⁰

Incapacity, physical, mental, legal.

Lastly, a plaintiff, who has already chosen his remedy and

¹ S. R. A., s. 24 (a).

² *Whitmel v. Farrel* [1749] 1 Ves. Sr., 256.

³ Cf. Fry, p. 21. *Ante*, 173.

⁴ *Re Arnold* [1886] 14 Ch. D., 279, 284; 2 Dart, V. & P., 1070-1.

⁵ S. R. A., s. 24 (b).

⁶ *Per Bramwell, B., Hall v. Wright* [1858] El. B. & E., 746, 778.

⁷ S. R. A., s. 24, ill. 1. to cl. (b). Cf. Fry, s. 952; *Buckland v. Hall* [1803]

8 Ves., 92.

⁸ *Willingham v. Joyce* [1796] 3 Ves., 168, 8 R. R., 372 n.; Fry, s. 955.

⁹ *Bryant v. Busk* [1827] 4 Russ., 1; Fry, s. 956. But secondary evidence would apparently be admissible. Cf. Ind. Ev. Act, s. 65; *Moulton v. Edmonds* [1859] 1 DeG. F. & J., 246.

¹⁰ Ind. Suc. Act. s. 5; Act III of 1874; 1 Stokes, A.-I. Codes 931.

Party holding decree for damages.

Defendants :
S. R. A., s. 27.

Party.

Legal representative.

obtained satisfaction for the alleged breach of contract, cannot maintain a second action for its specific performance.¹ As we shall presently see, it is open to a party to ask for damages or specific relief in the alternative in the same action,² and a second suit will be barred by the rule of *res judicata*.³

The persons who may be impleaded as defendants to a suit for specific performance of a contract are mentioned in section 27, Specific Relief Act.⁴ First, either party to the contract may figure as the defendant.⁵ Next, any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.⁶ This person so claiming under a party to the contract may be either his heir and legal representative or a subsequent transferee. *E.g.*, there may be a contract for sale of certain immoveable property by a certain date. If the vendor dies without performance before the specified date, the vendee may by suit compel his heir to

¹ S. R. A., s. 24 (c). Fry, s. 118, p. 49.

² S. R. A., s. 19.

³ (C. P. C., Act V. of 1908), s. 11.

⁴ 'May' in this section does not mean 'must,' *Abdul Majid v. Boida Nath* [1902] 6 C. W. N., 314.

⁵ S.R.A., s. 27 (a). A suit against a minor under the guardianship of the person who made the contract for him, has been permitted where the purpose of the contract appeared to be necessary or beneficial, *Khairunnissa Bibi v. Loke Nath Pal* [1899] 27 Cal., 276 ; *Krishnasami v. Sundarappayyar* [1894] 18 Mad., 415 ; *Jamsetji v. Kashinath*, [1901] 26 Bom., 326. Otherwise, where this purpose was not shown, *Jugal Kishori v. Anunda Lal* [1895] 22 Cal., 545 ; *Chhiter v. Jagannath* [1906] 29 All., 213. The decision in *Mohori Bibee v. Dhurmodas Ghose* [1903] 30 Cal., 539, P. C., does not affect these cases, for the contract, where made by a guardian, may be treated as the act of the guardian. Cf. *Abdul Rahman v. Sukhdajal Singh* [1905] 2 A.L.J.R. 507. But in *Mir Sarwarjan v. Fakharuddin* [1911] 39 Cal., 232, P. C. overruled Calcutta H. C. (34 Cal., 163, F. B.), and it is now doubtful how far the views expressed in the above cases, so far as they uphold contracts made by guardians of

minors, can be supported. *Guard v. Bradley*, 7 Indiana, 60, is the converse case, where an infant was allowed to maintain a bill for specific performance, the party contracting in his behalf having been competent, and the contract having been made on full consideration, which was paid. As to contracts for sale by Hindu father in a Mitakshara family who has minor sons, see *Jamsetji v. Kashinath* [1901] 26 Bom., 326 ; *Nathaji v. Sitaram* [1902] 4 Bom., L. R., 587 ; *Baikuntha v. Shibdas* [1905] 2 C. L. J., 321. Cf. *Ramaraja v. Ramalingam* [1902] 26 Mad., 72.

⁶ S.R.A., s. 27 (b). The intention of this clause, said M. Aiyar, J., is "to adopt the equitable doctrine of notice in suits for specific performance to protect *bonâ fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing, subject to the vendor's pre-existing contractual obligation, or with notice of a trust in favour of the party entitled to specific performance." *Kannan v. Krishnan* [1889] 13 Mad., 324, 329. The maxim in point is 'equity looks upon that as done, which ought to have been done.' Relief will be denied against a *bonâ fide* purchaser, *Le Fleur v. Chace*, 171 Mass., 59.

convey the estate.¹ If, on the other hand, the vendor sells away the estate to a third person, the vendee cannot get specific relief against the former, he has no longer the estate to convey.² But if the subsequent transferee has given no consideration and is a mere volunteer, he has no equity against the first promisee. So also if he has either actual or constructive notice of the prior contract, his conscience is affected by the notice, and he is compellable in equity to execute the necessary conveyance in favour of the original vendee.³ If the transferee, said Lord Rosslyn, "is purchaser with notice, he is liable in the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree."⁴ He cannot even claim the value of improvements effected by him.⁵

Subsequent
transferee
with notice.

As against notice, even registration of the subsequent deed of conveyance will not avail,⁶ nor actual possession obtained under it.⁷ Registration has sometimes been said to be notice,⁸ but mere registration of an *ikrarnamah* has been held not to be sufficient notice of a contract within the meaning of section 27.⁹ Where the subsequent transferee has taken with notice, both he and his transferor, the original contractor, may be impleaded as defendants to an action for specific performance by the original contractee.¹⁰ The subsequent transferee is liable

Registra-
tion.

¹ S.R.A., s. 27, ill. 1 of cl. (b) *Morse v. Faulkner* [1792] 1 Anst., 11, 14. Distinguish *Rashmoni v. Surja Kanta* [1905] 32 Cal., 832. "An agreement for the sale of lands is a personal contract; it does not attach to the lands sold, not divest the vendor of his estate. The legal title still remains in him, and he can convey to a *band fide* purchaser, without notice, a title to the premises, freed from the equity of the vendee," *Filley v. Hopkins*, 93 Am. Dec., 237, 2 Scott, 462.

² *Ante*, 364-5.

³ S.R.A., s. 27, ill. 2 of cl. (b) (actual notice); *ibid*, ill. 3 (constructive notice from fact of possession). Cf. *Jackson's case* [1609] Lane, 60, 1 Ames, 143 (lease). *Holmes v. Powell* [1856] 8 DeG. M. & G., 572, shows that for purpose of notice possession need not be unceasingly and actively asserted.

⁴ *Taylor v. Stibbert* [1794] 2 Ves.,

437. Cf. *Jennings v. Moore* [1708] 2 Vern., 609; *Lightfoot v. Heron* [1839] 3 Y. & C., Ex., 586 (sale).

⁵ *Haradhan v. Bharabati* [1914] 19 C. L. J., 420.

⁶ *Namasivayam v. Nelloyappa* [1894] 18 Mad., 43; *Hurnandun v. Javad Ali* [1899] 27 Cal., 468. Cf. *Agra Bank v. Barry* [1874] 7 H. L., 135.

⁷ *Chunder Kant v. Krishna Sunder* [1884] 10 Cal., 710.

⁸ *Janki Prasad v. Kishun Dat*, [1894] 16 All., 478. F. B., *Dina v. Nathu* [1902] 26 Bom., 538; *contra*, *Shan Maun v. Madras Building Co.* [1891] 15 Mad., 268; *Inderdawan v. Gobind* [1896] 23 Cal., 790. See also *Monindra v. Tray-luckho* [1898] 2 C. W. N., 750. 2 Wh. & T., 8th. ed., 249 12 Bom. L.R., 940.

⁹ *Prenath v. Ashutosh* [1899] 27 Cal., 355; *Inderdawan v. Gobind Lall*, *supra*.

¹⁰ Cf. *Gumani v. Ram Charan* [1878] 1 All., 555. *Anshutz's Appeal*, 34 Pa. St., 375. The subsequent transferee

and bound also, it appears, where he has acquired only what is called an equitable title and has no better equity than the prior vendee.¹

Restrictive
covenants.

The principle of notice is applicable to all contracts binding the land in equity.² Restrictive covenants, as we have seen, may be enforced against successors-in-title and assigns, who cannot plead want of notice, and under-lessees may find themselves as much bound as the head lessee.³ So also licensees⁴ and even mere squatters, who have not acquired a prescriptive title.⁵

Promisee of
contract to
make will.

So we have seen that in contracts for consideration to bequeath property, the intended legatee, upon the promisor's death intestate, may enforce specific performance of the contract against the administrator of the estate of the deceased,⁶ and this *post mortem* remedy, it has been said, the court will not allow to be defeated by any device inconsistent with the agreement.⁷

Committee
of lunatic.

Similarly, the committee of a lunatic is his legal representative, and where he contracted, say, to sell land during sanity, but before the completion of the contract became insane, a suit for the specific performance of the contract might be maintained against the committee.⁸ So specific performance has been enforced against the assignee in bankruptcy of a vendor, but not of a vendee.⁹

Assignee in
bankruptcy.

Person with
title dis-
placed.

In some cases, a person may be liable to be impleaded as a defendant, though he is not a successor-in-title of the defaulting

having died, his heirs were impleaded in *Jackson v. McCoy*, 56 Miss., 78. *Potter v. Sanders*, [1846] 6 Hare, 1. Cf. *Lovejoy v. Potter* [1886] 60 Mich., 95, 100 (original contractor need not be impleaded); *Bates v. Swiger* [1905] 21 S. E., 874, 877, (form of decree).

¹ *Flinn v. Pountain* [1889] 58 L. J. Ch., 389. A person having a prior title, who gets in the subsequent estate affected by the contract with notice of the same, is in no better position. *Mumford v. Stohwasser* [1874] 18 Eq., 556; *Hunt v. Luck* [1901] 1 Ch., 45, affd. [1902] 1 Ch., 428; Fry, s. 243.

² *Furnival v. Crew* [1744] 3 Atk., 83, 87.

³ *Hall v. Ewin* [1887] 37 Ch. D., 74; *John Brothers A. B. Co. v. Holmes*

[1900] 1 Ch., 188. *Ante*, 386 sqq.

⁴ *Mander v. Falcke* [1891] 2 Ch. D., 554, 556.

⁵ *Re Nisbet & Potts' contract* [1906] 1 Ch., 386.

⁶ *Ante*, 85; S.R.A., s. 27, ill. 4 of cl. (b); *Goilmere v. Battison* [1682] 1 Vern., 48, 2 Scott, 483. Cf. *Oassey v. Pitton* [1679] 2 Hargrave, 296, 1 Ames, 145. *Durour v. Perrara* [1769] 2 Hargr., 304 (agreement to make mutual wills).

⁷ *Per Lewis, J., Colby v. Colby*, 81 Hun., 221.

⁸ S.R.A., s. 27, ill. 5 of cl. (b).

⁹ *Pearce v. Bastable's Trustee* [1901] 2 Ch., 122. *Williams, Bankruptcy*, 199, sqq. Cf. *Purushotam v. Ponnurungum* [1913] 15 M.L.T., 92.

promisor. Suppose a tenancy for life and a remainder are created by a settlement, and a power of sale is conferred thereby upon the tenant-for-life. If the tenant-for-life exercises the power and sells the property, there will be nothing left for the remainderman to take subsequently. So the title of the remainderman is liable to be displaced by an act *intra vires* of the tenant-for-life.¹ A similar case is that of two or more joint tenants, with power in each to alien his undivided share in his life-time.² If one of the joint tenants does so alienate his share, it passes to the purchaser; otherwise, upon his death, it devolves upon the survivors.³ In both of these cases, if there is a transfer which is legal and valid, since the transferor is competent to displace the title, in respect of the property transferred, of persons who, in the absence of such transfer, will succeed to such property, the transferee, though apprised of the rights of these persons, takes a good title, and, in the event of the death of the actual transferor, may sue these other persons for specific performance of the contract which they never made.⁴ Strictly speaking, the transferee does not enforce the specific performance of a contract, but asserts a title under it against another, whose title has been displaced by this contract.⁵ Apparently, where execution *in specie* could not be asked for against the actual promisor, the relief is not available against any third party.⁶

We have already seen that by the amalgamation of two public companies, the liability under the contracts of the existing companies may be transferred to the new body which arises out of their fusion.⁷ In such a case, the new (amalgamated) company should be impleaded as the defendant to a suit for specific performance of those contracts.⁸

Amalgamated
companies.

¹ S.R.A., s. 27, ill. 1 to cl. (c). Cf. *Shannon v. Bradstreet* [1803] 1 Sch. & Lef., 52; *Ingle v. Jenkins* [1900] 2 Ch., 368.

² Many a Hindu joint family in the Bombay and the Madras Presidencies will answer this description.

³ S.R.A., s. 27, ill. 2 to cl. (c). Sugden, V. & P., 205.

⁴ It deserves to be noted here that cl. (c), s. 27, S. R. A., as it stands, is intelligible: "Any person claiming under a title which, though prior to

the contract and known to the plaintiff, might have been displaced by the defendant." But the promisor, as the illustrations show, is dead, and the defendant is the person whose title has been displaced. The word 'defendant' seems to have been used by oversight for 'contractor.'

⁵ Cf. Collett, 5th. ed. 244.

⁶ Cf. *Morgan v. Milman* [1852] 10 Hare, 279.

⁷ Fry, s. 239, p. 98.

⁸ S. R.A., s. 27 (d).

Company
ratifying
promoters'
contract.

So, again, where the promoters of a public company have, before its incorporation, entered into a contract, if the company, after establishment, has ratified and adopted the contract, and it is one which is warranted by the terms of the incorporation, the company may be made defendant to a suit to enforce the contract *in specie*.¹

Joint con-
tractors.

It may also be worth noting, in view of sections 42 and the following, Indian Contract Act, that in this country the liability under a joint contract is ordinarily joint and several.² Consequently, if one of several persons, who have made a joint promise, dies, the legal liability does not devolve upon the survivors, but the heir or heirs of the deceased are liable to be sued along with them.³ It is the option of the promisee whether he will sue all of the joint promisors or some, the release of one does not discharge the others;⁴ and even if a decree has been obtained against one, in the event of the judgment remaining unsatisfied, a fresh suit against the others will not be barred.⁵ Some of several joint contractors, however, cannot enforce specific performance of the contract, if the others refuse.⁶

Personal
considera-
tions.

But in none of the above cases should the general rule be lost sight of that there can be no performance of a contract by deputy or representative, where personal considerations enter into it. A receiver cannot be held to the specific performance of a contract made before his appointment and creating no lien.⁷

Party in
possession
or likely to
be affected.

"Ordinarily, a person not being a party to the contract ought not to be brought before the court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree."⁸ Where, therefore, specific performance is sought of an agreement for the sale of land, persons who were not parties to it, but who have been vested

¹ Ibid. (c). Cf. Fry, s. 249, p. 103.

² *Motilal v. Ghellabhai* [1892] 17 Bom., 6, 11. See Pollock, *I. C. A.*, 3rd. ed. 231 sqq.

³ *I. C. A.*, s. 42.

⁴ Ibid., s. 44.

⁵ *Muhammad Askari v. Radha Ram*, [1900] 22 All. 307 (where the authorities are collected and reviewed).

⁶ *Safur Rahman v. Maharamunnessa*

[1897] 24 Cal., 832; *Koripalli v. Sajja* [1912] 11 M. L. T., 192. Cf. *Kondapaneni v. Gagaru* [1913] 14 M. L. T., 495.

⁷ *Express Co. v. Railroad Co.*, 99 U. S., 191, 200; *Alderson, Rec.*, 507-8.

⁸ *Per Stuart, V. C., Bishop of Winchester v. Mid-Hants Ry. Co.* [1867] 5 Eq., 17, 21.

with certain rights subsequent to the making of the contract, or who are exercising some rights over the land liable to be disturbed upon the claim being decreed, are proper parties, in a suit to adjudicate the rights of the parties thereto.¹ So, where a stranger has mixed himself up with a contract by setting up a claim to some benefit resulting from it, *e.g.*, by claiming to be interested in the purchase-money under an arrangement antecedent to the contract, he may be impleaded as a defendant to a suit to enforce the contract.² And in a suit for specific performance by the purchaser from a voluntary settlor, the trustee of the settlement, and the persons beneficially interested under it may all be made defendants.³ Under section 32, Civil Procedure Code, large powers are conferred upon a court to bring upon the record all persons who appear to be so interested in a cause as to render their presence desirable at the trial thereof.⁴ But a person against whom no relief is claimed, *e.g.*, one of the heirs of a deceased vendor, who has conveyed to the plaintiff his interests in the land contracted to be sold, need not be arrayed as a defendant to the vendee's suit for specific performance against the legal representatives.⁵

C. P. C.,
s. 32.

Benamidar.

A contract to sell made by a *benamidar* may not bind the beneficial owner. *E.g.*, where a *benami* sale is effected to defraud creditors, but no creditor is actually defrauded thereby, the transferee *benamidar*, under section 84, Trusts Act, holds the property for the benefit of the transferor.⁶ The latter, therefore, may resist a suit for the specific performance of a contract for sale made by the *benamidar*,⁷ and as the beneficial interest is vested in him, he should be impleaded as defendant. Where, on the other hand, the defendant has treated with a third person, who was acting *benami* for the plaintiff, with whom the defendant had previously refused to deal, this fact

¹ *Curran v. Holyoke Water-Power Co.* [1874] 166 Mass., 90.

² *West Midland Ry. Co. v. Nixon* [1868] 1 H. & M., 176; Fry, s. 208, p. 83.

³ *Milletts v. Busby* [1842] 5 Beav., 193.

⁴ Act V of 1908, Sch. I, Or. I. r. 8 (2), 10 (2).

⁵ *Barnard v. Macy*, 11 Indiana, 536.

⁶ *Petherpermal v. Aluniandy* [1908]

7 C. L. J., 528, 35 Cal., 551, P.C.

⁷ *Munisami v. Subbarayar* [1907] 31 Mad., 97.

may make the court pause in a suit for specific performance of the agreement.¹

Pleadings.

Having disposed of the array of parties, I now come to the pleadings. These I will divide into (i) the allegations in the

Plaint.

plaint, and (ii) the prayer for relief.

(i) The facts that give rise to the cause of action must be briefly yet clearly stated. The material terms of the contract sought to be enforced should be alleged,² and where it concerns land, the land must be described with sufficient accuracy to enable the court to ascertain the property and define it in its decree.³ But the plaint should not be prolix or argumentative.⁴ "A court of equity, when examining a bill of complaint to find a grievance, which will justify its interposition," said an American judge, "looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them."⁵ Where the contract sued upon is bilateral or was dependent upon the performance of a condition precedent, it should be stated that the condition has been satisfied or that the plaintiff has performed his part of the contract or offered to perform the same,⁶ and the plaintiff should also express his willingness and readiness to perform such acts as remain to be performed by him.⁷ Unless the contract so requires expressly or by necessary implication, the making of a demand for performance is not essential to the right of the promisee to enforce performance. A request made by action is sufficient, and the plaintiff will be entitled to relief, if he offers to perform his promise in the plaint and is able to perform it at the time of the decree.⁸ When damages are claimed,

¹ *Bonnett v. Sadler* [1808] 14 Ves., 526, 528. Cf. *Phillips v. Duke of Bucks* [1683] 1 Vern., 227. Distinguish *Standard Steel Car Co. v. Starum* [1903] 56 Atl., 954.

² *Waterman*, s. 93, p. 121. Act V of 1908, sch. I, Or. 7.

³ *Waterman*, s. 94, pp. 122-3. Cf. Act V of 1908, sch. I, Or. 7, r 3. Cf. form of plaint, C.P.C., sch. iv, no. 112; Act V of 1908, App. A (3), no. 48.

⁴ C. P. C., (Act XIV of 1882) ss. 50, 53.

⁵ *Magniac v. Thomson*, 2 Wall. Jr., 254 (Grier, J.); *Lumley v. Wabash Ry. Co.* [1898] 71 Fed. R., 21, 3 Keener, 422.

⁶ I. C. A., s. 37.

⁷ *Ibid*, s. 51. The burden of proving readiness is upon plff., *Gajadhar v. Kandhaya* [1911] 9 I. C., 243. Cf. *Hari Raghuunath v. Krishnaji Anant* [1894] 19 Bom., 546. But see, as to the modern English practice, R. S. C., order XIX, rule XIV; 2 Smith, L.C. 12th ed. 17; and there is really no rule of procedure in India which makes a different practice obligatory. But cf. form of plaint, C. P. C., sch. iv, no. 111; Act V of 1908, App. A (3), no. 47.

⁸ *Bruce v. Tilson* [1862] 25 N. Y., 194, 1 Ames, 347. Cf. *Coffin v. Cooper* [1807] 14 Ves., 205; *Beaumont v. Dykes* [1821] Jac., 422. 4 Pomeroy, *Eq. J.*, s. 1407.

the particular injury must be alleged, and it is not enough to say that the plaintiff has sustained damage.¹ Generally speaking, pleadings are not strictly construed in India;² and with the object of administering complete justice, our courts seldom entertain technical objections based upon the inartistic drafting of a plaint. Where there are different sets of defendants impleaded, the reason of their being so arrayed and the cause of action against each should be separately indicated.

(ii) The plaintiff may pray for judgment directing the execution of the contract *in specie*, and may in addition seek relief, the right to which springs out of the contract, *e.g.*, possession of the property which the defendant has agreed to convey to him.³ He may also ask for compensation for the breach of the contract, and this, either in addition to, or in substitution for, specific performance.⁴ The peculiar province of a Court of Chancery has been said to be to adapt its remedies to the circumstances of each case as developed by the trial.⁵ But in jurisdictions where law is strictly differentiated from equity, parties may have to be bandied about from one court to another, as neither has power to make a decree to the whole extent which the case requires.⁶ To remedy this unhappy state of things in England, the statute, known as Lord Cairns' Act,⁷ was introduced, and the Court of Chancery was enabled to do complete justice.⁸ The court, having acquired jurisdiction, would retain it, in order to satisfy all the just requirements of the case between the parties in respect of the subject-matter, and it would give damages, either in addition to, or in substitution for, specific performance.⁹ But the operation of the Act was held not to transfer the jurisdiction of a court of law to a court of equity

Lord Cairns' Act.

¹ *Chinnock v. Marchioness of Ely* [1864] 2 H. & M., 220.

² *Nawab Nazim v. Amrao Begam* [1873] 21 W. R., C. R., 59, *Balmakund v. Dalu* [1901] 21 A. W. N., 157.

³ *Madan Mohan v. Gaju Prasad* [1911] 14 C. L. J., 159; *Fateh Chand v. Narsingh* [1913] 16 I. C., 988. Cf. *Jagesh v. Ananda* [1913] 19 I. C., 907 (action in ejectment distinguished.) *Distinguish Abadhaut v. Kaniz* [1913] 18 I. C., 239 (*Chakran land*); *Shankar v. Dulo* [1913] 40 P. L. R. (execution

of decree.)

⁴ S. R. A., s. 19.

⁵ *Milkman v. Ordway*, 106 Mass., 232 (Wells, J.). 2 Keener, 1217 n.

⁶ *Ferguson v. Wilson* [1866] 2 Ch., 77.

⁷ [1858] 21 & 22 Vict. c., 27. The jurisdiction conferred by it has not been affected by its repeal by 46 & 47 Vict. c., 49, see *Sayers v. Collyer* [1884] 28 Ch. D., 103.

⁸ *Ferguson v. Wilson*, *supra*.

⁹ *Soames v. Edge*, [1860] Johns, 689 *Waterman*, s. 514.

Damages.

where the contract or circumstances were such as not to attract the equitable jurisdiction of specific performance.¹ In India, we do not labour under the misfortune of dual courts, and law and equity, happily, sit together in the same temple of justice. The same court, therefore, has jurisdiction, when it holds, in the exercise of a judicial discretion, that the contract is not such as can be or should be specifically enforced, to make a decree for pecuniary damages in favour of the plaintiff by way of compensation for the breach of the contract. The contract may be one to sell a hundred maunds of rice² or to furnish a drawing-room handsomely, or to enter into a partnership for an indefinite period,⁴ or to work a railway for 21 years.⁵ These are not cases, as we have seen, where the court grants specific relief. But that is no reason why, if the court finds that a valid contract has been broken without excuse, it should not award to the promisee such compensation in money as it deems just.⁶ The fact that the plaintiff has opened his mouth too wide,⁷ and asked for specific relief instead, will not preclude him from getting any lesser relief that in law and justice he may be entitled to. And it should be here distinctly understood that the plaintiff is not *obliged* in a suit for specific performance to pray specifically for damages, whether in addition or in substitution. He has a choice of remedies open to him to apply for. But the court has always a discretionary power to award damages in a suit for specific performance, and it should exercise that discretion when of opinion that damages should be given.⁸

Damages as
alternative
relief.

So, again, the court may decide that, though it has jurisdiction to enforce the specific performance of a contract, yet the

¹ *Ferguson v. Wilson*, *supra*; *Howe v. Hunt* [1862] 31 Beav., 420; *Lewes v. Earl of Shaftesbury* [1866] 2 Eq., 270; *Proctor v. Bayley* [1889] 42 Ch. D., 390. The Judicature Act, 1873, now enables an English court to give damages even where there is no case for specific performance, Fry, ss. 1305, 6.

² S.R.A., s. 19, ill. of para. 2; s. 21(a).

³ *Ibid.*, s. 21 (b), ill., 11; *ibid.* (c).

⁴ *Ibid.*, (d).

⁵ *Ibid.*, (g).

⁶ S. R. A., s. 19, ill. of para. 2, *Futeek v. Mahender* [1876] 1 Cal., 385.

⁷ Cf. *Nazareth v. Jaffer* [1914] M. W. N., 839 (contract for sale of only some of the items alleged proved, decree accordingly).

⁸ *Callian i Harjivan v. Narsi Tricum* [1895] 19 Bom., 764, 770; *Kullian-das v. Tulsiads* [1899] 23 Bom., 786. Cf. Act V. of 1908, Sch. 1. Or 7, r. 7. *Plaint was amended in Ponnusami v. Vilhilingam* [1910] 8 I. C., 258.

justice of the case will be better met by awarding damages instead.¹ This happened in a case where a railway company had contracted to "erect, set up and construct a station" on land which they purchased from a landowner, but did not build one. The description of the station was not so complete as to enable the court to enforce specific execution. It therefore ordered that the damage sustained by the landowner by reason of the company's breach of the contract should be ascertained and the amount paid by the company to him.²

So, again, a plaintiff at the time that he institutes his suit may be entitled to specific relief, but by the time that the suit comes up for trial the defendant may have performed the contract. In such a case, the court may, if it finds that injury has been caused to the plaintiff by reason of the defendant having wrongfully delayed performance, make a decree for such damages as it deems proper.³

Damages for delay.

Or, the circumstances of the case may be such that, by reason of the wrongful default on the part of the defendant, the court may think that a decree for specific performance, belated as it must always be, will not afford adequate satisfaction to the plaintiff.⁴ *E.g.*, there may be a contract for lease of property, which, the lessor knows, the lessee wants for carrying on a business there. But the lessor makes wilful default, with the result that the business cannot be commenced for fifteen weeks. The court, upon the lessee's suit, will decree specific performance and may award damages for the plaintiff's loss of profits during the fifteen weeks.⁵ Similarly, if a contract for sale of immoveable property is delayed in consequence of the vendor's default, he not having cared, or troubled, or taken reasonable pains to perform his contract, the vendee may by suit obtain specific performance and, in addition thereto, damages for the delay.⁶

Damages as additional relief.

There may, again, be cases where the court thinks that the

¹ Fry, s. 1310, p 560.

² *Wilson v. Northampton & B. J. Ry. Co.* [1874] 9 Ch. 279.

³ *Cory v. Thames Ironworks & Ship-building Co.* [1863] 11 W.R. (Eng.) 589; 8 L.T. 237.

⁴ Cf. Bentham, *Theory Leg.*, 290.

⁵ *Jaques v. Millar* [1877] 6 Ch. D., 153; *Royal Bristol Building Society v. Bomash* [1887] 35 Ch. D., 390.

⁶ *Jones v. Gardiner* [1902] 1 Ch. 195. Cf. S R. A., s 19, ill. of para 3.

Damages for part.

ends of justice will be best served by not enforcing the whole of a contract *in specie*, but giving damages in respect of a portion of it. *E.g.*, an intending lessee may contract to pull down an old house and build a new one in its place to be let to him. If he makes default in rebuilding, the lessor may have damages for such default, and specific performance of the contract to accept the lease.¹ So, where there was a contract to give a lease of a hotel and to make there certain repairs, specific performance was decreed of the contract to give the lease, and an inquiry was directed as to the damages in respect to repairs.² So, in a somewhat similar contract for the lease of certain farm buildings, the court directed the lease to be granted to the lessee and also the price of materials furnished for repairs to be paid to him.³ And it is the constant course of the court, in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed.⁴

Compensation for specific performance.

We thus see that the court's jurisdiction in damages is (in Sir E. Fry's words) "an apt and flexible instrument for doing exact justice under the diverse and complicated circumstances of many of the cases upon which the court has from time to time to adjudicate,"⁵ and it effectually checks multiplicity of legal proceedings. Indian courts, accordingly, have not been slow to exercise this jurisdiction, and they have permitted a lessee, entitled to possession under the terms of his lease, to sue, in the alternative, for possession by way of specific relief or the recovery of his money,⁶ or the return of the premium (*salami*) paid by him, and compensation in addition thereto.⁷ And the circumstance that the contract has become incapable of performance, does not preclude

¹ *Soames v. Edge*, *supra*; *Samuda v. Lawford* [1852] 4 Giff., 42.

² *Middleton v. Greenwood* [1864] 2 DeG. J. & S., 142.

³ *Lillie v. Legh* [1858] 3 DeG. & J., 204.

⁴ *Per Turner, L. J., Prothero v.*

Phelps [1855] 7 DeG. M. & G., 722, 734.

⁵ Fry, s. 1307, p. 558.

⁶ *Munee Dutt Singh v. Campbell* [1869] 12 W. R., 149.

⁷ *Rajdhur Chowdhry v. Kalikristna*, [1882] 8 Cal., 963, 11 C. L. R., 330.

the court from exercising this jurisdiction.¹ The time for performing the contract may expire without the promisor fulfilling his promise, though he might have done so had he so chosen. Then, after a suit is filed, but before it is heard, performance *in specie* may become impossible. An apt illustration is afforded by an agreement to sell a patent where the patent expires during the pendency of the suit for specific performance of the agreement.² An action was brought to enforce the specific performance of a contract to maintain and operate a railway upon a given route, but before any decree could be made the original line of the railway had so decayed as to be useless, and the business was transferred to a new line; since specific performance had become impracticable, the court decreed compensation.³ Or, performance may have become impossible even before the institution of the suit. *E.g.*, the directors of a railway company may have passed a resolution under which the plaintiff is entitled to have a certain number of shares allotted to him, but before the plaintiff files a suit to enforce the allotment all the shares may have been allotted to others.⁴ So, the defendant may have sold away to a *bonâ fide* purchaser the immoveable property which he had previously agreed to sell to the plaintiff. In such cases the defendant cannot be allowed to escape scot-free by pleading his own default in defence, and the court will award compensation for the non-performance of the contract.⁵

The court is allowed a free hand in the matter of the assessment of the compensation.⁶ It may direct an inquiry for the purpose, or issue a commission; it may take an account, or it may determine the amount itself, after taking evidence, if necessary. But it seems clearly desirable that the assessment of damages should, wherever practicable, take place at the trial, without any separate enquiry; for, otherwise, the parties are virtually put to the expense of two trials of the same questions.⁷

Assessment
of damages
at trial.

¹ S. R. A., s. 19, expln.

² *Davenport v. Rylands* [1866] 1 Eq., 302; S. R. A., s. 19, ill. 1 of expln.

³ *Chapman v. Mad River R. R.*, 6 Ohio., 119.

⁴ *Ferguson v. Wilson* [1867] 2 Ch., 77; S. R. A., s. 19, ill. 2 to expln.

⁵ *Bowman v. Hyland* [1878] 8 Ch. D., 588; *Day v. Singleton* [1899] 2 Ch., 320.

⁶ S. R. A., s. 19, para. 4.

⁷ *Maxim Nordenfelt etc., Co. v. Nordenfelt* [1893] 3 Ch., 122.

Principle.

In assessing damages, the general rule was stated by Parke, B., to be that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position, with respect to damages, as if the contract had been performed.¹ But this does not imply an extravagant or unreasonable expenditure.² Compensation is given for any loss or damage caused by the breach to the promisee, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it.³ "A person can only be held to be responsible for such consequences," said Bowen, L. J., "as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract."⁴ If the subject-matter of the contract has in the interval undergone any deterioration, accidental or necessary, this must be taken into account also.⁵ Where a sum is named in the contract as the amount to be paid in case of breach, the party complaining of the breach may claim reasonable compensation not exceeding the amount so named.⁶

Sale of goods and land.

In England, a distinction has been taken between a contract for the sale of goods and one for the sale of land, and in the event of a breach of the latter, where it arises from the vendor's inability (without his own fault) to make a good title, the purchaser is not awarded any damages for the loss of his bargain, but is held entitled only to get back the purchase-money paid, with interest.⁷ But the Indian "legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities,"⁸ and no such distinction can

¹ *Robinson v. Harman* [1848] 1 Ex. 850, 855.

² Cf. *Le Blanche v. L. & N. W. Ry. Co.* [1876] 1 C. P. D., 286, 309, 313.

³ 1 C. A., s. 73; *Hadley v. Baxendale* [1854] 9 Ex., 341, 354, Finch, 762; *McMahon v. Field* [1881] 7 Q. B. D., 597; 18 Law Q. R., 275, 399 (F. E. Smith).

⁴ *Grebert-Borquis v. Nugent* [1885] 15, Q. B. D., 85, 92.

⁵ Bentham, *Theory Leg.*, 291.

⁶ 1 C. A., s. 74. *Sundar Koer v. Sham Krishen* [1906] 34 Cal., 150, 157,

P. C.

⁷ *Flureau v. Thornhill* [1776] 2 W. Bl., 1078; *Bain v. Fothergill* [1874] 7 H. L., 158. Title to realty is not considered so uncertain in the United States, and the law is altogether more favourable to the purchaser. Sedgwick, *Damages*, ed. 8, ss. 1018 sqq.

⁸ *Per* Farran, C. J., *Nagardas v. Ahmad Khan* [1895] 21 Bom., 175, 185. Pollock's strictures on *Pitamber v. Cassibai* [1886] 11 Bom., 272, seem entirely justified. 1 C. A., 3rd. ed., 327.

be justified on principle in a country where the difficulties and uncertainties associated with the English law of real property are happily unknown. Where, therefore, a vendor of land in India guarantees his title to the purchaser, who is, however, subsequently evicted, he is entitled to recover by way of damages the value of the land at the date of such eviction, and not merely the purchase-money he paid.¹ Where aggravating circumstances are present *e.g.*, the vendor has been guilty of wilful default or a wanton or dishonest refusal or a breach of duty, these may be taken into consideration by the court and substantial damages decreed in favour of the party that has suffered by reason of the breach.²

The obligations of a vendor and a vendee of immoveable property are set forth in section 55, Transfer of Property Act. The vendor is in the absence of a contract to the contrary, bound to take reasonable care of the property sold and to pay the outgoings until the purchaser takes or ought to take, possession, and the vendee has to pay the purchase-money and take possession when a good title has been shown.³ The vendor before

Vendor and
purchaser.

¹ *Naagardas v. Ahmad Khan*, *supra*; *Ranchhod v. Maumohandas* [1907] 32 Bom., 165.

² *f. Engell v. Fitch* [1869] 4 Q. B., 659; *Day v. Singleton*, *supra*; *Janes v. Gardiner* [1902] 1 Ch., 191. The distinction was thus put by Clayton, P. J.: "The law regulating the damages to be recovered, makes a distinction between cases where there is a fraudulent breach of contract and those where the breach is occasioned by some unforeseen and unavoidable obstacle. As where one covenants to convey a good title, and it is afterward discovered that he does not possess, and by no means in his power can procure, such a title; or the wife of the covenantor, without any collusion, persuasion or request on his part, refuses to join in the deed. In cases of this kind, when the covenantor does all in his power to fulfil his contract, and without any fault of his cannot perform it, the damages to be recovered against him are only such actual and immediate losses as he (the purchaser) may have suffered, such as the money paid, with interest thereon, the time lost, and expenses incurred in examining the title, con-

veyancing expenses, and such work or improvements as he may have made upon the land upon the faith of the contract. But where there is a wanton or dishonest refusal to perform the contract, or where the covenantor, by some fraudulent act on his part, renders the performance impossible, as when by collusion with his wife, or by request on his part, she refuses to sign the deed, or where her refusal is not her own free and uncontrolled act, but made at the implied or actual request of her husband, the law in such a case awards full compensatory damages, and permits a recovery for all the party has lost by reason of the default of the other party, including the value of the bargain and all injury and damage he may have suffered by reason of any act of his made upon the faith of the broken covenant." *Burk v. Serrill*, 80 Pa. St., 413; *Waterman*, 752 n. Cf. *Margruff v. Muir*, 57 N. Y., 155; *Waterman*, 743 n.

³ Cf. *De Visme v. De Visme* [1849] 1 M. & G., 336, 353. But see *Vickers v. Hund* [1859] 26 Beav., 630; *Herbert v. Salisbury Ry. Co.* [1866] 2 Eq., 224.

that time must, make all necessary repairs for the sustenance of the premises,¹ and a loss to the property, which occurs before the vendor is in a position to give a good title, must be borne by him, and not by the purchaser.² Where there is delay in the completion of a contract and the purchaser is not put in possession, courts of equity, proceeding upon the principle that the purchase-money belongs to the vendor and the land to the vendee, hold that the former may claim interest on this money and the latter the rents and profits of the land.³ The two things are mutually exclusive, and neither party can at the same time be entitled both to interest and to rents.⁴ The question will, however, often be found to turn upon the construction of express stipulations entered in the contract.⁵ It may, *e.g.*, be provided that interest shall be paid by the purchaser, "if from any cause whatever, other than wilful default on the part of the vendor," the completion of the purchase is delayed beyond a specified date. In such a case, Buckley, J., has recently said, "By the word 'wilful' is meant that the vendor, being a free agent and in a position to do either one of two acts, chooses to do the one and not to do the other; and 'default' includes the case where the vendor, owing to the purchaser the duty to act reasonably in all matters relating to completion, does an act in breach of that duty."⁶ Where nothing appears to occasion the delay, the rule no doubt is, that if the purchaser, who on the face of the contract is under the necessity of paying on a certain day, sets apart his money, and gives notice that it is ready, interest stops from that time, provided it be shown he made no interest of it.⁷ But a purchaser who takes possession before completion,

¹ *Carrodus v. Sharp* [1855] 20 Beav., 56.

² *Christian v. Cabell*, 22 Grattan, 82. *Cf. Paine v. Meller* [1801] 6 Ves., 349.

³ 1 Williams, *V. & P.*, ch. xi., s. 1.

⁴ Fry, s. 1399, quoting Knight Bruce, V. C., "you cannot have both money and mud," in a case arising out of the sale of some slob lands in Chichester Harbour.

⁵ *Cf. Brooke v. Champenownrne* [1837] 4 Cl. & F., 589, 611; *Jones v. Gardiner* [1902] 1 Ch., 194.

⁶ *Bennett v. Stone* [1902] 1 Ch., 232

(where authorities are collected.)

⁷ *Per Lord Cottenham, De Visme v. De Visme*, supra, 352. *Re Riley v. Stratfield* [1886] 34 Ch.D., 388; Fry, s. 1410. In *Davis v. Parker*, 14 Allen, 94, vendor-defendant, who had previously declined tender of the purchase-money, claimed interest thereon on account of growth of timber, on land sold *pendente lite*; held no interest could be allowed subsequent to the tender and refusal, unless vendor could show that vendee had made use of the money.

must pay interest on the unpaid part of the purchase-money. "The act of taking possession," said Grant, M.R., "is an implied agreement to pay interest: for so absurd an agreement as that a purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied."¹ "A court of equity," remarked Lord St. Leonards, "interposes only according to conscience."²

Where, before the purchaser does or can safely take possession, the vendor continues in occupation of the premises sold, "he will not be entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it."³ But he will not be answerable for accidents,⁴ nor for deterioration due to the purchaser himself.⁵ So where, after the vendee was permitted to take possession, he paid a portion of the purchase-money, and then died, leaving minor heirs, whereupon the vendor entered upon the land and claimed it, pulled down and sold houses, built others, and finally sold the property, in a suit for specific performance by the heirs he was held liable for the rental value of the land during his occupation. Ruffin, C. J., described him as "a *tort-feasor* by reason of a wilful and gross breach of trust, and therefore justly chargeable with the highest occupier's rent from the moment of the breach of trust."⁶

Vendor's
liability.

A curious case, upon which authorities seem divided, may arise where a vendee of land, relying upon the performance

Bonâ fide
possessor
under de-
fective title.

¹ *Fludyer v. Cocker* [1805] 12 Ves., 25, 27-8. *Beresford v. Clarke* [1908] 2 Ir. R., 317. This rule is applied in England, even where the delay is owing to vendor's default. But in the case of a vacant lot, or of wild land, not bought for immediate improvements or cultivation, an exception ought probably be made. Cf. *Stevenson v. Maxwell*, 2 Sandf. Ch., 302; *Waterman*, 744.

² *Birch v. Joy* [1852] 3 H.L.C., 565 598.

³ *Per Jessel, M.R., Lysaght v. Edwards* [1876] 2 Ch. D., 507. *Contra*, where purchaser has become entitled to take possession, *Binks v. Lord*

Rokeby [1818] 2 Sw., 222.

⁴ *Robertson v. Skelton* [1850] 12 Beav., 363.

⁵ *Harford v. Purrier* [1816] 1 Madd., 532.

⁶ *Cole v. Tyson*, 8 Ired. Eq., 170. Cf. *Henlen v. Martin*, 53 Calif., 321: "Whatever may be the rule where a trustee has not himself occupied and enjoyed the trust estate, but has received rents from it, justice and equity demand that where he has wrongfully excluded the true owner, and has himself occupied and enjoyed the fruits of the estate, he shall at least account for its rental value." *Waterman*, 740*n*.

of the vendor's agreement for sale, takes possession and in good faith incurs expenditure over permanent improvements. If the contract subsequently falls through by reason of the vendor failing to make a good title, it is a question whether the purchaser can recover from him or his property money's so spent, where they were not demanded by the contract.¹ Now, as to the improvements made upon land by a *bonâ fide* possessor, if the legal title is in another and if there has been neither fraud nor acquiescence on his part after he became aware of his legal rights, the prevailing opinion in England and America seems to be that he cannot be compelled to compensate the possessor without title for such improvements.² Mr. Justice Story was inclined to take the contrary view, more in harmony, as he remarked, with the Roman law.³ "It appears to me," urged this high authority with much force, "speaking with all deference to other opinions, that the denial of all compensation to such *bonâ fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bonâ fide* purchaser builds a house thereon, enhancing the value of the estate ten times the original value of the land, under a title apparently perfect and complete. Is it reasonable or just that, in such a case the true owner should recover and possess the whole, without any compensation whatever to the *bonâ fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another who is in no default."⁴

¹ *Putnam v. Ritchie*, 6 Paige Ch., 390 (Walworth, C., refused the vendee's claim). Distinguish *Bunny v. Hopkinson* [1859] 27 Beav., 565. 2 *Williams, V. & P.*, 966-7.

² *Ramsden v. Dyson* [1866] 1 H.L., 129, 141. *Putnam v. Ritchie*, supra, Walworth, C., thought the case would be different if the legal title was in the person who had made the improvements, and the equitable title only in the plaintiff, who might then be required to do equity himself. Cf. *Sugden, V. & P.* 747. See also *Price v. Neault* [1887] 12 A.C., 110; 2 Kent,

Com., 334. A purchaser obtaining possession before confirmation of his contract, and expending money in improvements, cannot make that a ground why his purchase should not be disturbed, *Millican v. Vanderplank* [1853] 11 Hare, 135.

³ Digest, Bk. 50, tit. 17, l. 206; 1 Domat, *Civil Law*, Bk. 3, tit. 1, s. 5, art. 7.

⁴ *Bright v. Boyd* [1841] 1 Story, 478, 2 *ibid.*, 605, 607. Woodruff, 348; *Williams v. Gibbs* [1857] 20 Howard, 535 Woodruff, 342; 3 Pomeroy, *Eq. J.*, s. 1241; 1 Story, *Eq.*, s. 388.

And it has been said that a party who files a bill to enforce his claim to real estate against a person, who, in good faith, supposing he has a perfect title to the property, has made improvements on the land, will be compelled to make due compensation to such person for his improvements.¹ Section 51 of our Transfer of Property Act is in support of this view.²

The intending purchaser often makes a deposit, and, in lieu of specific performance, a vendor may obtain a declaration of his right to the deposit and resell the property.³ "The deposit serves two purposes," said Lord Macnaghten: "if the purchase is carried out, it goes against the purchase-money; but its primary purpose is this—it is a guarantee that the purchaser means business."⁴ The purchaser may, therefore, have a lien for his deposit, as for an instalment of the purchase-money paid, where the contract for sale falls through by reason of a good title not being shown, or where it is rescinded under a condition authorising either party to rescind.⁵ But if the contract goes off through the purchaser's default or he unjustifiably repudiates it, the deposit is forfeited and the vendor may retain it.⁶ The purchaser could not, by his own default, acquire a right to rescind the contract.⁷ If, in such a case, the vendor chooses to resell the property or allows it to be resold, he must do so apparently within a reasonable time, and he will not be permitted to add to the amount of damages by waiting till the market falls and the subject-matter of the sale deteriorates.⁸ And where a vendor or lessor sues for specific performance of the contract

¹ *Waterman*, s. 521, citing *Green v. Biddle*, 8 Wheat., 1. *Neesom v. Clarkson* [1845] 4 Hare., 97; *Robinson v. Ridley* [1821] 6 Madd., 2.

² *Ramalinga v. Samiappa* [1889] 13 Mad., 15, 16. *Collier v. Baron*, [1905] 2 N.L.R., 34. Cf. *Kandarpa v. Jogendra* [1910] 12 C.L.J., 391, 397; *Mathunsa v. Appa* [1911] 21 M.L.J.R., 969. Distinguish *Vri ibhukundas v. Dayaram*, [1907] 32 Bom., 32.

³ *Kingdem v. Kirk* [1888] 37 Ch., D., 141. T. P. A. s. 55, (6) b.

⁴ *Soper v. Arnold*, [1889] 14 A.C., 435.

⁵ *Rose v. Watson* [1864] 10 H.L. C., 672, 678, 683-4; *Whitbread & Co. v. Watt* [1901] 1 Ch., 913, affd., [1902] 1 Ch. 835, 840; *Ibrahimhai v. Fletcher* [1896]

21 Bom., 827 (title defective); *Alokeshi Dassi v. Hara Chand* [1897] 24 Cal., 897 (contract unsuccessfully denied by vendor-defendant.)

⁶ *Howe v. Smith* [1884] 27 Ch. D., 89; *Ex parte Barrell* [1875] 10 Ch. 512; *Smith v. Butler* [1900] 1 Q. B., 694; *Levy v. Stogdon* [1898] 1 Ch., 486, affd. [1899] 1 Ch., 5 (delay, but no renunciation), *Cornwall v. Henson* [1899] 2 Ch., 710, [1900] 2 Ch. 298; *Bishan Chand v. Radha Kishan* [1897] 19 All., 489; *Balvanta Appaji v. Bira* [1897] 23 Bom., 56, 20 M.L.J.R., 230.

⁷ *Sugden, V. & P.* 40.

⁸ Cf. *Prag Narain v. Mulchand* [1897] 19 All., 535; I.C.A., s. 107.

and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.¹ Where the purchaser sues for specific performance and fails, the court may nevertheless give him a decree for refund of the deposit, although he had not asked for any such alternative relief.²

Compensation
S. R. A.,
ss. 14, 15, 19.

Compensation awarded under section 19, Specific Relief Act, must be distinguished from that awarded under sections 14 and 15. Under section 19, specific performance of the whole contract may be decreed and compensation given in addition. Under the earlier sections, such performance is decreed only in respect of a part of the contract, and for the remainder compensation may be given.³ In this case, if one of contract for sale, the abatement from the price should be such as to allow the vendee precisely what he has lost by reason of the inability of the vendor to convey the land as agreed; that is, the money and the land conveyed should together be equivalent to the land agreed to be conveyed.⁴ The apportionment of compensation in such a case is often difficult, as the dividing of the estate may very much increase the proportionate damages. The number of acres will seldom be a certain guide.⁵ And it has to be remembered that by the vendee making an election to take so much of the land as the vendor can convey and compensation for the deficiency, the former undertakes to receive what the latter never agreed to give, *viz.*, a partial conveyance of the estate. Equity will only allow this on the condition that the defendant shall not thereby be subjected to unreasonable injury.⁶

¹ S. R. A., s. 18 (d); *Turner v. Marriott*, [1867] 3 Eq., 744; *Middleton v. Magway* [1864] 2 H. & M., 233; *Hall v. Burnett* [1911] 2 Ch. 551, 2 Dab. V. & P., 1006.

² *Raghu v. Chandra* [1912] 17 C. W. N., 100.

³ *Hill v. Buckley* [1811] 17 Ves., 394.

⁴ *Harsha v. Reid*, 45 N. Y., 415. As a general rule, when a person can only partially perform a contract into which he has entered, he must

respond in damages to the extent of the difference in value between that which the other party receives and that to which the contract entitled him; and this is found by taking the market value of the whole subject of the contract. *Wetherbee v. Bennett*, 2 Allen, 428.

⁵ Cf. *Earl of Durham v. Legard* [1865] 34 Beav., 611, 1 Ames, 395; *Jacobs v. Locke*, 2 Ired. Eq., 286.

⁶ *Per Hoar, J., Woodbury v. Luddy*, 14 Allen, 1; *Waterman*, 753 n.

The Indian law, accordingly, allows compensation only where the part which cannot be performed bears a small proportion to the whole undertaking.¹ Otherwise, the promisee may have partial performance only upon relinquishing all claim to further performance.² And an indemnity must be distinguished from compensation. Neither a purchaser can be forced to accept a defective title with indemnity, nor a vendor can be made to convey less than what he has sold *plus* an indemnity against the risk of eviction.³ And the reason is that specific performance with compensation finally settles the matter; not so specific performance with indemnity, which contemplates and almost invites litigation.

Indemnity.

I have said that the plaintiff may elect his remedy. But he cannot maintain two suits. If he elects to sue for damages and fails, he cannot ask next for specific relief.⁴ If he elects to sue for specific relief and fails, he cannot sue again for compensation in respect of the same contract or the same part thereof.⁵ It is only a question of difference in the form of the relief, and the court, being once seised of the matter, has to dispose of it finally in all its aspects. So, where the plaintiff sues for damages and succeeds, a second suit for specific performance upon the same cause of action will not lie.⁶

Election of remedies.

But a plaintiff, instituting a suit for the specific performance of a contract in writing, may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.⁷ But the alternative relief must apparently be based on the same state of facts, though with different conclusions as to law.⁸ A vendor of land, *e.g.*, may sue for specific performance of the contract, and pray in the alternative that, if the court is not satisfied with the title he can

Rescission and cancellation.

¹ S. R. A., s. 14. Ante, 174 sqq.

² S. R. A., s. 15.

³ *Balmanno v. Lumley*, [1813] 1 V. & B., 224; Fry, ss. 1225, 1281.

⁴ C. P. C., s. 13; Act V of 1908, s. 11.

⁵ S. R. A., s. 29. Distinguish *Paran-*

godan v. Perumtoduka [1903] 27 Mad., 380 (recovery of money paid on failure of consideration).

⁶ S. R. A., s. 24 (c).

⁷ S. R. A., s. 37, Fry, s. 1058, p. 457.

⁸ *Rawlings v. Lambert* [1860] 1 J. & H., 458.

make, it may set aside the contract and thus discharge him from his obligation altogether. But it is doubtful if he can put forward two totally inconsistent claims, *e.g.*, ask for rescission on the ground of fraud and in the alternative for specific performance, if proof of fraud fails.¹ There is nothing, however, to prevent his asking for an incidental relief, *e.g.*, a plaintiff, suing for specific performance of a contract of sale, may pray for cancellation of the sale-deed in favour of a subsequent purchaser who is impleaded as defendant along with the vendor.²

Rectifica-
tion.

Where a contract in writing does not correctly represent the intention of the parties, the contract, as we shall see, may in some cases be rectified.³ If, before rectification, a suit is brought for specific performance, the defendant may prove a variation in his own favour, and unless the plaintiff submits to this variation he cannot insist upon a decree for relief *in specie*.⁴ But, to avoid this contingency, the plaintiff may sue for damages, in which case it does not appear to be open to the defendant to claim a variation in execution. The plaintiff may also anticipate the defence, where he sues for specific relief, and in his statement of claim may set forth the contract with the necessary variation. *E.g.*, where, in a contract for lease, it was agreed that the plaintiff should pay the defendant a premium of £200, but nothing was said about this in the written agreement, the plaintiff, having offered to make the payment by his claim, was granted a decree for specific performance.⁵ And even if the variation is in the plaintiff's favour, there is no valid reason why he may not have specific performance of the real agreement, the erroneous contract in writing being rectified, if necessary.⁶

¹ Cf. *Cawley v. Poole* [1863] 1 H. & M., 50; *Mahomed Buksh v. Hosseini* [1888] 15 Cal., 684, 692, P. C. But see *Jino v. Manon* [1895] 18 All., 125. *Woodroffe and Ameer Ali, C.P.*, 680. Where an excessive claim fails, an alternative claim for a more limited right may be allowed, provided it is not contrary to the evidence adduced in support of the original claim found unsustainable, *Gaj Kumar v. Lachman* [1911] 14 C.L.I., 627.

² *Nityanand v. Bishanlal* [1911] 33 All., 634 (the incidental relief was held not to affect the *forum* of appeal).

³ S.R.A., s. 31; Lect. IX. *post*.

⁴ S.R.A., s. 26; *Smith v. Wheatcroft* [1878] 9 Ch. D., 223.

⁵ *Martin v. Pycroft* [1852] 2 DeG. M. & G., 785.

⁶ Story says: "The ground is very clear, that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party

The English practice to the contrary,¹ questionable since the passing of the Judicature Act,² has not been followed in America,³ and section 34, Specific Relief Act, clearly recognises the right of the plaintiff to join a prayer for rectification of a contract in writing to one for its specific enforcement after rectification. In view of the provisions of this section, it may even be doubted in India if, where a plaintiff has only asked for rectification in his first suit and got a decree therefor, he can subsequently bring a second suit for specific performance of the agreement.⁴ The agreement, in respect of which relief is asked for, is in both cases the same, and the fact that it was in the first instance incorrectly expressed, cannot, it is conceived, make any difference.

S. R. A.,
s. 34.

The pleas that may be raised in defence have already been indicated with some fullness. The sections of the Code of Civil Procedure that deal with the frame and the filing of a written statement by the defendant are 110, 111, and 114-116.⁵

Written
statement.

I shall say a few words here about only one particular plea, *viz.*, that of limitation. Article 113, Schedule I, Act IX of 1908, provides that the period of limitation for a suit for specific performance of a contract is three years from the date fixed⁶ for the performance, or, if no such date is fixed,⁷ when the plaintiff has notice that performance is refused.⁸ It is immaterial whether the contract is one in writing, and if so whether it is registered or not. Unless compensation for the

Limitation.

as plaintiff, and cancel it, and if the mistake is partial only, why, at his instance, it should reform it. In these cases, the remedial justice is equal; and the parol evidence to establish it, is equally open to both parties to use as proof." 1 *Eq.*, s. 161 n.

¹ *Townshend v. Stangroom* [1801] 6 Ves., 328; *Squire v. Campbell* [1836] My. & Cr., 459, 480; *May v. Platt* [1900] 1 Ch., 616. "You may have an agreement specifically performed, but you can not have it *quasi* specifically performed, or specifically performed with a variation," said Langdale, M. R., *Nurse v. Seymour* [1851] 13 Beav., 254, 269.

² *Olley v. Fisher* [1886] 34 Ch. D., 367; Fry, ed. 1, s. 517, ed. 2, s. 781; 2 Williams, V. & P., 704.

³ Pollock, *Con.* (W. W.), 633 n.; 2 Pomeroy, *Eq. J.*, s. 862; 2 *Eq. R.*, 1149.

⁴ Cf. C. P. C., s. 13, expln., ii; Act V of 1908, s. 11, expln. 4.

⁵ For form of written statement, see Act V of 1908 App. A, no. 13. Cf. C. P. C., sch. iv, no. 122.

⁶ *Mahadeo v. Nundun* [1869] 12 W.R., 22; *Gajadhar v. Kandhaya* [1911] 9 I. C., 243; *Fazal v. Amiruddin* [1911] 11 I. C., 299.

⁷ *Ahmed v. Adjein* [1876] 2 Cal., 323, (but see *Starling, Lim.*, 246); *New Beerbhoom Coal Co. v. Buloram* [1878] 5 Cal., 175; *Virasami v. Ramasami* [1880] 3 Mad., 87.

⁸ *Hari v. Raghunath* [1888] 11 All., 27, F. B.; *Churilal v. Hiralal* [1902] 6 C. W. N., xcvi; *Visram v. Sultan* [1911] 11 I. C., 25; *Abdul v. Nagasurupu* [1912] M. W. N., 1004.

breach of the contract is the relief prayed for by the plaintiff, articles 115 and 116 do not apply.¹ The suit to which article 113 refers is a suit for specific performance, and therefore one directed against the parties to the contract and not strangers.² The contract may be for exchange of land³ or sale.⁴ As we have seen before,⁵ there is a conflict of authority upon the question whether a suit for possession of immoveable property⁶ upon the basis of an executed deed of sale or mortgage or lease, is governed by the three years rule of limitation. Such a suit cannot, strictly speaking, be termed a suit for specific performance of a contract, though it is no doubt a suit for specific relief.⁷ Where there has been only an executory contract, and the plaintiff sues for an executed and completed conveyance, and for possession of the property conveyed, there may be some reason for saying that the right to possession springs out of the contract,⁸ and the relief by giving possession in such a case is comprised in the relief by specific performance.⁹ The Madras High Court has even gone so far as to hold that, after a decree for the execution of a conveyance has been obtained, a separate suit for possession of the property conveyed is barred by section 43, Act XIV of 1882.¹⁰ Where the vendor was out of possession on the date of the execution of conveyance, but subsequently obtained possession, the Allahabad High Court applied the twelve years' limitation to a suit by the vendee to recover possession of the land purchased by him.¹¹ And so did the Privy Council where the Plaintiff's suit for possession was not founded merely upon contract, but also upon a title acknowledged and defined by a deed of compromise, which was only part of the evidence

¹ *Mitra, Lim.*, 932.

² *Vurmoh Valia v. Vurmah Kunhi* [1876] 1 Mad., 235, 246, P.C.

³ *Hari v. Raghunath*, supra; *Veera v. Poomambala* [1899] 9 M.L.J.R., 137 (in which art. 143 is distinguished); *Subba v. Hari* [1902] 5 O.C., 140.

⁴ *Distinguish Kalu v. Kishore* [1886] 6 A.W.N., 96.

⁵ *Ante*, 260.

⁶ To a claim for moveable property on equitable grounds, art. 120 has been applied, *Commercial Bank v. Allavooden* [1900] 23 Mad., 583, 592.

⁷ *Ante*, 21-2.

⁸ *Muhiddin v. Majlis* [1884] 6 All., 231, 232.

⁹ Act V of 1890, App. A (3), no. 47; *Mitra, Lim.*, 933.

¹⁰ *Narayana v. Kandasami* [1898] 22 Mad., 24 *Chinna Krishna v. Doraiswamy* [1901] 12 M.L.J.R., 71. *Distinguish Nathu v. Budhu* [1893] 18 Bom., 537; *Abdul Majid v. Baida Nath* [1902] 6 C.W.N., 314.

¹¹ *Sheo Prasad v. Udai* [1880] 2 All., 718.

adduced by the plaintiff to prove his case.¹ I have already dealt with suits to enforce awards.² It is only where an award directs the performance of anything that article 113 may be stretched to cover the award as the consummation of the antecedent agreement to refer.³

Where the date for the performance is not fixed, time apparently will not begin to run till a demand has been made. Demand and refusal give the cause of action.⁴ But where certain property was mortgaged with a right of pre-emption in favour of the mortgagee, and the mortgagor assigned the equity of redemption to a third person, the cause of action for a suit by the mortgagee to enforce the right of pre-emption was held by B. Ayyangar, J., to have arisen when the said right was infringed by the assignment of the equity.⁵ Where, again, a suit for specific performance of a contract for sale having failed, a second suit is brought for return of the deposit money, time has been held to begin to run from the date of the first suit.⁶

Terminus a quo.

As to the form of the decree, you will find a number of helpful forms given in Chapter L, of Seton on *Judgments and Orders*. Ordinarily, the court may content itself by declaring that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, and ordering and adjudging the same accordingly. Where a deed has to be executed, a further direction will have to be given to that effect, and the judge may settle the terms of the deed, if necessary. In the case of a contract for sale, for instance, where the plaintiff is the vendor, the decree in England may run thus: "Let upon the plaintiff executing a proper conveyance of the estate (described) to the defendant, at the expense of the defendant, according to the said agreement, or to whom he shall appoint, such conveyance to be settled by the judge in case the parties differ, and delivering to the

Decree.

¹ *Mewa Kuwar v. Hulas Kuwar* [1874] 13 B. L. R., 313, P. C. Of, *Betts v. Mahomed* [1876] 25 W. R., 521.

² *Aute*, 103-5.

³ *Mitra, Lim.*, 934.

⁴ *Virasami v. Ramasami*, *supra*.
Distinguish *Venkappa v. Akku* [1878]

7 Mad., H.C.R., 219; *Starling, Lim.*, 246. Demand may be made by suit, *Visram v. Sultan* [1911] 11 I. C., 25.

⁵ *Ramasami v. Chinnan* [1901] 24 Mad., 449.

⁶ *Chidambara v. Srinivasa*, [1898] 8 M.L.J.R., 61.

defendant upon oath all deeds and writings in his custody or in his power relating to the said estate, the defendant pay to the plaintiff the balance which shall be certified to remain due to the latter in respect of such purchase-money and interest and costs, after such deduction as aforesaid."¹ In India, the decree is generally framed in such terms as to be definite and final and capable of execution. If there is any ambiguity in the decree, however, it may be solved by reference to the judgment and the pleadings, if necessary.² The court is empowered to require the defendant to do all acts necessary for the fulfilment of the obligation into which he has entered, and where a sale-deed was executed but not registered within time the defendant was directed to execute and register a fresh sale-deed.³

Execution
of decree.

A decree for specific performance will have to be executed in the manner prescribed by section 260, Act XIV of 1882. That is, the judgment-debtor should be called upon to obey the decree, and if he does not avail himself of the opportunity, but wilfully fails to obey the decree, it may be enforced by his imprisonment or by the attachment of his property, or by both. The new Code, Act V. of 1908, adds that, where the judgment-debtor is a corporation, the decree may be enforced by the attachment of the property of the corporation, or, with the leave of the court, by the detention in the civil prison of the directors or other provincial officers thereof, or by attachment and detention.⁴ And then follows an even more important provision: "Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done, so far as practicable, by the decree-holder or some other person appointed by the court, at the cost of the judgment-debtor, and upon the act being done, the expenses incurred may be ascertained in such manner as the court may direct and

¹ Seton, *Judgments*, ch. L., s. 11, [1911] 21 M.L.G., 69 (notes).

ii ² *Rau Lakshmi v. Inuganti* [1898] 21 Mad., 344, P. C.; *Lakshmi Narain v. Jwala Nath* [1896] 18 All., 344, F. B.

³ *Amer Chand v. Nathu* [1910] 7

A. L. J. R., 887.

⁴ Sch. I, Or. XXI, r. 32(2).

may be recovered as if they were included in the decree.”¹ Formerly the decree-holder often failed to obtain specific relief, where the judgment-debtor was obdurate and did not mind spending some time in the civil prison or was prepared to allow some of his property to be attached and sold. It is to be hoped that the provision above-quoted will help a decree-holder in future to reap the fruits of his decree.

Where in a suit for specific performance, the purchaser obtains a decree, in execution of which he obtains possession, the transfer is as complete as if made by a registered instrument.² But in some cases it may be necessary to obtain execution of a sale-deed by court.³

Court-fee.

It remains to add that the court-fee in suits for specific performance (*a*) of a contract of sale, is to be calculated on the amount of the consideration, (*b*) of a contract of mortgage, on the amount agreed to be secured, (*c*) of a contract of lease, on the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term, and (*d*) of an award, on the amount or value of the property in dispute.⁴ Where, however, the plaintiff not only seeks for specific performance of a contract of sale, but also asks that the defendant may be compelled to execute a conveyance and to deliver possession of the property to him, the suit is in substance one for possession of the property and should be valued under section 7, clause V of the Court Fees Act, according to the value of the subject matter.⁵

¹ Ibid, (5). Cf. English R. S. C., Or. 42, r. 30.

² Cf. *Lokessur v. Purgun* [1881] 7 Cal., 418, folg. *Juggobundhu v. Ram Chunder* [1880] 5 Cal., 584, F. B.

³ Cf. *Pupireddi v. Narasareddi* [1892] 16 Mad., 464.

⁴ Act VII of 1870, s. 7, (x).

⁵ *Mudan Mohan v. Gaja Prasad* [1911] 14 C. L. J., 159. But undervaluation immaterial, where disposal of suit on the merits not prejudicially affected. *Baijunth v. Micank* [1911] 11 I. C., 742.

LECTURE IX.

RECTIFICATION, RESCISSION, AND CANCELLATION.

(a) *Rectification of Instruments.*

Difference
between in-
tention and
expression.

Among the infirmities which attach to human transactions is their not infrequent failure to represent and give effect to the true intent of the parties. An illustration in point is a written instrument which purports to embody the contract of two parties, but which in reality does not do so. The parties in question may have come to an agreement which is clear, valid and complete, equitable and conscientious,¹ but when they proceed to have this agreement set down in black and white, the expression actually employed may be such as does not convey the purport it was intended to, with the result that the parties to the written contract find that in effect and scope it is very different from what they had really agreed to. The writing expresses more or less than the real contract, or so varies it as altogether to violate their common intent and create rights and liabilities which they did not contemplate. This result may be due either to mistake, which is innocent, or to misrepresentation, which is not innocent. The mistake may be of the parties themselves, or it may be of the scrivener or attorney employed by them, and it may be a mistake either of fact or of law. *E.g.*, a conveyance may specify other parcels than those actually sold or a larger extent of land, or may even by accident comprise a clause which was not agreed upon.² So, in a settlement made with the intention of providing for sons and daughters, the word "daughters" may be omitted through oversight,³ or by inadvertence no mention of property may

Mistake.

¹ S. R. A., s. 32.

² *Pitcairn v. Ogbourne* [1751] 2 Ves., Sr., 375; *Harris v. Pepperell* [1867] 5 Eq., 1; *Jenner v. Jenner* [1866] 1 Eq., 361; *Rob v. Lutterwick* [1816] 2 Pr., 190; *Owen v. Truefitt* [1899] 2 Ch.,

309; *Brown v. Lampton*, 25 Vt., 258; *Gillespie v. Moon* [1817] 2 Johns, Ch., 585, 1 Scott, 473; *Johnson v. Bragge* [1901] 1 Ch., 28.

³ *In re Daniel's Trusts* [1876] 1 Ch. D., 373.

be made.¹ These are errors due to a mistake of fact. But the legal meaning and operation of the terms or language employed in the writing may be misunderstood and misconceived; and in such a case, too, the writing will fail to express the contract which the parties actually entered into.² Here the deed is in form as it was intended and understood to be when accepted, the mistake consisting in the erroneous supposition that in fact and legal effect it corresponded with the precedent oral agreement.³ To take an illustration of a marriage-settlement, again, the father of the intended bride may covenant with the intended bridegroom to pay to him an annuity as a provision for his wife and children by her, but the written instrument executed to give effect to the covenant, may express the annuity as payable to the bridegroom and his heirs, executors and assigns. Now, suppose the son-in-law subsequently dies insolvent; as the settlement stands, his official assignee will be entitled to claim this annuity, and thus defeat the true intent and purpose of the promise of the father-in-law.⁴ So a release may be so broadly worded as to pass all the executant's rights in property, contrary to the bargain and the expectation of the parties.⁵ Or, on a sale of real estate the draftsman may decline to insert a clause reserving growing grain and timber on the premises (as agreed upon by the parties), upon an idea that such a clause is unusual and improper in a fee-simple conveyance.⁶ There is a mistake here as to the legal effect of the writing adopted. The object of the parties was to produce a certain legal result; but this the contract as framed is not calculated to produce.⁷ Fraud may, again, Fraud.

¹ *Miles v. Fox* [1888] 37 Ch. D., 153.

² *Pomeroy, Eq. Jur.*, s. 845. *Dinwiddie v. Self* [1893] 145 Ill., 290, 3 Keener, 137. *Per Turner, L. J.*, "When, however, parties come to this court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done." *Stone v. Godfrey* [1854] 5 DeG. M. & G., 76.

³ *Stockbridge Iron Co. v. Hudson Iron Co.* [1871] 107 Mass., 290, 3 Keener, 64; *Pitcher v. Hennessey* [1872] 48 N. Y., 415, 3 Keener, 70.

⁴ S. R. A., s. 31, ill. (b); *Rogers v. Ingham* [1876] 3 Ch. D., 351, 357, 3 Keener, 9; *Hall-Dare v. Hall-Dare* [1886] 31 Ch. D., 251; *Allcard v. Walker* [1896] 2 Ch., 369, 381.

⁵ *Cholmondeley v. Clinton* [1817] 2 Mcr., 171; *Dungey v. Angove* [1794] 2 Ves., 304.

⁶ *Hendrickson v. Ivins*, Saxton, 562; *Waterman*, 500.

⁷ S. R. A., s. 26 (d). Cf. *Canedy v. Marcy* [1859] 13 Gray, 373, 3 Keener, 37; *Snell v. Atlantic Insurance Co.* [1878] 98 U. S., 85, 3 Keener, 80, 85; *Griswold v. Hazard* [1891] 141 U. S., 260, 3 Keener, 107, 24 Harv. L. R., 394-6.

be at the root of the mischief. There may, *e.g.*, be a contract for sale of a house and one of three godowns, but the purchaser may fraudulently have a conveyance prepared that includes all the three godowns.¹ Or, to take the case of a settlement once more, where the ultimate limitation in default of the specific objects of the settlement is in favour of the paternal next-of-kin, by the fraud of one of these, an antecedent power to appoint for others as the settlor may think fit may not be specified, with the result that the latter is disabled from providing, say, for his own mother.² Now, it is established, on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud.³

Enforcement
with varia-
tion.

We have already seen that if a plaintiff sues to enforce a contract in writing which is not identical with the actual agreement between the parties, the defendant may show how it should be varied, with the object of bringing it into conformity therewith; and then if the plaintiff insists on specific performance, he has to submit to the variation so proved.⁴ Section 31, Specific Relief Act, recognises the right of this defendant in some cases to come into court as the plaintiff and actively seek the rectification or reformation of the faulty contract in writing.⁵ For the endeavour of a court of equity is to get at the true understanding of the parties and to give effect, so far as practicable, to their agreements as they really are, and not as they merely seem to be. It may therefore correct a contract or rather instrument in writing, when it is satisfied that the same does not truly express the intention of either party. "The reason," it was said in a leading American case, "is obvious. The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the

Rectifica-
tion.

¹ S. R. A., s. 31, ill. (a).

² *James v. Couchman* [1885] 29 Ch. D., 212.

³ *Per Kent, C., Gillespie v. Moon,*

supra.

⁴ *Ante*, 244-8, 344-347; S. R. A., s. 26.

⁵ *Anwarullah Shaikh v. Koylash Chunder Bose* [1881] 8 Cal., 118.

parties had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it and to the manifest intention of the parties."¹ But an instrument, executed with all the deliberation and solemnity that a document in writing implies, cannot be lightly touched. Equity may compel parties to perform their agreements when fairly entered into, according to their terms, but it has no power to make agreements for the parties, and then compel them to execute the same.² "Courts of equity do not rectify contracts," said James, V.C.; "they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts"³ It has, accordingly, been laid down with authority: "The power which the court possesses of reforming written agreements, where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. It is clear that a person who seeks to rectify a deed upon the ground of mistake, must be required to establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of a mistake. In the latter case, you can only act upon the mutual and concurrent intention of all parties for whom the court is virtually making a new written agreement."⁴ But note it is

¹ Per Washington, J. *Hunt v. Rousmaniere's Admrs.* [1828] 1 Peters, 1, 3 Keener, 16.

² *Ibid.*

³ *Mackenzie v. Coulson* [1869] 8 Eq., 368, 3, Keener, 271.

⁴ *Fowler v. Fowler* [1859] 4 De G. & J., 250, 264-5.

only a new *written* agreement. Rescission is a more drastic remedy than rectification, and will not be readily resorted to in the case of executed contracts. To afford relief in the milder form is "not to make a new contract for the parties, but simply to refuse to set aside the contract which they have made for themselves, under a mistake, provided the party profiting by the mistake will do a more perfect equity by correcting the same."¹

Prior complete agreement.

A plaintiff, therefore, who seeks the assistance of a court for the rectification of a contract in writing must clearly prove,² that (a) there was a prior complete agreement, which (b) according to the common intention was embodied in writing, but (c) by reason of fraud or mistake in framing the writing, this does not express or give effect to the agreement.³ A negotiation not concluded is not enough,⁴ nor an honourable understanding which, as of imperfect obligation, the law does not enforce.⁵ And if the writing purport to contain the contract, but omit some material part thereof, and there was no common intention to put the whole contract into writing, the document cannot be rectified.⁶ *E.g.*, the parties may have deliberately agreed to leave out a certain clause. In *Lord Irnham v. Child*,⁷ there was a deed granting an annuity which the parties intended to be redeemable, but from which a clause containing the power of redemption was designedly omitted, as the parties at the time thought (erroneously, as they subsequently discovered) that its insertion would make the contract usurious. So, a power of subsequent revocation may be intentionally left out of a voluntary deed, because of an erroneous belief of the grantor that, notwithstanding such

Deliberate omission.

¹ *Lawrence v. Staigg* [1866] 8 R. I., 256, 3 Keener, 233.

² S.R.A., s. 31. The word 'contract' here means the instrument purporting to embody the contract, *Jewraj v. Norwich Assurance Co.* [1903] 5 Bom., L.R., 853. *Breadalbane v. Chandos* [1836] 2 M. & C., 711.

³ *Per Monks, J.*: "In every case, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon, and that the writing afterwards signed fails to be, as it was intended, an exe-

cution of such previous agreement, but, on the contrary, expresses a different contract." *Citizens National Bank v. Judy* [1896] 146 Indiana, 322. 4 Wigmore, 3400.

⁴ *Morocco Land Trading Co. v. Fry* [1865] 13 W.R. (Eng.), 310, 11 L. T., 618 (the slip, as distinguished, from the policy, is not a contract). *Marshall v. Westrope* [1896] 67 N. W. Rep., 257, 3 Keener, 172-3.

⁵ *Mackenzie v. Coulson*, *supra*.

⁶ 2 Williams, V. & P., 701.

⁷ [1781] 1 Bro. C. C., 92.

omission, he will have the power.¹ The omission in such cases is purposed, and, if the parties apply for rectification, they desire the court (in Lord Eldon's words) "not to do what they intended, for the insertion of that proviso was directly contrary to their intention, but they desire to be put in the same situation as if they had been better informed, and consequently had a contrary intention."² The parties, again, may have deliberately selected one species of security and rejected another. In the well-known case of *Hunt v. Rousmaniere's Administrators*,³ Choice. Rousmaniere had taken a loan from the plaintiff, upon an agreement to secure the amount on two ships. He offered to give a mortgage, but the plaintiff took the advice of counsel and preferred to take instead a power-of-attorney, authorising him to execute a bill of sale of the vessels, and, in case of loss, to collect the amount for which the said vessels were insured. The security so chosen failing or proving inadequate, the court cannot direct a new security to be substituted therefor. And, finally, the parties may deliberately agree to renounce doubtful rights, because they are not clear as to the law applicable, or certain about the facts.⁴ The form of the instrument in the above cases, by whatever considerations arrived at, is part of a real agreement and the result of an effective choice of courses,⁵ and if either party dislikes it afterwards, and pleads, say, an error of law, since the parties have agreed upon the law, whether their view be right or wrong, there can be no relief.⁶ For no court will be justified in making a new contract for the parties.⁷ The mistakes of law, then, against which equity will not relieve, are those which pertain to the subject of the contract, and were

Mistake of law.

¹ *Worrall v. Jacob* [1817] 3 Mer., 256, 270. Distinguish *Martin v. N. Y. S. & W. R. Co.* [1882] 36 N. J. Eq., 109, 3 Keener, 89.

² *Townshend v. Stangroom* [1801] 6 Ves., 328, 333. Cf. *Pitcairn v. Ogbourne*, 2. Ves. Sr., 375; *Williams v. Jones* [1888] 36 W. R., (Eng.) 573; *Vouillon v. States* [1857] 25 L. J. Ch., 875; *Kelly v. Turner* [1883] 74 Alab., 513, 3 Keener, 92.

³ [1828] 1 Peters, 1, 3 Keener, 13 n. Cf. *Marshall v. Westrope* [1896] 98 Iowa, 324, 3 Keener, 166; *Greene v. Smith*, 160 N. Y., 533.

⁴ *Stewart v. Stewart* [1839] 6 Cl. & F., 911; *Stone v. Godfrey* [1854] 5 DeG. M. & G., 76; *Sears v. Grand Lodge*, 163 N. Y., 374; *Pollock, Con.* (W. W.), 578.

⁵ *Pollock, Con.* (W. W.), 577.

⁶ *Bigelow, I. L. Q. R.*, 300, 1 Story, Eq., 114-5n.

⁷ 2 *Pomeroy, Eq. R.*, 1141; *Whitemore v. Farrington* [1879] 76 N. Y., 452, 3 Keener, 212, (per Rappallo, J., "After a contract has been thus fully performed, there can be no jurisdiction in equity to decree a second performance.")

inducements thereto, or considerations therefor. In such cases, the parties intended to make the very contracts which they executed, but they were mistaken as to the results to be reached, and these results were inducements to the contracts. The mistakes do not pertain to the instruments, but to their effect upon the rights of the parties, possibly not contemplated by the contracts or provided for therein.¹

Mutual mistake.

If a mistake is averred as the ground for the reformation of a written contract, the evidence must prove "a mistake common to all the parties,"² i.e., a common intention, different from the expressed intention, and a common mistaken supposition that it is rightly expressed.³ There is no mistake as to what was agreed, the mistake is in the expression of the agreement in writing. If there were a mistake in the agreement itself, that would preclude a *consensus ad idem*, and no contract would be formed, and there would be nothing to rectify the instrument by.⁴ A mutual mistake, therefore, must be shown.⁵ If the court were to act upon the mistake of one party to the agreement only, it would be imposing upon the other party the erroneous conception of this.⁶ As Ames, C. J., explained, "If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have engaged in the singular office, for a court of equity, of doing right to one party, at the expense of a precisely equal wrong to the other."⁷ The mistake may be

¹ *Stafford v. Fetters* [1881] 55 Iowa, 484, 3 Keener, 88 *Ante*, 339-40.

² *Per Romilly, M. R., Bentley v. Mackay* [1869] 31 Beav., 151.

³ *Pollock, Con. (W. W.)*, 639.

⁴ *Cf. Beale v. Kyte* [1907] 76 L. J. Ch., 294.

⁵ *S. R. A.*, s. 31; *Henkle v. Royal Exchange Assurance Co.* [1749] 1 Ves. Sr., 318; *Mortimer v. Shortall* [1842] 2 Dr. & W., 368; *Rooke v. Lord Kensington* [1856] 2 K. & J., 753; *Earl of Bradford v. Earl of Hounsey* [1862] 30

Beav., 431; *Hills v. Rowland* [1853] 4 DeG. M. & G., 430; *Thompson v. Whitmore* [1860] 1 J. & H., 268, 276; *Jawahir Singh v. Arjun Singh* [1904] 8 O. C., 1.

⁶ *Sells v. Sells* [1860] 1 Dr. & Sm., 42; *Fry*, 345.

⁷ *Dimun v. Providence W. & B. R. Co.* [1858] 5 R. L., 130, 3 Keener, 258. *Cf. Gun v. McCarthy, L. R., Ir.*, 13 Ch. D., 404; *Williams v. Hamilton*, 65 Am. St. R., 475.

either as to the contents or the effect of the instrument, but it must be a mistake of both parties, in regard to the same matter.¹ Where mistake is proved as a fact, the plaintiff's negligence cannot be pleaded as a bar to relief.² "The rule *caveat emptor* applies," said Sawyer, J., "to the making of the contract of purchase—the negotiations, the agreement, the inducements upon which the purchaser acts, the grounds on which the minds of the parties meet, but not to the formal, clerical process of giving the purchaser written evidence of the completed bargain."³ A conveyance may, therefore, be rectified where it purports to pass property which the parties never intended to deal with; there is a common error in such case. Such was the case of *Crowe v. Lewin*,⁴ where it was proved that, what one meant to sell, the other did not mean to buy, and what one meant to buy, the other did not mean to sell. But where the vendors did intend to sell all their remaining interest in some property, but by their own mistake they misdescribed the nature of that interest, it is a case of unilateral mistake, and there can be no relief.⁵ The conveyance here is such as the parties intended it should be, and the grantee may in good conscience retain the property, though it turns out to be more valuable than it was supposed to be.⁶

In a case where the plaintiff had agreed to sell two houses according to a certain plan, but the conveyance prepared by the defendant's solicitor referred to a different plan and affected a larger property, Romilly, M. R., said that, as the court would not enforce specific performance of a contract which one party had made under a mistake, so the court might interfere where rectification was claimed on the ground of unilateral mistake, if the parties could be placed in *statu quo*, and, following an older precedent of his own,⁷ gave the defendant, who had traversed the plaintiff's averments, an option of "having the whole contract annulled or else of taking it in the form

Unilateral
mistake.

¹ *Page v. Higgins* [1889] 150 Mass., 27, 5 L. R. A., 152.

² *Pomeroy, Eq. J.*, s. 856.

³ *Hitchins v. Pettingill* [1876] 58 N. H., 3, 3 Keener, 371.

⁴ [1884] 95 N. Y., 423, 3 Keener, 294.

⁵ *Okill v. Whittaker* [1847] 2 Ph., 338, 3 Keener, 227.

⁶ *Stedwell v. Anderson*, 21 Conn., 139.

⁷ *Garrard v. Frankel* [1862] 30 Beav., 445, 3 Keener, 261.

which the plaintiff intended.”¹ This course was also adopted in two later cases.² But there can be no doubt that the learned Master of the Rolls laid down the law as to the effect of mistake too broadly,³ and the cases must be regarded as anomalous.⁴ The court was apparently unable to determine whether the plaintiff’s allegation of mistake was correct or the defendant’s denial thereof, and attempted to give an equitable judgment on the hypothesis that both stories were true.⁵ If the parties did not rightly understand each other, it was not possible without consent to make either take what the other had offered.⁶ Farwell, J., has recently examined these cases and pointed out that the defendant’s conduct, though not actually stigmatised as fraud, was treated as equivalent to it. His lordship holds that in the absence of fraud, there is no jurisdiction to grant the relief of rectification upon the ground of unilateral mistake.⁷ Turner, L. J., however, suggested an exception in the case where the object of the rectification was to set aside a deed *pro tanto* as against the party alleging the mistake and where the particular part of the instrument affecting this party could be taken out. But this was an *obiter*.⁸

Fraud.

The expression ‘mutual mistake’ has been criticised, for the mistake averred is in the writing, and where the defendant has intended it, the mistake is obviously on one side only.⁹ But in such a case, the defendant’s conduct may be deemed fraudulent;¹⁰ and where fraud can be established, the plaintiff may claim rectification, mistake or no mistake.¹¹ Where the instrument does not express the true intent of the parties, owing

¹ *Harris v. Pepperell* [1867] 5 Eq., 1.

² *Bloomer v. Spittle* [1872] 13 Eq., 427, 3 Keener, 398 (Romilly, M. R.); *Paget v. Marshall* [1884] 28 Ch. D., 255, 3 Keener, 295 (Bacon, V. C.). Cf. also *Brown v. Lamphear*, 35 Vt., 252, and other American cases cited in Pollock, *Con.* (W. W.), 600 n.

³ Cf. *Tamplin v. James* [1880] 15 Ch. D., 215; 2 Williams, V. & P., 712.

⁴ 2 Dart, V. & P., ed. 6, 839, ed. 7, 743; Pollock, *Con.* (W. W.), 644; Kerr, *Fraud*, 500.

⁵ 2 Williams, V. & P., 716 (where the cases are examined and analysed

with much ability).

⁶ Cf. *Clowes v. Higginson* [1813] 1 V. & B., 524, 535; Pollock, *Con.* (W. W.), 000-1.

⁷ *May v. Platt* [1900] 1 Ch., 616, 623; Fry, s. 782, p. 345.

⁸ *Bentley v. Mackay* [1862] 4 DeG. F. & J., 279.

⁹ *Rider v. Powell*, 28 N. Y., 310; Bigelow, 1 L. Q. R., 298, 1 Story, *Eq.*, 150 n.

¹⁰ 2 Williams, V. & P., 718.

¹¹ S. R. A., s. 31; 1 Story, s. 154. *Welles v. Yates* [1871] 44 N. Y., 525, 3 Keener, 272.

to mistake on one side coupled with fraud or inequitable conduct on the other, relief will be freely given,¹ and no question will be raised as to how far the mistake may be attributed to the plaintiff's own negligence.² It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded, when he demands relief, that he ought not to have believed or trusted him.³ Where the defendant is shown to have been aware not only that the instrument did not express the real agreement, but that the plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is clearly one for reformation.⁴ Cases have occurred where one of the parties has really acted as the other's agent and prepared the deed which, relying upon him, the other has executed. If it afterwards turns out that the latter has acted upon a wrong assumption and the instrument was not properly framed, a court of equity may reform it.⁵

The burden of proof that the instrument does not agree with the intention, is upon the plaintiff in a suit for rectification,⁶ and in order to discharge it he must adduce evidence that is clear, cogent and convincing. Equity will reform a contract only when, after reformation, it will express the understanding of both parties at the time.⁷ In rectifying a written instrument, therefore, the court may inquire what the instrument was intended to mean, and what its legal consequences were intended to be, and is not confined to the inquiry as to what the language of the instrument was intended to be.⁸ In the absence of existing writing which contains the original instructions or

Evidence,
parol.

¹ *Simmons Creek Co. v. Doran*, 142, U. S., 417; *Kilmer v. Smith* [1879] 77 N. Y., 126, 3 Keener, 283; *Citizen's Nat. Bank v. Judy* [1896] 146 Indiana, 322, citing 4 Pomeroy, *Eq. J.*, s. 1376. Cf. *Evans v. Llewellyn* [1877] 1 Cox., 333.

² *Albany City Savings Inst. v. Burdick* [1881] 87 N. Y., 40, 3 Keener 378; *West v. Sudda*, 69 Conn. 60 (failure to read is not negligence). Otherwise where no fraud, *Eldridge v. Dexter P. R. Co.* [1895] 88 Maine, 191, 3 Keener, 160.

³ *Per Earl, J., Albany City Savings Inst. v. Burdick*, supra.

⁴ *Keister v. Myers* [1888] 115 Indiana, 312, 3 Keener, 314.

⁵ *Clark v. Girdwood* [1877] 7 Ch. D., 9; *Lovesy v. Smith* [1880] 15 Ch. D., 665; *Pollock, Con. (W. W.)*, 641-2. Cf. 1 Story, *Eq.*, s. 138 c.

⁶ *Wright v. Goff* [1856] 22 Beav., 207; *Bonhote v. Henderson* [1895] 1 Ch., 742, 2 Ch., 202.

⁷ *Wilkinson v. Nelson* [1861] 7 Jur. N. S., 480.

⁸ *S. R. A.*, s. 33. Cf. *Murray v. Parker* [1854] 19 Beav., 305, 308; *Shelburne v. Inchiquin* [1784] 1 Bro. C. C., 338, 341; *Ivinson v. Hutton* [1878] 98 U. S., 79, 3 Keener, 234.

contract, parol evidence will be acted upon by the court.¹ This is an exception to the general rule that where a contract, grant or other disposition of property has been reduced to writing, evidence of intention *dehors* the document cannot be admitted for varying its terms in any way.² And it is an exception that follows from the very nature of the case put forward by the plaintiff. Where a court is asked to reform a document because it does not correctly express the intention of the parties, the expression becomes immaterial and the issue to be determined is—what was the intention, the intention, *i.e.*, as to the meaning and effect of the agreement the parties had entered into, and not as to the words they had chosen to employ? And the intention which the court has to ascertain is that which was in the mind of the parties at the time they entered into the contract, and not that which might have arisen later on by reason of subsequent developments.³ “You cannot prove,” said Holmes, J., “a mere private convention between the two parties to give language a different meaning from its common one.” But “as an artificial construction cannot be given to plain words by express agreement, the same rule is applied when there is a mutual mistake not apparent on the face of the instrument,” and it “must be construed to mean what the words would mean if there were no mistake.”⁴

Nature of
evidence.

The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court, as to either of these points.⁵ In England, courts have from time to time formulated special rules of evidence to guide judicial discretion in cases of rectification. The proof must be “strongest possible,” it has been said by one authority,⁶ “strong and irrefragable,” by another.⁷ The ordinary rule of evidence in civil actions that a fact must be “proved by a preponderance of evidence, does not apply to such a case as this,”

¹ *Jiwaraj v. Norwich Assurance Co.* [1903] 5 Bom. L. R., 853.

² Ind. Ev. Act, s. 92; *Balkishen v. Legge* [1899] 22 All. 149, 158, P. C. Cf.

³ *Williams, V. & P.*, 698.

⁴ 1 Story, *Eq.*, s. 164 (b).

⁵ *Goode v. Riley* [1891] 153 Mass.,

585, 3 Keener, 254.

⁶ *Hearne v. Marine Insurance Co.*, 20 Wallace, 488.

⁷ *Townshend v. Stangroom* [1801] 6 Ves., 328, 333 (Lord Eldon).

⁸ *Shelburne v. Inehiquin* [1784] 1 Bro. C. C., 388 (Lord Thurlow.)

says the Massachusetts Court.¹ Oath against oath has been deemed insufficient; and where the defendant by his answer has traversed the case set up by the plaintiff, the latter has not been allowed to succeed upon parol evidence alone.² So, where a previous agreement in writing has been produced, which is unambiguous, the court has refused to admit parol evidence to rectify the final instrument executed in accordance with such agreement.³ But the legislature in India has avoided hard and fast rules, and rightly. It may be admitted that "until beyond reasonable controversy the mistake is made to appear, the writing must remain the sole expositor of the intent and agreement of the parties."⁴ The presumption in favour of the written over the spoken agreement is almost resistless.⁵ But it is also clear that when the mind of the court is entirely convinced upon any disputed question, it is its duty to act upon the conviction.⁶ The true rule seems to be that equity will not reform an instrument on the ground of mistake, unless the evidence is clear and convincing.⁷ The remedy may not be granted upon a probability or even a mere preponderance of the evidence,⁸ the court should act with care and caution;⁹ but if it is reasonably satisfied of the error, there is no reason why it should not act even upon parol evidence, though there is nothing in writing to which the parol evidence may attach.¹⁰

¹ *Hudson Iron Co. v. Stockbridge Iron Co.* [1870] 102 Mass., 45, 49.

² *Mortimer v. Shortall* [1842] 1 Dr. & War., 363, 374; *Attorney-General v. Sitwell* [1835] 1 Y. & C., 559, 583. But see as to these dicta 2 Williams, V. & P., 702 n. Where mistake is admitted, see *Pollock, Con.* (W. W.), 638.

³ *Davies v. Fitton* [1842] 2 Dr. & War., 225, 232; *Pollock, Con.* (W. W.), 637. If the previous agreement is ambiguous, parol evidence is admissible to explain it, *Murray v. Parker*, supra. But in the absence of any express reference, there does not seem to be any presumption that the previous agreement in writing represented the intention of the parties even at the time when the instrument sought to be rectified was executed. 1 Story, *Eq.*, s. 160.

⁴ *Hinton v. Insurance Co.*, 63 Alabama, 488.

⁵ *Park Bros. & Co. v. Blodgett &*

Clapp, [1894] 64 Conn., 28, 3 Keener 155.

⁶ *Waterman*, 515: "The court will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the contract and all the provisions and expressions of the instrument. The court will also call in aid the acts done under the contract and deed, and contemporaneous writings made between the parties at or near the time when the deed was executed, relating to the same subject-matter."

⁷ S. R. A., s. 31. *Wall v. Meeilk*, 89 Minn., 232, 240; *Southard v. Ourley* [1892] 134 N. Y., 148, 3 Keener, 460.

⁸ 2 Pomeroy, *Eq. J.*, s. 859; 1 Story, *Eq.*, s. 157.

⁹ *Murray v. Parker*, supra.

¹⁰ *Alexander v. Crosbie* [1835] Ll. & G., 145, 150, 46 R. R., 185; *Gillespie v. Moon* [1817] 2 Johns. Ch., 585.

And a court may rectify a written contract not only when the fact of the mistake is *expressly* established, but also when it is fairly *implied* from the nature of the transaction.¹ Thus, where a joint loan of money is advanced to two or more obligors, but by the instrument which is drawn up they are made jointly liable, and not jointly and severally, the nature of the transaction and the circumstances of the case, may raise a presumption that the parties intended the bond to be joint and several, but failed to do so by mistake or want of skill, and the court may give effect to the presumption by reforming the instrument, if satisfied about the mistake and the intention.²

Marriage
settlements.

Rectification is frequently applied for in England in connection with marriage and other family settlements, and in many of these cases articles previously prepared are available for comparison and reference. Where the settlement purports to be in pursuance of the articles, but is found to differ, the court may presume mistake and reform the latter document, and will apparently make no distinction between an ante-nuptial and a post-nuptial settlement. But if the settlement does not refer to the previous articles, the court will not act upon any presumption but will require proof as to whether the settlement was or was not meant to follow the articles.³ In rectifying a settlement the intent of the articles, and not its actual words, will have to be primarily considered;⁴ and the court will act with extreme caution, because it is impossible to recall the marriage, or to remit the parties to the same position in which they were before the marriage.⁵

Executed
documents.

A court of equity would be of little value, it has been said, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties.⁶ Reformation in such a case can injure neither party; it will, on the contrary, advance their real purpose; while a refusal to reform may work a surprise or

¹ 1 Story, *Eq.*, s. 162.

² *Bishop v. Church* [1750] 2 Ves., Sr., 100, 371.

³ *Bold v. Hutchinson* [1885] 5 DeG. M. & G., 558, 567-8.

⁴ *Cogan v. Duffield* [1876] 2 Ch. D., 44.

⁵ *Per Lopes, L. J., Tucker v. Bennett* [1887] 38 Ch. D., 1.

⁶ 1 Story, *Eq.*, s. 155.

fraud upon both.¹ A court of equity, therefore, makes no difference between documents, upon the ground of their being either executory or executed ; when a case of reformation is clearly established, a memorandum or articles will be as readily rectified as a duly executed and registered conveyance.² The consummation of the transaction in ignorance of the mistake, without laches on the part of the party injured, gives to the other party no immunity from making recompense, nor does it deprive the court of the power to remedy the injustice.³ And the relief has sometimes been given in a comprehensive form. Where the same mutual mistake has been repeated in each of a chain of conveyances, equity may work back through all and hold the last vendee entitled to a reformation against the original grantor.⁴ And, where a mutual mistake in the description of the mortgaged property was copied from the mortgage-deed into the foreclosure decree and thence into the sheriff's deed to the foreclosure purchaser, American courts have gone back to the original transaction and reformed the mortgage and decree as well as the deed, so as to make them conform to the intention of the parties concerned.⁵

But the court has a discretion to exercise, and it may refuse to rectify a contract in writing, where rectification will not alter its effect, nor render it operative.⁶ Equity does not interpose to correct mistakes by which the rights or interests of the parties are not affected.⁷ So it may hold its hand where it considers the agreement inequitable or unconscientious.⁸ He

Relief
refused.

¹ *Ante*, 25.

² *Beaumont v. Brumley* [1822] T. & R., 41, 52 ; *Fife v. Clayton* [1807] 13, Ves. 546 ; *White v. White* [1873] 15 Eq., 247 ; *Cowen v. Truefitt* [1899] 2 Ch., 309 ; *Re Ethel & Mitchells & Butler's contract* [1901] 1 Ch., 945 ; *Olley v. Fisher* [1886] 34 Ch. D., 367, 369.

³ *Per Andrews, C.J., Paine v. Upton* [1882] 87 N. Y., 327, 3 Keener, 392.

⁴ *Blackburn v. Randolph*, 33 Ark. 119 ; *Tillis v. Smith*, 108 Alabama, 264.

⁵ *Busey v. Moraja*, 130 Calif., 586 ;

⁶ *Pomeroy, Eq. R.*, 1143. But see *Stephenson v. Harris*, 131 Alabama, 470. In *Waldron v. Letson*, 15 N. J. Eq., 126, purchaser was quieted in his possession against mortgagor. In *Thompson v. Hickman* [1907] 76 L. J.,

Ch. 254, 258, *Neville, J.*, while following *Davies v. Fitton* [1842] 2 Dr. & W. 225, and *May v. Platt* [1900] 1 Ch., 616, observed, "to grant relief where error has crept into one document, and refuse it where it is embodied in two, is inconsistent with equitable principle, for equity regards the substance rather than the form of a transaction."

⁷ *Gardner v. Knight*, 124 Alabama, 273 (effect same) ; *McCrory v. Williams*, 127 *ibid*, 251 (mortgage remains inoperative even after reformation).

⁸ *Daggett v. Ayer* [1888] 65 N. H., 82, 3 Keener, 183.

⁹ S. R. A., s. 32. "On what authority this section is supposed to be founded I know not," *Pollock, F. M. M.*, 123.

who comes into equity must come with clean hands. And where a plaintiff has lost a remedy by his own *laches*, the court will not by rectification grant a remedy which will be exactly equivalent.¹ So if an agreement has been adjudicated upon and performed under the direction of a competent court, it cannot be subsequently rectified.² An agreement is rectified for some legitimate purpose, and if nothing remains to be done under it, there is no ground for rectification.³ Nor will equity interfere in favour of a volunteer who has given neither valuable nor meritorious consideration for a conveyance which is left imperfect.⁴ On the other hand, as a person has perfect liberty to dispose of his property gratuitously if he likes, where he has done so irrevocably, he cannot expect any court to help him, except upon strictly legal and equitable grounds.⁵ And in any case, an action for rectification will fail, if neither fraud nor mutual mistake can be clearly proved.⁶ Where a mistake is relied upon, to warrant relief in equity, it must be shown to be material. The matter of fact to which it relates must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake, the plaintiff would not have assumed the obligation from which he seeks to be relieved.⁷

Parties.

The relief of rectification may be granted where the question is mooted as between the original parties to the agreement or their representatives in interest,⁸ *e.g.*, heirs, devisees, legatees, assignees, voluntary grantees, or judgment-creditors,⁹ or purchasers

¹ *Daggett v. Ayer*, *supra*; 2 Pomeroy, *Eq. R.*, s. 678.

² *Caird v. Moss* [1886] 33 Ch. D., 22.

³ *Kelleher*, 195.

⁴ *Phillipson v. Kerry* [1863] 32 Beav., 628; *Brown v. Kennedy* [1863] 33 Beav., 147; *Lister v. Hodgson* [1867] 4 Eq., 30, 34. "If there is a mistake or a defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to correct," *Adair v. McDonald*, 42 Ga., 506. "Equity never gives active assistance to a volunteer," unless its aid is invoked in favour of a voluntary trust com-

pletely executed, *Thompson v. White-more* [1860] 1 J. & H., 268.

⁵ *Phillips v. Mullings* [1871] 7 Ch., 244; *Turner v. Collings* [1871] 7 Ch., 329, 342; *Hall v. Hall* [1873] 8 Ch., 430; *Bonhote v. Henderson* [1895] 1 Ch., 742, *affd.* 2 Ch., 202.

⁶ *Amanat Bibi v. Lachman Persad* [1886] 14 Cal., 308, P. C.

⁷ *Grymes v. Sanders* [1876] 93 U. S., 55, 3 Keener, 178. *Kerr, Fraud*, 4th, ed. 477.

⁸ S. R. A., s. 31. For form of decree, see *White v. White* [1872] 15 Eq., 247; *Stock v. Vinning* [1858] 25 Beav., 235.

⁹ 2 Pomeroy, *Eq.*, s. 721.

from them, with notice of the facts.¹ And in the case of a settlement, it has been said that the plaintiff, who seeks rectification, need not be or represent one of the original parties to it, or be even within its consideration.² But no reformation can be had as against innocent third parties, who are not in privity with the parties who originally contracted.³ And as the right to claim rectification is only an equity,⁴ it can be given effect to only without prejudice to rights acquired by third persons in good faith and for value.⁵ Such rights, acquired on the faith of the instrument as it stood, deserve at least equally to be protected by a court of equity, and the instrument cannot be reformed after a *bonâ fide* acquisition of the subject-matter for value.⁶

A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the court thinks fit the rectified contract may be specifically enforced.⁷ *E.g.*, where a client has contracted with his solicitor to pay him a fixed sum in lieu of costs, but the written contract contains mistakes as to the name and rights of the client, which, if construed strictly, will exclude the attorney from all rights under it, the latter may in the same suit have it rectified and, if the court thinks fit, obtain an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.⁸ When equity once acquires jurisdiction it is retained, as we have seen, for full relief,⁹ so there is no reason why any additional relief that may be proper, *e.g.*, specific performance or damages, should not be awarded in the same suit.¹⁰ A contrary practice used to

Enforcement after rectification.

¹ 1 Story, *Eq.* s. 165.

² *Thompson v. Whitmore* [1860] 1 J. & H., 268, 273.

³ *Adams v. Baker*, 24 Nev., 162, 77 Am. St. R., 799.

⁴ 2 Williams, V. & P., 719.

⁵ S. R. A., s. 31.

⁶ *Blackie v. Clark* [1852] 15 Beav., 595; *Garrard v. Frankel* [1862] 20 Beav., 445; *Fane v. Fane* [1875] 20 Eq., 6:8; 2 Pomeroy, *Eq., J.*, s. 776; 1 Story, *Eq.*, 151 n.

⁷ S. R. A., s. 34. In the converse case, however, of suit for recovery of property sold without prior demand for rectification of sale-deed, relief

has been refused, *Sajjad v. Baker* [1907] 11 O. C., 93; *Sed quare*.

⁸ S. R. A., s. 34 ill.; *Stedman v. Collett* [1854] 17 Beav., 608.

⁹ *Taylor v. Merchants Fire Ins. Co.* [1850] 9 Howard, 390, 1 Ames, 60. *Ante*, 415.

¹⁰ 1 Pomeroy, *Eq. J.*, s. 238. In America, foreclosure of mortgage (*Christensen v. Hollingsworth*, 96 Am. St. R., 256), recovery on insurance policy (*Taylor v. Glens Falls Ins. Co.*, 44 Fla., 273), and removal of cloud on title (*Bieler v. Dreher*, 129 Alabama, 384), have also been decreed in suits for reformation.

obtain in England formerly,¹ and even after the Judicature Act the practice does not seem to have become settled in favour of a more liberal and less technical rule.² But, upon principle, it seems clear that "if the court has a competent jurisdiction to correct such mistakes, the agreement when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties."³ In a recent case, where by the mistake of an insurance agent a policy of insurance was issued regarding certain property which was erroneously described as located in a certain building, and the property was destroyed subsequently in the building to which the contract was intended to attach, the Texas Supreme Court permitted the assured to sue on the contract, without previously securing a reformation of the policy.⁴

Limitation.

A suit for the rectification of an instrument has not been specially provided for in the first schedule of the Indian Limitation Act, and it has accordingly been suggested that the residuary article 120 applies.⁵ But as the plaintiff seeks relief on the ground either of mistake or fraud, articles 96 and 95 seem to be in point, and the Punjab Chief Court has taken this view.⁶ Where a question of *laches* is raised, time cannot clearly run from the date on which the mistake was committed, but the *terminus a quo* must be the time when the attention of the person claiming relief was first called to the error.⁷

(B) Rescission of Contracts.

The rescission of a contract may be said to be a remedy

¹ Fry, ss. 811-2, pp. 351-4, where the question is well discussed. See also 2 Williams. V. & P., 703-7.

² Cf. *Olley v. Fisher* [1886] 34 Ch. D., 367, with *May v. Platt* [1900] 1 Ch., 616; 2 Dart, V. & P. 1046-7.

³ Per Kent, C., *Keisselbrack v. Livingston* [1819] 4 Johns. Ch., 144, 2 Scott, 616. 1 Story, Eq., s. 161. Ante, 428. As to the form in which relief by way of reformation is given, see *Stock v. Vining* [1858] 25 Beav., 235; *White v. White* [1872] 15 Eq., 247;

Smith v. Eliffe [1875] 20 Eq., 666; *Andrews v. Andrews* [1889] 81 Me., 337; Seton, *Judgments*, Ch. XLV, s. 1 (iii). (1911) 21 M. L. J. 967 (notes).

⁴ *Ætna Ins. Co. v. Brannon* [1905] 2 L. R. A., N. S., 548.

⁵ *Advocate General v. Punjabai* [1894] 18 Bom., 551, 562; *Mitra, Lim.*, 935.

⁶ *Gopal v. Arura* [1901] P. R. no. 62.

⁷ *Beale v. Kyte* [1907] 76 L. J. Ch., 294.

converse to that of specific performance. In such a case, the plaintiff's prayer is that the contract may not be enforced. And this may be so, either because the plaintiff has reserved to himself by agreement a right, in certain contingencies, to withdraw from the contract, or because the contract has been concluded under such circumstances, or is otherwise such as by law not to be binding upon the plaintiff unless he chooses to affirm it. Take the case of a contract for sale of immoveable property induced by the vendor's fraud. Here, upon discovery of the fraud, the purchaser has an election: he may either affirm or repudiate the contract. If he chooses to affirm, he may insist upon being put, so far as practicable, in the same position as if the representation had been true.¹ If he chooses to repudiate, he may within a reasonable time claim to be restored, so far as may be, with due regard to the altered circumstances and the rights of *bonâ fide* purchasers for value, if any, to his former position,² and if he has received any benefit thereunder he must, so far as may be, restore the same to the person from whom it was received.³ If the defrauded party chooses to sue, three remedies seem open to him. He may rescind the contract absolutely and sue to recover the consideration parted with upon the fraudulent contract, or he may bring an action to rescind the contract and in that action have full relief, or he may retain what he has received and bring an action to recover the damages sustained.⁴ The first action presupposes a rescission by act of parties, which, as the Contract Act will show, may take place under a variety of circumstances. The contract may contain an option to rescind,⁵ it may be voidable,⁶ it may have been broken⁷ or a breach threatened,⁸ or it may have been novated.⁹ The last action proceeds upon an affirmance of the contract. Section 35, Specific Relief Act, provides for the second class of action, which is essentially equitable.

¹ I.C.A., s. 19.

² Pollock, *Con.* (W. W.), 705-6.

³ I.C.A., s. 64.

⁴ *Vail v. Reynolds*, 118 N.Y., 297.

⁵ Cf. I. C. A., s. 121.

⁶ I.C.A., ss. 19, 19A, 64.

⁷ *Ibid*, s. 39. *Outter v. Powell* [1795] Smith, L. C., 12th. ed., 1, and notes.

Subba Ram v. Devuketti [1894] 18 Mad., 126.

⁸ I.C.A., s. 39. Cf. *Purshotamdas v. Purshotamdas* [1896] 21 Bom., 23; *Hochster v. De la Tour* [1853] 2 E. & B., 678; *Roehm v. Horst* [1900] 178 U. S., 1, H. & W., 843.

⁹ I.C.A., s. 62.

S. R. A.,
s. 35.

An examination of this section shows that the relief of rescission may be asked for in respect of contracts, whether in writing or not, wherever the Transfer of Property Act is in force,¹ and in respect of written contracts only in other places, and it may be asked for in four classes of cases. I will now consider these *seriatim*.

(i) Terminable contract.

(i) The contract may be terminable at the instance of the plaintiff, *i.e.*, it may reserve a right to rescind in his favour.² The parties may stipulate for a condition subsequent, which will put an end to the contract. The "excepted risks" of a charter-party³ may be referred to as an illustration in point. Or the vendor of immoveable property may agree that if he fails to show a good title within a specified period, the bargain will be off,⁴ and so the purchaser may agree that if he makes default in the payment of purchase-money by a certain date, the vendor may deem himself relieved of his obligations. An option of rescission must be construed with reference to the language employed. If the vendor has no title at all, he cannot take shelter under a condition which entitles him to rescind in the event of the purchaser making an objection or requisition in respect of the title which the former is unwilling to comply with.⁵ The condition applies only to an honest case.⁶ No party can capriciously and arbitrarily refuse to perform his promise,⁷ and, unless there is an express reservation in favour of unwillingness, the court will require to be satisfied by the party seeking to exercise a contractual right to rescind, that he has done all that was incumbent upon him and the act stipulated *can not* be done.⁸ The condition must be acted upon *bonâ fide*, and the occasion for taking such action must be within the stipulation,⁹

¹ Act IV. of 1882, ss. 1, 2, and sch.

² *Marsden v. Sambell* [1881] 43 L. T., 120.

³ *Geipel v. Smith* [1872] 7 Q.B., 404. In the case of a contract with a common carrier, there is an implication in favour of "the act of God or of the King's enemies." *Nugent v. Smith* [1876] 1 C. P. D., 423.

⁴ *Whitbread & Co. v. Watt* [1901] 1 Ch., 911 [1902] 1 Ch., 885.

⁵ *Bowman v. Hyland* [1878] 8 Ch. D.,

588, 590 (vendor was made to pay damages for non-performance)

⁶ *Re Deighton & Harris's Contract* [1898] 1 Ch., 458, 463.

⁷ *In re Dames & Wood* [1885] 29 Ch. D., 626; *In re Starr-Bowkett Society & Sibun* [1889] 42 Ch. D., 375; *Re Jackson & Haden* [1906] 1 Ch., 412.

⁸ *Page v. Adams* [1841] 4 Beav., 269; *Greaves v. Wilson*, [1858] 25 Beav., 290.

⁹ *Re Jackson & Oakshott* [1880] 14 Ch. D., 851; *Re Weston & Thomas*, [1907] 76 L. J. Ch., 179.

and if the right is once waived, it cannot be reasserted.¹ An adverse judicial decision may also put an end to the right.²

(ii) The contract may be voidable by the plaintiff. This voidability may attach to a contract *ab initio*, or it may arise by reason of the subsequent conduct of one of the parties. Sections 19 and 19A, Indian Contract Act, show that when consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. I have discussed these circumstances in some detail before, and, as they are matters which belong to the general law of contracts, a lengthened consideration of them here is not strictly called for. I will therefore content myself with giving some illustrations. The general feature of all the cases is that some representation has been made which has been acted upon.³ This representation may have been innocent or not; but if the consent which has been thereby induced is not full and free,⁴ it does not bind. What, therefore, the plaintiff in an action for the rescission of a contract must establish is that (a) the defendant has made a representation in regard to a material fact,⁵ (b) which representation is false and (c) was not actually believed by the defendant on reasonable grounds⁶ to be true, and (d) which was made with intent that it should be acted upon, and that (e) it was acted upon by the plaintiff to his damage, and (f) in so acting upon it he was ignorant of its falsity, and reasonably believed it to be true.⁷ Where, *e.g.*, the nature of the property contracted to

(ii) Voidable contract.

Misrepresentation.

¹ *Hunter v. Daniel* [1845] 4 Hare, 420 (money payable by instalments); *Smith v. Wallace* [1895] 1 Ch., 385, 390 (vendor played fast and loose with purchaser).

² *Re Arbil & Glass's Contract* [1891] 1 Ch., 601.

³ The representation may be made a continuing one by agreement, and if it has ceased to be true at the time when a transaction is entered into on its basis, the contract may be rescinded, *Atlas Shoe Co. v. Bechard* [1906] 10 L. R. A., N. S., 245.

⁴ I. C. A., s. 14.

⁵ *2 Re Pacaya Rubber Co* [1914] 1 Ch., 542 (prospectus containing expert's report).

⁶ *Derry v. Peek* [1889] 14 A. C., 337, dispenses with this qualification. But this decision, though it has been followed at Allahabad (*ante* 291, *Shanto v. Nain Sukh* [1901] 23 All., 355, 358) is not, strictly speaking, binding on the Indian courts. Pollock, *F. M. M.*, 49 sqq.

⁷ *Southern Development Co. v. Silva*, 125 U. S., 247, 250. Cf. *Pennybacker v. Laidley* [1890] 33 W. Va., 624, 3 Keener, 493.

*Flight v.
Booth.*

be sold is not correctly stated,¹ or the burdens to which it is subject are concealed, the purchaser may have the contract annulled. *A* may agree to sell a field to *B*, over which there is a right of way. *A* has a direct personal knowledge of this, but he conceals it from *B*. *B* may by suit be relieved from the contract.² So, where an intended lessee is represented to be "a desirable tenant" when he is to the vendor's knowledge in arrears with his rent, the purchaser of the premises is entitled to rescission.³ In the ruling case of *Flight v. Booth*,⁴ certain leasehold premises were sold with a representation (found to have been made innocently) that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter." But when the original lease was produced, it was found to prohibit the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fish-monger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter, and many others, and also the sale of coals, potatoes, or any provisions. Tindal, C. J., held that there was such a material discrepancy between the particulars and the lease as to entitle a purchaser to rescind his contract, and he was not bound to resort to a clause of compensation contained in the lease.⁵ So, where in a sale of immoveable property, a misrepresentation is made by the vendor's solicitors that a certain deed contains no unusually restrictive covenant, whereas there is such a covenant which entitles the tenant in occupation at any time (and not, as is usual, within a limited time) to build an additional house as security

¹ *Hart v. Swaine* [1877] 7 Ch. D., 46 (copyhold sold as freehold); *Edwards v. McLeay* [1815] G. Coop. 308 (title to part of estate sold as fee simple, defective); *Nottingham Patent Brick Co. v. Butler* [1885] 15 Q. B. D. 261, affg. 16 Q. B. D. 778 (covenants preventing use of land sold as brickfield, not disclosed).

² S. R. A. s 35, ill. to (a); *Wilde v. Gibson* [1848] 1 H. L. C., 605, revg. 2 Y. & C. Ch., 542. Cf. *Ashburner v. Sewell* [1891] 3 Ch., 405, 409. Even where a sale is made subject to any existing rights and easements, if misleading statement is made about

an easement known to the vendor, that will avoid the sale. *Heywood v. Mallatieu* [1883] 25 Ch. D., 357; *Dunn v. Flood*, *ibid*, 629.

³ *Smith v. Lund etc. Corporation* [1884] 28 Ch. D., 7.

⁴ [1834] 1 Bing. N.C., 370, 6 R. C. 747.

⁵ Misrepresentation may entitle a person to rescind a contract, although there is a clause for compensation. *Re Fawcett v. Holmes*, [1889] 42 Ch. D., 150. The purchaser is not entitled to rescind the contract, if there is a latent but not material defect. *Re Shepherd v. Croft* (1910) 1 Ch. 521.

for the ground-rent, the purchaser's claim for rescission of the contract will be sustained.¹ But an innocent misrepresentation, thought Blackburn, J., will not justify rescission, unless such a complete difference in substance between what was supposed to be and what was taken, can be shown as to amount to a failure of consideration.² But where a material representation, false in fact, was proved, the rule in equity, which since the Judicature Act is the rule in all English courts,³ did not require further proof that the party who made it, knew at the time that it was false.⁴ To set aside a conveyance on the ground of inadequacy of consideration, there must be an inequality so strong, gross and manifest, that, thought Lord Thurlow, it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.⁵ Fraud, where it exists, would operate on the whole contract and justify an avoidance *in toto*, even where the contract is executed.⁶ But it must be remembered that the ignorance of the vendor is not of itself fraud on the part of the purchaser, and if the latter is enabled to make an advantageous bargain by reason of such ignorance, the contract will not be ordinarily set aside.⁷ "A purchaser is not bound by our laws," said Black, J., "to make the man he buys from as wise as himself."⁸ We have already considered the cases where there is a duty to speak.⁹ But even where there is no such duty in law, circumstances may exist which make the purchaser's silence immoral and unjust; and in such cases, a court of equity will refuse specific enforcement of

Fraud.

¹ *Andrew v. Aitken* [1882] 22 Ch. D., 218. In *Wauton v. Coppard* [1899] 1 Ch., 92, the misrepresentation was made by defendant's agent.

² *Kennedy v. Panama etc. Mail Co.* [1867] 2 Q. B., 580, 587.

³ *Benjamin, Sale*, 441.

⁴ *Redgrave v. Hurd* [1881] 20 Ch. D., 1, 12-3 (Jessel, M. R.). Moncrieff, *Fraud*, 310, sqq.

⁵ *Gwynne v. Heaton*, [1778] 1 Br. Ch., 1, 3 Keener, 506; *Summers v. Griffiths* [1866] 35 Beav., 27, 3 Keener, 512; *Butler v. Haskell* [1816] 4 Desaus., 650, 2 Scott, 674.

⁶ *Rawlins v. Wickham*, [1858] 3 DeG. & J., 304. *Edwards v. McLeay* [1818] 2 Sw., 287.

⁷ *Ante*, 230; *Williams v. Spurr* 24, Mich., 335 (iron ores not disclosed.) The limitations of this rule are pointed out by Lord Eldon in *Turner v. Harvey* [1821] Jac., 169, 178. Bigelow, *Fraud*, 592, 79 L. J. K.S. 547.

⁸ *Harris v. Tyson*, [1855] 24 Pa. St. 347, 3 Keener, 563. Cf. *Smith v. Beatty*, 2 Ired. Eq., 456, 40 Am. Dec., 435, (existence of gold mine not disclosed.)

⁹ *Ante*, 221-9; Bigelow, *Fraud*, s. 2.

an unfair bargain.¹ "If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title, while I know that he can, and I conceal that knowledge from him, is not that a *suppressio veri*," asks Lord Romilly, "which is one of the elements which constitute a fraud?" Where there is a duty to disclose and material facts have been concealed, the court will go further and rescind the agreement." And even in a sale "with all faults," where active steps have been taken to conceal defects in the object sold, *e.g.*, a vessel has been moved off her ways, where she lay dry, into the water, in order to conceal her worm-eaten bottom and broken keel, the contract is liable to be set aside.⁴ Wherever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation has been said, in effect, to amount to a warranty; at least, the seller is bound to make good the representation.⁵ It will not be out of place to add here that in an action to rescind upon the ground of fraud, the fraud is the essential thing, and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance.⁶ It should also be noted that a person who is not a party in the fraud may yet be answerable if he is a partner with the person who actually committed the fraud.⁷

¹ *Ante*, 230, 295. Cf. *Barwick v. English, Joint Stock Bank* [1867] 2 Ex., 259. In *Bowman v. Bates*, 4 Am. Dec., 677, the Kentucky Court set aside a sale, where the purchaser having discovered a valuable salt spring on a tract, bought it from the owner at an ordinary price, concealing his discovery. "One cannot help admiring the stern morality of this decision," says Pomeroy, "even if it be not sustained by the current of authority," 2 *Eq. J.*, 1615. But the purchaser's conduct appears to have been fraudulent, 6 R. C., 758.

² *Summers v. Griffiths*, *supra*.

³ *Venezuela Ry. Co. v. Kisch* [1867] 2 H. L., 99, 6 R. C., 759; *Erlanger v. New Sombrero Phosphate Co.* [1870] 3

A. C., 1218, 6 R. C., 777; *Re Metropolitan Coal Consumers Assn.* [1892] 3 Ch., 1; *Lynde v. Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch., 176.

⁴ *Buglehole v. Walters* [1811] 3 Camp., 154, 13 R. R., 778; *Schneider v. Heath* [1813] 3 Camp., 506, 14 R. R., 825; Fry, s. 876. See also *Shepherd v. Kain* [1821] 5 Barn. & Al., 240. Moncrieff, *Fraud*, 353-7.

⁵ *Smith v. Richards* [1839] 13 Pet., 26, 3 Keener, 539; *McKnight v. Thompson* [1894] 58 N. W. R., 453, 3 Keener, 637.

⁶ *Wainscott v. Occidental Loan Assn.* [1893] 98 Calif., 253, 2 Scott, 729.

⁷ *Reynolds v. Waller's Heir* [1793] 1 Wash. Va., 745, 2 Scott, 745; *Thackrah v. Haas* [1886] 119 U. S., 499, 501.

Undue influence has sometimes been treated as a species of fraud. In any case, whether exercised by a respectable professional man¹ or the 'professor' of a foolish superstition,² the presence of such influence will vitiate a contract.³ Where the plaintiff was interested under a will, but, being a weak and improvident person, was induced by his uncle, a trustee under the will, to execute a voluntary settlement, this was set aside by the court upon it appearing that the plaintiff neither understood fully what he was doing, nor appreciated the effect of the settlement and his position with regard to the property.⁴ It has been generally laid down that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to have the sale set aside and the property re-exposed for sale.⁵

Undue influence.

Duress or coercion also renders a contract voidable. A man was arrested by due process of law, but a wrong use was made of this arrest by obliging him to execute a conveyance, which was never under consideration before. The Chancellor granted relief.⁶ Where there is a threat of imprisonment, the imprisonment may be lawful as against the authorities and the public, but it will be unlawful as against the threatener if he attempts to use for his private benefit processes provided for the protection of the public and the punishment of crime.⁷

Coercion.

Subsequent conduct of one of the parties to the contract may also in some cases make the contract voidable at the instance of the other. *E.g.*, the promisor may refuse to perform or disable himself from performing his promise in its entirety,⁸ or he may fail to perform it at or before the specified time, in cases where the parties intended time to be

Subsequent conduct.

¹ *Huguenin v. Baseley* [1807] 14 Ves., 273, 1 Wh. & T. 8th, ed. 259 (clergyman); *Woodbury v. Woodbury*, 141 Mass., 329 (physician); *Stout v. Smith*, 50 Am. R., 632 (attorney).

² *Lyon v. Home* [1867] 37 L. J. Ch., 674, 6 R. C., 852 (medium of communication with spirits of the dead).

³ *Becker v. Schwerdtle*, 141 Calif., 386 (confidential relation); *Rees v. De Barnardy* [1896] 2 Ch., 437.

⁴ *Dutton v. Thomson* [1883] 23 Ch. D., 278.

⁵ *Davone v. Fanning* [1816] 2 John. Ch., 252; *Coles v. Trecothick*, [1804] 9 Ves., 234, 244-5. Distinguish *Knight v. Majoribanks* [1849] 2 M. & G., 10; *Re Bole's & British Land Co's Contract* [1902] 1 Ch., 244.

⁶ *Nicholls v. Nicholls* [1737] 1 Atk., 409.

⁷ *Morse v. Woodworth* [1891] 155 Mass., 233, 3 Keener, 793 *Galusha v. Sherman* [1900] 105 Wis., 263.

⁸ I. C. A., s. 39, *Chokkalingam v. Srinivasa* [1908] 19 M. L. J. R., 28.

of the essence of the contract.¹ If the promisee does not acquiesce, he may put an end to the contract. The non-performance must generally be of the substance of the promise taken as a whole,² and the refusal relied upon must be total and absolute, amounting to a renunciation of the contract.³ A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract.⁴ So, again, where a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented,⁵ and the same result follows where the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise.⁶ *E.g.*, where a master workman has undertaken to teach his trade to an apprentice, the former cannot be liable for not teaching the latter, if the latter will not be taught.⁷ And where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.⁸ In the event of default by either, the other may treat the contract as at an end. A party must bear the consequences of an impossibility created by himself.⁹ Lastly, a contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.¹⁰ *E.g.*, if

¹ *Ibid.*, s. 55.

² *Sooltan Chund v. Schiller* [1878].

4 Cal., 252.

³ *Rash Behari v. Nritya Gopal* [1906] 3 C. L. J., 249, folg. *Freeth v. Burr* [1874] 9 C. P., 208, *Finch*, 714; *Mersey Steel etc. Co. v. Naylor, Benzon & Co.* [1884] 9 A. C., 434. See also *Withers v. Reynolds* [1831] 2 B. & Ad., 882, *Finch*, 712; *Ehrensperger v. Anderson* [1868] 3 Ex., 148, 158. But the doctrine is vigorously criticised by Prof. Williston, *Pollock, Con.* (W.), 339 sqq.

⁴ *Bradley v. Bertoumieux*, 17 Victorian L. R., 144, 147.

⁵ I. C. A., s. 53; *Giles v. Edwards* [1797] 7 T. R., 181, 4 R. R., 414.

⁶ I. C. A., s. 67.

⁷ *Raymond v. Minton* [1863] 1 Ex., 244.

⁸ *Per Lord Blackburn, Mackay v. Dick* [1881] 6 A. C., 251, 263.

⁹ *Pollock, Con.* (W. W.), 549 n., 550 n., *Ganga Dei v. Asaram* [1907] 4 A. L. J. R., 778, 780.

¹⁰ I. C. A., s. 153.

a horse let on hire for riding is driven in a carriage, the owner of the horse may at his option terminate the bailment.¹

It appears, however, that the mere failure by a grantee to perform a promise, which formed the whole or part of the consideration inducing an executed conveyance, gives rise to no right of rescission in the grantor, unless such promise amounts to a condition.² Lord Selborne was of opinion that to entitle a party to the rescission of a conveyance after its completion, he must make out a case of misrepresentation and fraud or prove an error *in substantialibus* sufficient to annul the whole contract.³ Difficulty has been felt in America in cases where an aged person has conveyed all his property to a son or other relative, on the consideration, often oral, that the grantee shall support and care for the grantor during the remainder of the latter's life, and the former, while retaining the land, has abandoned the performance of his obligation.⁴ Relief by periodic suits for damages has been deemed inadequate, and some courts have decreed cancellation or a reconveyance in favour of the grantor. But the reasons assigned in support of such a decree have not been uniform. Some courts have professed to proceed on the ground of fraud, actual or constructive,⁵ others have raised an implied trust,⁶ and others again have treated the grantee's promise as a condition subsequent, the breach whereof gives a right of re-entry.⁷ In other jurisdictions the rule above stated has been more strictly applied and cancellation or rescission has been refused, but the court has placed the property in the hands of a receiver, to be administered primarily for the support of the grantor,⁸ or has declared a charge upon the property for such support.⁹ This last is probably the least unsatisfactory solution of the difficulty.¹⁰

Executed
conveyance.

The contracts so far dealt with are all voidable. This

¹ *Ibid*, *ill*.

² *Piedmont Land Improvement Co. v. Piedmont etc. Co.*, 96 Alabama, 389; *Chicago T. & M. R. Co. v. Titterington*, 31 Am. St. R., 39; 16 Harv. L. R., 465, (Williston); 4 Columbia L. R. 1, 265 (Burdick).

³ *Brownlie v. Campbell* [1880] 5 A. C., 916, 987; *Baslingapa v. Virupaxapa* [1903] 5 Bom. L. R., 392.

⁴ 2 Pomeroy, *Eq. R.*, s. 686.

⁵ *Pittenger v. Pittenger*, 208 Ill., 582; *Lockwood v. Lockwood*, 124 Mich. 627.

⁶ *Grant v. Bell*, 58 Atl., 951.

⁷ *Glocke v. Glocke* [1902] 113 Wis., 303, 57 L. R. A., 458.

⁸ *Keister v. Cubine*, 101 Va., 768.

⁹ *Patton v. Nixon*, 33 Oregon, 159.

¹⁰ 2 Pomeroy, *Eq. R.*, 1159 n.

Affirmance of
voidable
contracts.

Innocent
third parties.

means that they may be good so long as not disaffirmed by the party who has the election, and they become absolutely good after affirmation. If the contract relates to a disposition of property, the property will pass, and before avoidance the guilty party may transfer the same and, if these transferees are not parties or privy to the fraud or other improper act or conduct which renders the first contract voidable, they may even acquire absolute interests and rights under this contract.¹ In such a case, equity will not interfere with the right of an innocent person, and rescission of the contract will not be decreed.² Where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.³ Where, therefore, a sale has been procured by fraud, a purchaser in good faith from the fraudulent buyer will acquire an indefeasible title⁴ and the defrauded seller cannot afterwards rescind. But, where goods have been obtained not by means of a contract but through fraudulent pretences, no title, however qualified, can pass, and no disposition of the property by the possessor will bind the defrauded owner.⁵ Thus a watch-maker, who has obtained possession of a watch under pretence of cleaning it, cannot validly pledge it.⁶ The above principles are well illustrated by cases which have arisen in England, in respect of the shares of a company that a person has been induced to take by misrepresentation and which he subsequently desires to give up. Several such cases arose out of the failure of Messrs. Overend Gurney & Co., Ltd., of London, in 1866. Shareholders, who had been induced by misrepresentation in a prospectus to take shares, wanted to rescind, but the House of

¹ Fry, s. 735, p. 321. Where money has been obtained by undue influence, "whoever receives it," said Wilmot C. J., "must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it," *Bridgman*

v. Green, [1755] Wilmot's Notes 58, 64; *Huguenin v. Baseley* [1807] 14 Ves., 289, 1 Wh. & T., 8th. ed. 259; *Morley v. Loughman* [1893] 1 Ch., 736, 3 Keener, 848.

² Pollock, *Con.* (W. W.), 715 sqq.

³ *Babcock v. Lawson* [1880] 4 Q. B. D., 400.

⁴ *White v. Garden* [1851] 10 C. B., 919. *Bentley v. Vilmont* [1887] 12 A. C., 471, 483. Cf. Sale of Goods Act (56 & 57 Vict., c. 71.), s. 24.

⁵ *Hollins v. Fowler* [1874-5] 7 H. L., 757, 795; *Cundy v. Lindsay* [1878] 3 A. C., 459.

⁶ *Baehr v. Clark*, 83 Iowa, 313.

Lords held that, after an order had been made for winding up the business, there could be no rescission.¹ The interests of the creditors of the company, and of other shareholders,² then intervene, and these a court will protect. It has even been said that a shareholder desiring to rescind must commence proceedings to have his name removed from the register before a petition to wind up the company is presented.³ But this is not necessary where there is no contract, *e.g.*, where an intending shareholder was misled into believing that he was dealing with an old company and applied for and took shares in a new company of the same name, he was allowed to rescind, though the winding-up had commenced and his name was on the list of contributories.⁴

This brings me to the case where there is no contract, where the agreement is void or has proved abortive. Now, the relief of rescission is not confined to voidable contracts. Section 36, Specific Relief Act, shows that it may be granted also for "mere mistake." Now, the presence of mistake, as we know, makes an agreement void, and not merely voidable.⁵ Strictly speaking, therefore, there is nothing either to affirm or to disaffirm. But a voidable contract upon repudiation becomes a void agreement, and for practical purposes there is not much difference if a court of equity declares that an agreement cannot be enforced, because it is void, or that it shall not be enforced, because the only person entitled to enforce it elects not to do so.⁶ Rescission for mistake has therefore been deemed appropriate when there is an apparently valid written agreement or transaction embodied in writing, while, in fact, by reason of a mistake of both or of one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or

Void agree-
ments.

Mistake.

¹ *Oakes v. Turquand* [1867] 2 H. L., 326, 6 R. C., 879. This case proceeded largely upon the language of the English Companies Act, 1862, but the principle is of general application. See *Burgess's Case* [1880]. 15 Ch. D., 507.

² *Re Scottish Petroleum Co.* [1883] 23 Ch. D., 429.

³ *Central Klondyke Gold Mining, re Thomson's case* [1898] 5 Manson, 282.

⁴ *International Soc. of Auctioneers, re Baillie's case* [1898] 1 Ch., 110.

⁵ I. C. A., s. 20

⁶ 1 Story, *Eq.*, s. 140.

terms, from that which was intended.¹ The mistake may be either of law,² or of fact, in both cases the court granting relief on the ground of want of union of minds.³ The mistake may be common to both parties⁴ or confined to one.⁵ Where, *e.g.*, *A* surrenders a life-policy to *B*, both parties supposing the insured is living, while he is actually dead, the agreement will be relieved against.⁶ So, where *A* engages a pleader to fight a case, which, unknown to both the parties, has been already decided in *A*'s favour, the pleader's services will be dispensed with.⁷ Or, *A* may let land to *B* for mining coal, and the land contains no coal; the agreement may be rescinded.⁸ Or, the contract for sale may relate to property which the vendor does not own and does not, as a matter of fact, mean to sell, but which the purchaser, being ignorant of the vendor's lack of title, means to buy; such an agreement will be set aside.⁹ Or, the plaintiff may have agreed to sell and the defendant to buy an extinct thing, both supposing it to be existent, and both ignorant that from the nature of the case, and as a matter of law, the object could not exist.¹⁰ A deed may thus be nullified in its inception by the non-existence of a material fact, which constituted at once its inducement and the basis of the negotiations between the parties.¹¹ It is easy to multiply instances. So, again, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.¹² Where *A* believes that he is a stranger to certain property and agrees to purchase the same from *B*, who believes himself to be entitled to it, and it subsequently turns out that the property in reality

Mistake as
to title.

¹ 2 Pomeroy, *Eq. J.*, s. 870.

² Fry, s. 304, pp. 348-9; 2 Pomeroy, *Eq. J.*, ss. 847, 849, 850. *Allcard v. Walker* [1896] 2 Ch. D., 369.

³ Bigelow, 1 L. Q. R., 300. *Trigg v. Read*, 5 Humph., 529 (bill for specific performance of contract of rescission).

⁴ *Torrance v. Bolton* [1872] 14 Eq., 124.

⁵ *Adam v. Newbigging* [1881] 13 A. C., 308; *Wilding v. Sanderson* [1897] 2 Ch., 534, 550; *Jawahir Singh v. Arjun* [1904] 8 O. C. 1.

⁶ *Riegel v. American Life Insurance*

Co. [1893] 153 Pa. St., 134, 3 Keener, 191.

⁷ Cf. *Allen v. Hammond*, 11 Peters, 63.

⁸ *Fritzler v. Robinson*, 70 Iowa, 500.

⁹ *Crow v. Lewin* [1884] 95 N. Y., 423, 3 Keener, 293.

¹⁰ *Blakeman v. Blakeman* [1872] 39 Con., 320, 3 Keener, 75 (right of way extinguished by reason of union of dominant and servient estates).

¹¹ *Griffith v. Sebastian County* [1886] 49 Ark. 24, 3 Keener, 220.

¹² Per Lord Westbury, *Cooper v. Phibbs* [1867] 2 H. L., 149.

already belongs to *A* and it does not belong to *B*, there is a mutual mistake of fact and the contract cannot stand.¹ Such a case is different from that of "any other purchase in which the vendor turns out to have no title,"² and Mr. Collett acutely suggests that in every sale of property by *A* to *B* there must be taken to be present, as inherently essential to the notion of such a contract, a mutual assumption that the thing is not already *B*'s property.³ If it is, there is clearly a total failure of the supposed subject-matter of the transaction, which, Sir F. Pollock thinks, may even be regarded as "legally impossible."⁴ Where there is a common mistake, it may be relieved against in the same way as fraud, even where the contract has been completed.⁵ And, where a mistake of fact may be a ground of relief, if it has actually been made, the plaintiff may apparently rely upon it, even though he had the means of knowledge.⁶ If a deed has been signed through a mistaken, but not negligent, belief that it was a lease, whereas it was a transfer of a mortgage debt and the securities therefor, the deed may be adjudicated void.⁷ So, where the garden of a house sold is described as 'inclosed by a rustic wall with a tradesman's side entrance,' and it turns out that the wall is no part of the property sold

Means of
knowledge.

¹ *Cooper v. Phibbs*, supra; *Bingham v. Bingham* [1748] 1 Ves., 126; *Daniel v. Sinclair* [1881] 6 A. C., 181. Cf. *Jordan v. Stevens* [1863] 51 Maine, 78, 3 Keener, 38, in which case the right to relief in the event of a mistake of law was carefully examined, and it was suggested that, though "generally, as between the parties, a mistake of law has as equitable a claim to relief as a mistake of fact," yet in nearly all cases where relief had been granted, two additional facts had been found, viz., (1) a marked disparity in the position and intelligence of the parties and (2) 'undue influence' on the one side and 'undue confidence' on the other. Said Davis, J.: "When property has been obtained under such circumstances and by such means, courts of equity have never hesitated to compel its restoration, though both the parties acted under a mistake of the law. And there would be still stronger reasons for granting relief in such a case, if the party from whom the property had

been obtained had been led into his mistake of the law by the other party" (3 Keener, 41). "In general, equity will interfere to prevent the unjust enrichment of one party and the unjust impoverishment of the other, whether caused by mistake of law or by mistake of facts, but the hardship resulting from mistake of law must be so marked as to outweigh the practical danger of allowing a defendant to plead that he was mistaken as to the law." 17 Harv. L. R., 138. *Query, Sahiban v. Madho Lal* [1907] 4 A. L. J., 198.

² *Stewart v. Stewart* [1838] 6 Cl. & F., 911. Cf. *Sears v. Leland*, 145 Mass., 277.

³ *S. R.*, 4th. ed. 278.

⁴ Pollock, *Con.* (W. W.) 615.

⁵ *Jones v. Clifford* [1876] 3 Ch. D., 793 (Hall, V. C.).

⁶ *Willmott v. Barber* [1880] 15 Ch. D., 96. 2 Pomeroy, *Eq. J.*, s. 856; ante, 336.

⁷ *Favell v. Wright* [1891] 64 L. T., 85.

and the entrance is used only by sufferance, the court will rescind the contract.¹ If, in a case of unilateral mistake of fact, there are circumstances of hardship present, a court of equity will the more readily interfere. Such was the unreported case of *Morshead v. Frederick*, referred to by Lord St. Leonards.² There a house was sold, which was liable to two rents, payable to two different parties, and the plaintiff purchased and paid for it on the calculation of its value as liable to only one, the smaller, rent. The mistake was entirely the purchaser's, but as he had thereby been induced to pay an unreasonable price, the contract was rescinded on his suit. But there will be no relief unless the mistake be one which really touches the substance of the contract,³ its existence or non-existence is intrinsic to the transaction.⁴ Rescission may not be granted for a mistake on a mere collateral matter, even though mutual, especially when the sources of information are open to both parties alike.⁵

Substance
of contract.

Extrinsic
facts.

"There are many extrinsic facts surrounding every business transaction," says an American judge, "which have an important bearing and influence upon its results, some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination, and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance."⁶

¹ *Brewer v. Brown* [1885] 28 Ch. D., 309.

² *Sugden, V. & P.*, 120.

³ *North v. Percival* [1898] 2 Ch., 131-2. *Grymes v. Sanders* [1876] 93 U. S., 55, 3 Keener, 178. Cf. C. P. C., sch. iv, form 99; Act V of 1908, App. A, no. 34.

⁴ *Beach, Mod. Eq.*, ss. 52-3; *Kowalke v. Milwaukee Ry. Co.* [1899] 100 Wis., 472, 2 Scott, 603.

⁵ *Sample v. Bridgforth*, 72 Miss., 293.

⁶ *Per Earl, J., Dambmann v. Schul-ting* [1878] 75 N. Y., 55, 3 Keener, 207; *Chicago Ry. Co. v. Willcox*

(iii.) The contract may be unlawful for causes not apparent on its face, and the defendant more to blame than the plaintiff.¹ (iii) Unlawful contract.

I have so far been considering the case of an innocent plaintiff. But there are cases where, upon grounds of public policy, equity may even aid one whose own conduct has not been free from taint. A person may have participated in an unlawful transaction and yet may be relieved because of "necessity of supporting the public interests of public policy, however reprehensible the acts of the parties may be."² Every agreement, the object or consideration of which is unlawful, is void.³ "No polluted hand shall touch the pure fountains of justice," said Wilmot, C. J.,⁴ and the familiar maxim, *in pari delicto potior est conditio possidentis*, simply means that the law leaves the parties exactly where they stand.⁵ Courts are not organised to enforce the saying that there is honour among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions.⁶ But it is easy to conceive of agreements, the direct object of which is quite innocent, but the design of which is the furtherance of an unlawful purpose. In such a case, the question of the intention of the parties becomes relevant. If both parties are aware of this design and purpose, no court will have anything to do with the agreement. It is void.⁷ If one of the parties is ignorant of such design and purpose, it is voidable at his option, if executory, and, upon becoming aware of the same, he may repudiate it.⁸ Such a case may be treated as one under clause (a), section 35, Specific Relief Act, for the plaintiff is innocent.

[1902] 116 Fed., 913, 2 Scott, 609 (mistake in prophecy). Cf. *Steinmeyer v. Schroepel* [1907] 10 L. R. A., N. S., 114 (mistake in adding up figures.)

¹ S. R. A., s. 35 (b.)

² *Bosunquett v. Dashwood* [1734] Cas. Temp. Talbot, 37, 40-1; 1 Story, Eq., s. 300.

³ I. C. A., s. 23.

⁴ *Collins v. Blantern* [1767] 1 Smith,

L. C., 12th ed. 412.

⁵ *Atwood v. Fisk* [1869] 101 Mass., 363, 2 Scott, 793.

⁶ *Per Follett, C. J., Leonard v. Poole* [1899] 114 N. Y., 371, 2 Scott, 789.

⁷ *Pearce v. Brooks* [1866] 1 Ex., 213, Finch, 620 (brougham knowingly lent on hire to prostitute).

⁸ *Cowan v. Milbourn* [1867] 2 Ex., 230 (rooms let for delivery of lectures on subject forbidden by statute).

Parties not
in *pari*
delicto.

But a third class of cases may occur where the plaintiff is neither wholly innocent nor wholly guilty. He may have acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offence.¹ In such a case, the parties are not *in pari delicto*, and the court in the exercise of its discretion may interfere. As an illustration in point, I will refer to the well-known case of *Atkinson v. Denby*.² There a debtor had offered a composition of five shillings in the pound to his creditors. One of them refused to accept this unless he was paid something more. The debtor paid him £ 50 more, whereupon he executed the composition-deed. The debtor subsequently sued to recover this amount as paid under oppression and in fraud of the other creditors. The claim was decreed. The Court of Exchequer Chamber said, "It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit."³ So, where an attorney induces his client, a Hindu widow, to transfer property to him for the purpose of defrauding her creditors, as the parties are not equally in fault, the widow may have the instrument of transfer rescinded.⁴ Knight Bruce, L. J., stated the doctrine of equity thus: "Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him."⁵ A plaintiff may therefore have a contract rescinded where it is *prima facie* not unlawful, where he is in a position to allege and prove extenuating circumstances, and the defendant has been more to blame than himself,⁶ and where the interests of third persons require that it

¹ 1 Story, *Eq.*, s. 300.

² [1860] 6 H. & N., 778, 7 H. & N., 934.

³ Cf. *Williams v. Hedley* [1807] 8 East, 378, 9 R. R., 473. Distinguish *Wilson v. Ray* [1839] 10 A. & E., 82. 50 R. R., 341.

⁴ S. R. A., s. 36, ill. of (b).

⁵ *Reynell v. Sprye* [1852] 1 DeG.M. & G. 660. 679, *Osborne v. Williams*, [1811] 18 Ves, 379.

⁶ *Hari Balkrishna v. Naro Moreshtar* [1893] 18 Bom., 342; *Tamarasherri v. Maranat* [1881] 3 Mad., 215.

should be set aside.¹ Public policy requires that those who violate the law must not apply to the law for protection.² But when the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy.³

The law on the subject has been thus summarised by an American judge: "The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general principle* of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance (1) where he is not *in pari delicto*; or (2) in some cases where he elects to disaffirm the contract while it remains *executory*. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second it is equally unimportant that the parties are *in pari delicto*."⁴ The door of the court should not be closed against one seeking

Malum prohibitum or *in se*.

¹ *W. v. B.* [1863] 31 L. J. Ch., 755, 32 Beav., 574. *Pollock, Con.* (W. W.), 505.

² *Benyon v. Nettlefold* [1850] 3 M. & G., 102, 2 Scott, 776 (Truro, L. C.). *Kahn v. Walton* [1889] 46 Ohio, 195. The true test to determine whether plaintiff is *in pari delicto* is, says Mellor, J., "by considering whether the plaintiff could make out his case, otherwise than through the medium and by the aid of the illegal transaction," *Taylor v. Chapter* [1869] 4 Q. B., 309, 314; *Sampson v. Shaer*, 101 Mass., 145; 3 Keener, 869 n.; Keener, *Quasi-Contracts*, 274-5.

³ *Per* Lord Selborne, *Ayerst v. Jenkins* [1873] 16 Eq., 275, 283, 3 Keener, 857 (voluntary gift of part of his property by one *particeps cri-*

minis to another, held to be neither fraudulent nor prohibited by law). Where illegal purpose has been consummated and defendants have in hand a thing of value which does not belong to them, the court may aid plaintiff, *Planter's Bank v. Union Bank* [1872] 16 Wall., 483, 499; *Sharp v. Taylor* [1849] 2 Ph., 801.

⁴ *Per* Seldon, J., *Tracy v. Talmage*, 14 N. Y., 162, 181; *St. Louis R. Co. v. Terre Haute R. Co.*, 145 U. S., 407. 2 Pomeroy, *Eq. J.*, ss. 934-42. In *Ayerst v. Jenkins* [1873] 16 Eq., 275, relief was refused, as contract had been entirely executed. The distinction between *malum prohibitum* and *malum in se* has been sometimes repudiated. See *Pullman Palace Car Co. v. Central Transportation Co.*, *infra*.

to extricate himself from an unlawful connection, provided relief is sought without delay, and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.¹

(iv) Breach
after decree.

(iv) A decree for specific performance of a contract for sale or lease may have been made, and the purchaser or lessee may subsequently have made default in payment of the purchase-money or other sums which the court has ordered him to pay.² Here the vendor or lessor may take advantage of a breach after judgment, and ask for rescission of the contract. But the court must be satisfied that there has been, first, the usual decree for specific performance and, next, default by the purchaser, before it will grant rescission.³ In England, a motion to rescind is generally made in the same cause,⁴ and the defaulting purchaser loses his deposit,⁵ and may be directed to pay the vendor's costs.⁶ Unless there has been a positive refusal to complete the contract, a final period of grace may be granted to the defaulter,⁷ and the court may assess and award damages caused to the party moving for rescission by reason of the breach.⁸ The principle upon which the English courts act is that the court being once seised of the litigation, any orders touching the same subject-matter, even after decree, ought to be made in the same suit; and I agree with Mr. Collett that this is in all cases the better, because the more convenient, more speedy and more economical, procedure.⁹ It is probable that the Indian legislature when it enacted clause (c) of section 35 in three paragraphs, had the same practice in mind and intended to adopt it. But I cannot congratulate them on the language which they have used, and, as our courts have to interpret the actual words used and not to rectify the enactment in accordance with an intention faultily expressed, the Indian practice is bound to be

S. R. A.
s. 35 (c).

¹ *McCutcheon v. Merz Capsule Co.* [1896] 71 Fed. R. 787, 3 Keener, 884. About contracts *ultra vires*, see *Pullman Car Co. v. Central Transport Co.* [1894] 65 Fed. R., 158, 3 Keener, 870.

² S. R. A., s. 35 (c); Fry, s. 1170.

³ *Stone v. Smith* [1887] 35 Ch. D., 188.

⁴ Fry, s. 1173, p. 505.

⁵ *Dunn v. Vere* [1871] 19 W. R. (Eng.),

151.

⁶ *Hutchins v. Humphreys* [1885] 54 L. J. Ch., 650.

⁷ *Foligno v. Martin* [1853] 16 Beav., 586; *Henty v. Schroder* [1879] 12 Ch. D., 666.

⁸ *Watson v. Cox* [1873] 15 Eq., 219; *Jeffery, v. Stewart* [1899] 80 L. T., 70 (explg. *Henty v. Schroder*, supra).

⁹ Collett, 4th. ed. 281. Consider Act V. of 1908, ss. 148, 151.

both cumbrous and anomalous. As I apprehend the meaning of those three paragraphs, the result seems to be this :

Suit No. 1 is brought for specific performance of a contract for sale or for lease of immoveable property, the pecuniary consideration of which, or at least a part thereof, still remains to be paid. The plaintiff may be either the vendor or lessor, or the vendee or lessee. The plaintiff may have also asked for damages,¹ and further prayed, in the alternative, that if the court does not think proper to decree a specific performance, it may direct the contract to be rescinded and cancelled.² Suppose the first prayer is granted and a decree is made for specific performance, which directs that by a certain date the purchaser or lessee should pay up the purchase-money or some other sums that the court deems the vendor or lessor entitled to receive. Now, if such money is not paid within due date, the decree may be executed in the manner provided by the Code of Civil Procedure, if capable of execution, but no further proceeding can be taken in the cause on the regular side, except in one case. This is when the purchaser or lessee is shown to have been in possession of the subject-matter at the time the suit was instituted. If the court finds that such possession was wrongful, then, in the event of the decree not being complied with, the court may, in its discretion, with proper regard to the justice of the case, make a second order in the suit rescinding the contract either as a whole or only in part, so far as the party in default is concerned.

But liberty is reserved to the vendor or lessor, in the event of the decree in suit No. 1 not being complied with by the due making of the payment it directs, to bring a fresh suit. In this suit No. 2, the vendor or lessor may pray judgment, first, for rescission of the contract, and, secondly, for any rents and profits received by the defendant-purchaser or lessee, but this only if at the time the purchaser or lessee is in possession of the subject matter of the contract, and the court finds that such possession is wrongful. So the whole matter of litigation may be disposed of once for all in suit No. 1 only in one contingency, *viz.*, where

¹ S. R. A., s. 19 ; *ante*, 537.

² *Ibid.*, s. 37.

the purchaser or lessor has already taken wrongful possession of the property contracted to be sold or let, and the contract may be then set aside either altogether or partially. But a second suit for rescission may be brought whenever there is default on the part of the purchaser or lessor in complying with the terms of the decree regarding payment of any sums made payable by it, and if, apparently since the institution of the first suit, he has taken wrongful possession of the land or premises in question, the plaintiff may also ask for a subsidiary relief regarding the mesne profits.¹ But, where a second suit is brought, there may be a question if the plaintiff may have a decree for partial rescission. The Calcutta High Court has ruled that a plaintiff under Chapter IV, Specific Relief Act, has no right to sue for rescission in part; he must seek to have the whole contract set aside.² But, surely, a court can make such a decree as the justice of the case may require, and is not bound by the terms of the prayer for relief in the plaint.

Restitutio in integrum.

I have now disposed of the four classes of cases where rescission may be applied for, and I will now lay before you some general considerations. As a general rule, it has been said rescission must be accompanied by *restitutio in integrum*.³ The maxim of equity is plain, he who seeks equity must do equity, and "the court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction."⁴ "You cannot both eat your cake and return your cake," said Crompton, J.⁵ This principle of elementary justice, which is fully recognised in sections 64, 65 and 75, Indian Contract Act, was thus formulated by Lord Blackburn: "No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep

¹ Collett seems to take a similar view too, *S. R.*, 4th. ed. 280-2.

² *Inder Pershad v. Campbell* [1881] 7 Cal., 474.

³ *Western Bank of Scotland v. Addie* [1867] 1 Sc. & D., 145, per Lord Cranworth: "*Restitutio in integrum* can only be had where the party seeking

it is able to put those, against whom it is asked, in the same situation in which they stood when the contract was entered into."

⁴ Per Hunt, J., *Neblett v. Macfarland*, 92 U. S., 101.

⁵ *Clarke v. Dickson*, [1859] El. B. & E., 148, 152.

the money or other advantages which he has obtained under it."¹ Restitution, it may be added, does not mean merely the disgorging of benefits obtained by mis-statements; it includes indemnity against all liabilities contracted under or created by the agreement.²

There can therefore be no rescission of a contract, which has been partly or wholly performed, unless substantial restoration is possible. This impossibility of restoration to *statu quo ante* may be due to physical causes, as where the subject-matter of the contract is destroyed.³ Or, it may arise by operation of law, as where the said subject-matter is transferred for value.⁴ Or, lastly, it may be justified upon equitable grounds, as where innocent parties acquire interest in this subject-matter, subsequent to the contract, but prior to its affirmance.⁵ A contract that has been once affirmed, after full knowledge of the facts, cannot afterwards be cancelled.⁶ It has been said to be "a distinct principle of public policy that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract, or disaffirm it and demand the consequent redress."⁷ Accordingly, where the party entitled to rescind takes the benefits of the contract or exercises dominion over its subject-matter, or does any other act inconsistent with an inten-

Restoration impracticable.

¹ *Clough v. London & N. W. Ry. Co.* [1871] 7 A. C., 360. Cf. *T. P. A.*, s. 35; *Sinaya Pilai v. Munisami Ayyan* [1898] 22 Mad., 289; *Tejpal v. Ganga* [1902] 25 All., 59. See also *Subba v. Deva Shetti* [1894] 18 Mad., 126.

² *Newbigging v. Adam* [1886] 34 Ch. D., 582, *affd.* 13 A. C., 308; *Moncrieff, Fraud*, 17-20, 220.

³ *Pothier, Contrat de Vente*, s. 348. Cf. *Clarke v. Dickson*, *supra* (partnership on cost-book principle converted into joint-stock corporation, and being wound up); *Western Bank of Scotland v. Addie*, *supra* (unincorporated banking company converted into incorporated company, in course of winding up). *Burgess's Case* [1880] 15 Ch., 507, 509. *Crompton, J.*, thought that the doctrine was limited to cases where the impossibility could be attributed

to the party's own act, *Clarke v. Dickson*, *supra*, 155. Cf. *Urguhart v. Macpherson* [1878] 3 A. C., 831. But it is not easy to see why impossibility brought about by act of a third party, or even of God, should have a different result. *Fry*, s. 746, p. 326.

⁴ *Kingsford v. Merry* [1856] 11 Ex., 577, and other cases cited, *ante* 408-9.

⁵ *Oakes v. Turquand*, *supra*.

⁶ *Campbell v. Fleming* [1834] 1 A. & E., 40; *Clough v. London & N. W. Ry. Co.*, *supra*, 34. As to confirmation of fraud, see *Morse v. Royal* [1806] 12 Ves., 355, 373; *Moxon v. Payne* [1872] 8 Ch. Ap., 881.

⁷ *Per Choate, D. J.*, *Emma Silver Min. Co. v. Emma S. M. Co. of New York*, 7 Fed., 401; 2 *Pomeroy, Eq. R.*, s. 687. *Bigelow, Fraud*, 436.

tion to rescind,¹ after knowledge of the facts, the court may presume a ratification. There may, *e.g.*, be receipt or payment of purchase-money,² or collection of rents,³ or work done upon the property which makes restitution difficult, if not impossible.⁴ The conduct of the party misled, even without knowledge of all the facts, may sometimes lead to the same result.⁵ A purchaser of immoveable property, who has taken possession, has accordingly not been allowed to maintain an action to recover his deposit.⁶ The rule, however, has no application to a case where a person agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded, and brings a suit to recover the amount which he has paid under the agreement.⁷

Compensation.

But restoration need not in every case be in kind; compensation may often afford adequate and substantial reparation. Where, *e.g.*, a purchaser of leasehold houses has been in possession and the sale is afterwards set aside, the court may fix an occupation rent upon the houses and set this off against the purchase-money directed to be repaid with interest, and the purchaser may also be allowed for lasting repairs and substantial improvements.⁸ The construction of a warping-drain and the inclosure of a common have been held not to prevent the rescission of a contract for the sale of the land on the ground of mistake,⁹ and where possession had been taken and a trial well sunk,

¹ *E.g.*, suits for damages for deceit, *Stuart v. Hayden*, 36 U. S. Ap., 462. But an unsuccessful attempt by a defrauded purchaser to sell the property to a stranger is not enough, *Hoyle v. Southern Works*, 105 Ga., 123. There must be an unequivocal act, showing an election to retain the property, after discovery of the deceit. *McClelland v. McClelland*, 176 Ill., 83; *Tarkington v. Purvis* [1890] 9 L. R. A., 607.

² *Litchfield v. Browne*, 36 U. S. Ap., 130; *Dennis v. Jones* [1848] 44 N. J. Eq., 513, 3 Keener, 728.

³ *Shappirio v. Goldberg*, 192 U. S., 232.

⁴ *Vigers v. Pike* [1840-2] 8 Cl. & F., 562, 650 (mine worked by lessee, after full information).

⁵ *Sheffield Nickel Co. v. Unwin* [1877]

2 Q. B. D., 214; *Urquhart v. Macpherson*, *supra*.

⁶ *Blackburn v. Smith* [1848] 2 Ex., 783. In fact, an exception to the general rule seems to exist with regard to a deposit paid on a sale of land to the vendor, or his agent, where the vendor lawfully rescinds the contract for the purchaser's breach or renunciation of it; for the deposit, as we have seen, is paid as a guarantee for due performance of the contract. 2 Williams, *V. and P.*, 951-3.

⁷ *Timmerman v. Stanley* [1905] 1 L. R. A., N. S., 379.

⁸ *Murray v. Palmer*, [1805] 2 Sch. & L., 489 (account was directed with annual rests).

⁹ *Earl Beauchamp v. Winn* [1873] 6 H. L. 223, 232.

the Privy Council thought compensation might be given.¹ So, where a sale of farm lands was set aside on the ground of a mutual mistake as to the area, the Supreme Court of New Hampshire held it to be no objection to a rescission that such articles as were necessarily consumed in the proper and ordinary management of a farm could not be restored *in specie*.² Section 64, Indian Contract Act, enacts, "The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, *so far as may be*, to the person from whom it was received," and section 38, Specific Relief Act, provides, "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make *any compensation* to the other which justice may require." But a distinction may reasonably be drawn between a case where rescission is allowed on the ground, say, of fraud and another where the foundation of the relief is mistake pure and simple. In the latter case, neither party may be to blame, and equity requires that the relief should be refused, unless the party against whom rescission is adjudged can be restored to substantially the same position as if the contract had not been made at all.³ But, where the defendant's conduct has not been above board, he cannot in justice demand a complete restoration of the *status quo*,⁴ and if by natural causes or reasonable user the value of the property is diminished, and also perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition.⁵ "When, without fault on the part of the one defrauded seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied, because it would become a loophole for the escape of the fraud. Equity makes a reasonable

Wrongful
conduct.

¹ *Lindsay Petroleum Co. v. Hurd* [1874] 5 P. C., 221 (court below had offered an account of profit of the well, if any). Cf. *Head v. Tattersall* [1871] 7 Ex., 7, 11; *Benjamin, Sale*, 442-3.

² *Newton v. Tolles* [1889] 66 N. H., 136, Keener, 386.

³ *S. R. A.*, s. 36; *Buckner v. Pacific*

R. Co., 53 Ark., 16; 2 *Pomeroy, Eq. R.*, s. 688, p. 1163.

⁴ Cf. *Fry*, s. 744. p. 324.

⁵ *Brown v. Norman*, [1888] 65 Miss., 369, 3 Keener, 702; *Neblett v. Macfarland* [1875] 92 U. S., 101, 3 Keener, 696; *Western Bank of Scotland v. Addie* [1867] 1 H. L. Sc., 145, 166.

application of the rule by requiring whatever fair dealing requires under all the circumstances of the particular case, but it does not permit the rule to become a shield for wrongdoing.”¹ *A fortiori*, “where a party seeking to rescind a contract, on the ground of fraud, acts without unnecessary delay, and restores or offers to restore that which he has received, it is no defence that the wrongdoer has, by his own act, made a full restoration impossible on his part, or has entered into obligations to others. He cannot prevent a restoration as far as it is within his power, by showing that he has himself done acts which prevent his being restored to his original position.”² The plaintiff can restore only what he has received and has, by force of the contract, under his control. Where the consideration so received is worthless or represents nothing of value, its return will not be required, because such return would be a mere idle ceremony.³

Tender.

And for a plaintiff who institutes a suit for rescission of a contract, it is not necessary to have made a tender or offer of restoration before suit.⁴ Where rescission is an act of the party, and he subsequently brings an action for recovery of possession of land or chattels or for damages, the rescission being prior to the suit, it may be necessary to show that it was accompanied by an offer to restore or an actual restoration to the other party of whatever might have been received by the plaintiff by virtue of the contract. But a suit brought expressly for rescission of a contract is maintained for a rescission, and does not presuppose it. It is, therefore, quite enough for the plaintiff to offer in his plaint to return what he has received and make tender of it in the court.⁵

Laches.

As the equitable relief of rescission is not a matter of absolute right, English and American courts do not grant it, where the plaintiff has been guilty of laches.⁶ But as Turner, L. J.,

¹ *Butler v. Prentiss*, 158 N. Y., 49, 64.

² *Hammond v. Pennock* [1874] 61 N. Y., 145, 3 Keener, 691; *Masson v. Bovet*, 1 Denio, 69. Pollock, *Con.* (W. W.), 713.

³ *Bank of Dayton v. Kusworm* [1894] 88 Wis., 188, 3, Keener, 804.

⁴ *Barker v. Walters* [1844] 8 Beav.,

92; *Jervis v. Berridge* [1873] 8 Ch., 351; *Thackrah v. Haas* [1886] 119 U. S., 499, 3 Keener, 697.

⁵ *Vail v. Reynolds*, 118 N. Y., 297; *Brown v. Norman*, *supra*; 1 Pomeroy, *Eq. J.*, s. 110n.

⁶ Pollock, *Con.* (W. W.), 721; 1 Pomeroy, *Eq. R.*, Ch. 1.

explained, "The two propositions of a bar by length of time and by acquiescence are not distinct propositions,"¹ and an American court has correctly ruled—"Delay in exercising the power of rescission is evidence of an election to treat the transaction (in this case, a sale), as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless, in the meantime, superior rights of third persons have intervened."² The Indian Limitation Act prescribes a period of three years from the time when the facts entitling the plaintiff to have a contract rescinded first became known to him, for a suit for the rescission of a contract.³ Lapse of time, short of the limitation period, would therefore be not of much consequence in India,⁴ unless there are other circumstances which would justify an inference of acquiescence⁵ or waiver. But there can be neither without knowledge, and the defendant must prove actual, and not merely possible or potential, knowledge. "The wrongdoer," says the Supreme Court of the United States, "cannot make extreme vigilance and promptitude conditions of rescission."⁶ If the defendant pleads that the plaintiff has by his subsequent acts confirmed the transaction in dispute, such acts must be shown to have been done with that intention by the complaining party, when he was no longer under the influence of the previous transaction⁷ and had a knowledge of its invalidity.⁸

Upon the same ground of the relief being discretionary, rescission has been refused to a plaintiff, who had previously declined a proper offer for rectification of a contract in writing made by the defendant.⁹

Rectifica-
tion de-
clined.

¹ *Life Assn. of Scotland v. Siddal* [1861] 3 DeG. F. & J., 58, 72.

² *Williamson v. Railroad Co.*, 29 N. J. Eq., 311, 320.

³ Act IX of 1908, Sch. i, art., 114.

⁴ *Athikarath v. Erathanikat* [1897]. 21 Mad., 42. Pollock, *F. M. M.*, 36-8. *Ante*, 473-6.

⁵ *Orr v. Sundra* [1893] 14 Mad., 255, 257; *Erlanger v. New S. P. Co.* [1878] 3 A. C., 1218, 1278. Acquiescence has been defined as 'quiescence under such circumstances that assent may be reasonably inferred from it,' *De-Bussche v. Alt* [1877] 8 Ch. D., 314. It is an inference of

law to be made from the facts proved, *Beni Ram v. Kundan* [1899] 21 All., 496, P. C., and the elements necessary to constitute it will be found carefully defined by Fry, *J. Willmott v. Barber* [1881] 15 Ch. D., 96; *Naunihal v. Rameshar* [1894] 16 All., 329, 331. 2 Pomeroy, *Eq. J.*, s. 965.

⁶ *Pence v. Langdon* [1878] 99 U. S., 581.

⁷ *Montgomery v. Pickering* [1874] 116 Mass., 227, 3 Keener, 726.

⁸ *Kempson v. Ashber* [1875] 10 Ch., 15; *Rau v. Von Zedlitz* [1882] 132 Mass., 164, 3 Keener, 787.

⁹ *Laver v. Dennett* [1883] 109 U. S.,

Burden of
proof.

The *onus probandi* in suits for rescission rests upon the plaintiff,¹ and even a *pardanishin* lady in India who comes into court to repudiate her own act must make out a *prima facie* case.² A court will not interfere, if only suspicion and distrust have been thrown over a transaction.³ But, where a right to rescind is lost, the right to recover damages may still remain in the party aggrieved.⁴

(c) *Cancellation of Instruments.*

Cancellation
of instru-
ments.

Voidable or
void.

A kindred topic is that of cancellation of documents. In fact, in the matter of voidable contracts in writing, the powers of judicial rescission are co-extensive with those of directing the cancellation and surrender of the instruments. It is upon the same grounds, *e.g.*, of misrepresentation or fraud, whether actual and personal or contrary to public policy,⁵ that a court may in its discretion direct an instrument evidencing a shady or inequitable transaction to be delivered up and cancelled. So also where undue influence has been exercised. *E.g.*, if the owner of a ship fraudulently represents her to be sea-worthy and thus induces an underwriter to insure her, the latter, upon discovery of the fraud, may have the policy cancelled, though the ship has not been lost, and may never be lost.⁶ So, if in consideration of the sale and delivery of a ship, the intending purchaser accepts four bills of exchange drawn upon him by the seller, who, however, does not deliver the ship according to his agreement, but subsequently sues upon one of the bills, the disappointed vendee may bring a cross-action for the cancellation of all the four bills, the consideration having failed *in toto*.⁷ So, again, where an old *Chhatri* having heard his spiritual guide, a Brahman, recite a holy book, executed a deed of gift,

90. *Query*, whether there is any discretion under S. R. A., s. 35, *Mitra, Lim.*, 935.

¹ *McClutchie v. Huslam* [1891] 65 L. T., 691; *Kalee Pershad v. Perhlad Sein* [1869] 12 M. I. A., 282.

² *Naushani Begam v. Intizar Begam* [1899] 19 A. W. N., 25.

³ *Gormly v. Gormly* [1889] 130 Pa., 467, 3 Keener, 190.

⁴ *Erlanger v. New Sombrero P. Co.* [1878] 3 A. C., 1278; *Re Gloag & Miller's Contract* [1883] 23 Ch. D., 320.

⁵ But "where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or base and unconscionable conduct on his own part, in such cases courts of equity will leave him to the consequences of his own iniquity." 2 Story, *Eq.*, s. 697.

⁶ S. R. A., s. 39, *ill. (a)*.

⁷ S. R. A., s. 39, *ill. (d)*.

relating to his whole property, in favour of this Brahman, with the object, as he fancied, of securing benefit to his soul in the other world, the donee was required to show that the transaction was free from any taint of undue influence and *mala fides*, and, upon his failing to do so, the deed of gift was ordered to be cancelled.¹ Where a marriage was treating between two persons, but the woman not having so great a portion as the man insisted upon, she prevailed with her brother to let her have some money and gave him a bond for repayment, and thereupon the marriage was had, but the husband, who knew nothing of the bond, died without issue, and the wife also subsequently died, her executor was allowed to maintain a bill for surrender of the bond against the brother's executor. Jeffreys, C., observed, "that which was once a fraud, will be always so, and the accident of the woman's surviving the husband will not better the case."²

But the court will not interfere unless and until it is satisfied that (i) the written instrument in question is either voidable or void, as against the plaintiff, (ii) who may reasonably apprehend serious injury from the instrument being left outstanding, and (iii) in view of all the circumstances of the particular case the court considers it reasonable and proper to administer the protective and preventive justice asked for.³ So the relief may be granted even where the instrument is absolutely void, and not merely voidable, and in this respect the remedy available under section 39, Specific Relief Act, is wider than that provided for by the earlier section 35, and the basis as also the test of the jurisdiction is a reasonable apprehension of serious injury.⁴ Chapter V of the Specific Relief Act "applies," says Dr. Whitley Stokes, "to cases not unfrequent in India, where a party gets possession of a document, on which he might not indeed be able to found a claim in a court of justice, but which might give him such *prima facie* right against the other as would expose him to vexatious demands and litigation."⁵ "The party

¹ *Mannu Singh v. Umadat Pande* v. *Dattubhoy* [1900] 25 Bom., 10, 1890] 12 All., 523.

² *Gale v. Lindo* [1687] 1 Vern., 475, [1898] 23 Bom., 375.

³ *Scott*, 732.

⁴ S. R. A., s. 39; *Vulley Mahomed*

⁵ 1 A.-I. Codes, 934.

is relieved," to quote Mr. Justice Story, "upon the principle, as *quia timet*, it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest."¹ Where, therefore, an instrument purports to be in prejudice of the plaintiff's rights, and, to consider his estate and property more particularly, to establish an apparent incumbrance thereupon or an apparent defect therein,² and it is not a valid document, the plaintiff may invoke the aid of the court to have its unenforceability formally and solemnly adjudged.³ It does not matter that upon examination the document turns out to be void, the more reason why it should be given up. The mistake of one of the parties alone may not be sufficient to avoid an agreement,⁴ but, where both parties are under a mistake, a court of equity should not refuse to cancel it.⁵ Failure of title, however, in the absence of fraud and special covenants, does not vitiate a contract of sale.⁶ A forged instrument, so long as the forgery has not been judicially determined, may create the greatest mischief, and a court of equity will order its cancellation in anticipation.⁷ And it does not matter that the plaintiff is not a party to such a document, it does not embody a contract which binds him personally, it will all the same attract the remedial jurisdiction of a court of equity, if it throws a cloud upon the plaintiff's title or otherwise stands in his way. *E.g.*, A may have conveyed land to B, who bequeaths it to C and dies. Now, if D were to get possession of the land and put forward a forged instrument, stating that the conveyance was made to B in trust for him, as the title of C is gravely jeopardised, he may obtain

¹ 2 Story, *Eq.*, s. 694, *Ohaganlal v. Dhondu* [1903] 27 Bom., 607.

² *Detroit v. Martin*, 34 Mich., 170, 173.

³ Cf. *London & Prov. Insurance Co. v. Seymour* [1873] 17 *Eq.*, 85.

⁴ *Sells v. Sells* [1860] Dr. & Sm., 42.

⁵ *Allen v. Hammond* [1847] 11 Pet., 63; *Scott v. Coulson* [1903] 2 Ch., D. 249. For distinction between ignorance and mistake of fact, see *Penny v. Martin* [1820] 4 John. Ch., 566,

(Kent, C.).

⁶ *Abbott v. Allen* [1817] 2 John. Ch., 519.

⁷ 2 Story, *Eq.*, s. 701, *In re Cooper*, [1882] 20 Ch. D., 611; *Sharon v. Hill*, 20 Fed., 1 (forged contract of marriage). *Mohima Chunder v. Jugul Kishore*, [1881] 7 Cal., 736 (deed of sale, alleged to be forged, of which the District Registrar had ordered registration).

cancellation of this forged instrument.¹ So, again, where the owner of *zemindari* property sells it to a purchaser, upon a representation that the tenants are all at will, and executes a conveyance in his favour, but subsequently, being fraudulently minded, executes a lease of part of the land in favour of a third party, puts upon it a false date, anterior to that borne by the conveyance, and gets it registered, there is a cloud upon the purchaser's title, and he may have the lease cancelled by suit.² It is not only a relation of trust or contract between the parties which attracts the relief. "The jurisdiction has been asserted and enforced as an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust or account, or, indeed, any other basis of equitable intervention."³ A document, again, that created a valid and enforceable obligation in its inception, may have since expired by reason of discharge of the obligation. Or, the obligee may not have intended to use or enforce it. Such a document no longer embodies an act in the law, and should not be allowed to remain as a menace and danger to the party against whom, under different circumstances, it might have operated. A case in point is *Flower v. Marten*.⁴ A father there paid his son's debt and got his son to execute a bond for the amount in his favour. The bond was intended only *in terrorem*, and not as a security for the obligee. Upon the father's death, the obligor son compelled his executors to deliver up the bond to be cancelled. In another case a testator on his death-bed asked his executrix to hand over a certain bond to the obligor and not to trouble him for the amount; the Privy Council decreed the surrender and cancellation of the bond at the suit of the obligor.⁵ So, if a marriage settlement is drawn up in contemplation of a marriage, which eventually falls through, the settlement will not be allowed to stand.⁶ Kent, C., directed a bond to be delivered up which was said to have been given upon a special trust of a secret and delicate nature, and was to be in force only upon certain contingencies which

Documents
expired.

Unreal.

¹ S. R. A., s. 39, ill. (b).² S. R. A., s. 39, ill. (c).³ *Per Green J., Dull's Appeal* [1886] 113 Pa. St., 510, 1 Keener, 354.⁴ [1837] 2 My. & C., 459.⁵ *Wekett v. Raby* [1724] 2 Bro. P.C., 386; *Re Appleby* [1891] 3 Ch., 422. Cf. Act X of 1865, s. 178.⁶ *Bond v. Walford* [1886] 32 Ch. D., 238.

might never happen, and which the defendant had not paid any consideration for and was not personally interested in.¹

Instrument
other than
contract.

The instrument which the plaintiff impeaches as voidable or void, need not embody a contract. An award, not made upon a reference under chapter XXXVII, Code of Civil Procedure,² may be set aside by a suit under section 39, Specific Relief Act.³

Discretion.

The court has to exercise a discretion, *secundum arbitrium boni judicis*.⁴ There are many cases in which the court will not lend its aid to compel a specific performance of an executory agreement, in which it would not feel itself authorized to interfere, by decreeing that an executed contract should be rescinded.⁵ It has to consider the conduct of the parties⁶ and the nature of the document, and "while a court of equity will set aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once, still, if the defect appears upon its face and a resort to extrinsic evidence [on the part of the plaintiff] is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any cloud whatever is cast upon the title."⁷ And the same principle may be extended to cover cases where the instrument is not null and void upon its face, so as to be incapable of being used as a means of vexatious litigation or serious injury,⁸ but the party claiming under it, in order to enforce it, *must necessarily* offer evidence which will inevitably show its invalidity and destroy its efficacy.⁹ In neither of these cases can there be said to be any cloud, any real danger to the plaintiff's right or title or the security

Void upon
face.

¹ *Hamilton v. Cummings* [1815] 1 John. Ch., 517, 1 Keener, 316.

² Act V of 1908, sch. II.

³ *Lu Tha v. Ma Shwe Me* [1905] 3 L. B. R., 4.

⁴ *Goring v. Nash* [1744] 3 Atk., 186, 188.

⁵ *Bates v. Delavan* [1835] 5 Paige, 299 (Walworth, C.).

⁶ *Vulley Muhomed v. Duttubhoy* [1900] 25 Bom., 10.

⁷ *Simpson v. Lord Howden*, [1837] 3 My. & C., 97, 102-3, 108, 1 Keener, 323. *Cooper v. Joel* [1859] 27 Beav., 313, 1 Keener, 337; *Brooking v. Maudslay Son & Field* [1888] 38 Ch. D., 636, 1 Keener, 368.

⁸ *Story, Eq.*, s. 700 a.

⁹ *Clark v. Davenport* [1884] 95 N. Y., 477, 1 Keener, 344, 4 Pomeroy, *Eq. J.*, s. 1399.

thereof, and the processes of the court cannot be permitted to be unnecessarily abused.¹

But the question should always be treated as one of discretion and not jurisdiction.² A different view, Prof. Pomeroy has forcibly pointed out, "often operates to produce a denial of justice. It leads to the strange scene almost daily in the courts, of defendants urging that the instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested*, and of judges deciding that the court cannot interfere, *because the deed or other instrument is void*, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market-value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency."³

Question not
of jurisdic-
tion.

Where there is no immediate danger to the plaintiff's rights or title, the court may interfere in his favour, if satisfied that delay is likely to entail loss of evidence or to introduce complications by bringing into existence conflicting rights of third parties. In the case of the fraudulent policy put in illustration (a) to section 39, Specific Relief Act, the court will be induced to exercise its discretion in favour of the underwriter before any loss has actually happened or been threatened, because it is obvious that satisfactory evidence of unseaworthiness

Circumstan-
ces deter-
mining
discretion.

¹ "Unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference," *Scott v. Onderdonk* [1856] 67 Am. Dec., 106, 1 Keener, 333.

² *Piersoll v. Elliott*, 6 Peters, 98 (Marshall, C. J.); *Hamilton v. Cummings* [1815] 1 John. Ch., 517, 1 Keener, 321 (Kent, C.); *Bromley v. Holland* [1802] 7 Ves., 3, 21-2.

³ 4 Eq. J., s. 1399. This criticism was judicially approved in *Day Co. v. State of Texas* [1887] 68 Texas, 527, 1 Keener, 364, where Stayton, A. J., said: "A defendant who asserts claim even under an instrument void on its face, cannot be heard to say that it has not such semblance of

validity as to create a cloud upon the title to property which it professes to convey, that will prejudice the right of the real owner if it be not removed. He cannot be heard to say that others will not attach to it the same degree of faith and credit as a title-bearing instrument which he in good faith gives to it, and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured, or is likely to be injured." See also *Linnell v. Battey* [1841] 17 R. L., 241, 1 Keener, 388; *Whitehouse v. Jones* [1906] 12 L. R. A., N. S., 49, 57-61. Cf. 2 Pomeroy, *Eq. R.*, 1239, n.; 2 Story, *Eq.*, 13 n. (Bigelow's note).

can be more easily adduced while the vessel is still in existence than after it has been lost. And in the case of bills of exchange, the consideration of which has failed, put in illustration (*d*), the court, in determining the exercise of its discretion, will also take into consideration the likelihood of the bills circulating and being negotiated into the hands of holders in due course.¹

Plaintiff's
title.

The court will also require to be satisfied of the plaintiff's present interest and title. A bill to remove a cloud from the title cannot be brought by a stranger to the title.² Where, therefore, an owner of land warranted his title to the same and sold it to two purchasers, it was held that he had no further interest left in the property and could not maintain an action to set aside a mortgage, on foot of which the defendant had subsequently brought a suit and obtained a decree against the two purchasers, and this decree.³ The mortgage had merged in the decree and there was no instrument which could be treated either as void or voidable against a person, who had sold away the property which the decree purported to affect. So, where a party has no title but only an expectancy, say, a Mahomedan son, a deed of gift executed by his father of his own property in favour of a third person will, it is apprehended, be neither void nor voidable at his instance, and cannot be impeached by him, unless he can prove fraud or other equally cogent invalidating circumstance.

Partial cancellation.

The court is not bound to cancel the whole of the instrument impugned, but may, in its discretion, allow a part of it to stand. This it will feel disposed to do where the instrument is evidence of different rights or different obligations.⁴ A bill

¹ *Of. Collett*, 5th, ed. 287. In America, the jurisdiction of equity seems to be exercised as a matter of course where the instrument is negotiable and not yet mature, "because in such cases, if the present unlawful holder, although the legal defence to an action by him would be perfect, should transfer the security to a *bond fide* purchaser, such legal defence would be cut off." The transfer of the instrument is usually enjoined and its surrender ordered. *Pomeroy, Eq. J.*, ss. 221, 1340.

² *Pomeroy, Eq. R.*, s. 730, p. 1229.

³ *Jhuna v. Beni Ram* [1887] 9 All., 439. But it seems to have been held in America that one who has conveyed with covenants of warranty, or under an agreement to clear the title for the benefit of his grantee, has a standing in a court of equity to remove a cloud, especially where he has a grantor's lien for part of the purchase-money. *Remer v. Mackay*, 35 Fed., 86; 2 *Pomeroy, Eq. R.*, p. 1230, n. 16.

⁴ *S.R.A.*, s. 40.

of exchange, *e.g.*, may bear several endorsements, one of which alone is forged. At the suit of the indorsee, whose signature has been forged, the court may cancel the forged endorsement and leave the bill to stand in other respects.¹ In a suit for partial rescission of a contract that came up before the High Court of Calcutta, relief was granted to the plaintiff, under section 40, Specific Relief Act. That case arose out of a contract to cultivate indigo in different villages. The court held that the instrument of lease evidenced different rights and obligations, and the plaintiff-tenant having been ejected from some of the lands and thus disabled from carrying out a part of the contract, was entitled to have the lease cancelled to that extent.² Where, by reason of a mutual mistake, a lot of land was sold at an undervalue, the aim of the court, in giving relief for a mistake, being to put the parties, as nearly as possible, in the situation they would have been in but for the mistake, an American court held that that aim would be better accomplished by rectifying the price than by annulling the conveyance.³

If the instrument in question has been registered under the Indian Registration Act, the court, in the event of decreeing a claim for its cancellation and surrender, shall send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.⁴ But a Registrar is not a "competent court," and his order overruling the plaintiff's objections and directing the registration of an instrument, which the plaintiff impugned as a forgery, will not preclude the latter from suing for the cancellation of this disputed instrument.⁵

Registered
instrument.

But, as the court has a discretion to exercise, it will not be willing to entertain inconsistent claims. Where, therefore, the plaintiff sued for cancellation of a sale-deed, said to have been executed by him, upon the allegation that it was a forgery, and

Inconsistent
claims.

¹ S.R.A., s. 40, ill.

256, 2 Scott, 596.

² *Inder Pershad Singh v. Campbell* [1881] 7 Cal., 474.

⁴ S.R.A., s. 39, para. 2.

³ *Lawrence v. Staigg* [1866] 8 R. L.,

⁵ *Mohima Chunder v. Jugul Kishore* [1881] 7 Cal., 736.

stated, as alternative cases, that the execution of the deed had been obtained by fraud and that it was also void for want of consideration, the Madras court rejected the claim.¹ But a plaintiff may sue for cancellation of a deed of gift, under which the defendant claims, even after he has instituted a possessory action in respect of the immoveable property, which is the subject of the gift and of which the defendant has taken possession.² Where, however, a suit is already pending wherein the defence raised is that the bond is void, another suit for cancellation of the bond is unnecessary.³

Relief in
plaint.

It is necessary to bear in mind that, in a suit instituted under chapter V, Specific Relief Act, the relief that the court can grant is of a limited character. It may, first, adjudge an instrument to be either void or voidable, and it may, next, order it to be delivered up and cancelled. Where the plaintiff asks for other and further relief, the suit is not for cancellation. The form of relief is of importance in determining the question of limitation. To a suit for cancellation of an instrument article 91, schedule I, Indian Limitation Act, applies, and it must be instituted within three years.⁴ But where the cancellation of an instrument is not the primary relief, but is ancillary to the main relief prayed for, the period of limitation applicable will have to be determined with reference to this main relief.⁵ Suppose a Hindu reversioner, upon the death of the widow life-tenant, sues to recover possession of property which this widow had alienated by deed in favour of a stranger, possession is the main relief asked for, and the plaintiff has twelve years from the date of the death of the widow for bringing the suit.⁶ So, where the plaintiff alleged that he was the owner of certain land, which a stranger had fraudulently

Limitation.

¹ *Iyyappa v. Ramalakshamma* [1890] 13 Mad., 549.

² *Joy Gopal v. Lalit Mohan* [1903] 26 All., 236.

³ *Chhaganlal v. Dhondu* [1903] 27, Bom., 607.

⁴ *Bakratram v. Karsetji* [1903] 27 Bom., 560; *Rampal v. Balbhaddar* [1902] 25 All., 1, P. C.

⁵ *Of. Narayanan v. Kannammai* [1904] 28 Mad., 338.

⁶ Act IX of 1908, sch. I, art. 141; *Harikar v. Dasarathi* [1905] 9 C. W. N., 636; *Mitra, Lim.*, 1042-3. Where reversioners ask for a declaration of invalidity of alienation, art. 120 applies, *Krishna v. Lakshmi* [1908] 18 M. L. J. R., 275. *Of. Unni v. Kunchi Amma* [1890] 14 Mad., 26; *Bitjou Gopal v. Krishna Mahishi* [1907] 34 Cal., 329, P. C. *Karm Kulli v. Karmdad* [1905] P. R., 79.

mortgaged to the defendant, and the latter having applied for foreclosure and the usual notice having been issued, he claimed "that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure by cancelment of the foreclosure proceedings," the court held that the suit was really one for a declaratory decree, and article 91 afore-mentioned was not applicable.¹ Where the next presumptive heir sues for a declaration that an alienation of land made by a Hindu or Mahomedan lady in possession of such land, is void except for her life or until her re-marriage, article 125 applies, and the suit may be brought within twelve years of date of the alienation.²

An instrument may evidence a transaction which the court cannot support, but there may be a right to compensation in respect of it which a court of justice will not deem inequitable. The remedy of cancellation is not a matter of absolute right, and, as we have seen, he who seeks equity must do equity.³ A court may, therefore, on adjudging the cancellation of an instrument, which it holds to be void or voidable, impose terms upon the plaintiff, who has moved it, and require him to make any compensation to the defendant which justice may require.⁴ This compensation, too, cannot be claimed as a matter of right: the court will exercise its discretion. It may refuse to show any favour to a professional money-lender, who knows that a person is a minor and yet proceeds to advance to him a loan.⁵

Compensation.

¹ *Sobha Pandey v. Sahodra Bibi* [1883] 5 All., 322. See cases collected in Mitra's commentary on art. 91, Lim. Act, sch. II. But, for purposes of court-fee, a suit praying for a declaration that a sale-deed was fraudulent and for an order to have it cancelled and a copy thereof sent to the Registrar, falls within s. 7, para 4, cl. (c), Act VII of 1870. *Parvati Bai v. Vishvanath* [1905] 29 Bom., 207. For difference between setting aside a deed as void and declaring a party's rights not to be affected by it, see *Ebrahimbhai v. Fulbai* [1902] 26 Bom., 577, 581-2; *Motilal v. Karrabuddin* [1897] 25 Cal., 179, 186, P. C.

² *Mitra, Lim.*, 973. sqq. *Mesraw v. Girjanundan* [1908] 12 C. W. N., 857; *Ram Sarup v. Ram Dei* [1907] 29 All., 239. Where suit by remote reversioner, art 120 applies, *Bhagwanta,*

v. Sukhi [1899] 22 All., 33, 41, F. B.; where alienation by mother as guardian for minor son, who subsequently dies, neither art 125, nor art. 141 applies, *Soundara v. Velayudam* [1894] 4 M. L. J. R., 275.

³ In America, it has, accordingly, been held that a court of equity will not cancel a real-estate mortgage securing a just debt, which concededly has not been paid, at the suit of the mortgagor, or one standing in his shoes, when the only ground urged for such relief is that the statute of limitations is available as a defence against its foreclosure, *Tracy v. Wheeler* [1906] 6 L. R. A., N. S., 516.

⁴ S. R. A., s. 41; 2 Story, Eq., s. 696.

⁵ *Brohmo Dutt v. Dharmo Das Ghose* [1898] 26 Cal., 330, 381, affd. s. n. *Mohori Bibee v. Dhurmodas Ghose* [1903] 30 Cal., 539, P. C. *Kampta*

But the discretion is a judicial one; and, where a minor, who has obtained a loan upon security of landed property, comes to a court of equity to have the mortgage-deed cancelled, the court may make its decree conditional upon his refunding to the creditor the money actually received by him.¹ There is nothing in section 41, Specific Relief Act, to compel a court to restrict the considerations of justice to cases where the parties arrayed on both sides are of full age. Where this is the case, however, there can be no difficulty in the way of the court giving full effect to the equities as between the parties before it; and sections 64 and 65, Indian Contract Act, may also be usefully referred to.

Cancellation
through
fraud or
mistake.

In conclusion, I will ask you to note that equity will also relieve where an instrument has been delivered up or cancelled through fraud or mistake.² A case in point is *Banta v. Vreeland*,³ where an aged man, ignorant of business, had surrendered and cancelled a mortgage-deed, under a mistaken belief that it had been paid up long before. Upon proof of mistake, a decree for foreclosure of the mortgage was granted.

Prasad v. Sheo Gopal Lal [1904] 26 All., 234, purports to follow this ruling, but the actual decision is not satisfactory. It was found as a fact that the plaintiff, who had sued for cancellation of a mortgage-deed executed by himself, had actually received part of the consideration (a fact which the plaintiff had denied in the plaint), but the court of first appeal thought, the plaintiff being a minor, it had no discretion to exercise, and unconditionally decreed his claim. In second appeal, the High Court could not and did not consider the evidence to determine if justice required the

payment of any compensation to the defendant, but it should have corrected the error of the lower appellate court, which had overlooked s. 41, S. R. A.

¹ *Dattaram v. Vinayak* [1903] 28 Bom., 181. *Baluk v. Dadu* [1910] P. R. No. 70. Cf. *Ajit Singh v. Bijai Bahadur Singh* [1884] 11 Cal., 61, P. C. Distinguish *Madho Parshad v. Mehrban Singh* [1890] 18 Cal. 157, 163, P. C.

² 1 Story, *Eq.*, s. 167.

³ [1862] 15 N. J. Eq., 103, 3 Keener. 368.

LECTURE X.

Declaratory Decrees.

Akin to the relief of cancellation of instruments is that of a declaratory decree. But the remedy in the latter case is of a wider and more comprehensive nature. Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief¹ The remedy provided by section 42, Specific Relief Act, is based more upon Scotch² than English practice. English courts of equity in former times often prefaced their decrees with a declaration of rights or title, but this was only by way of introduction to some other relief which it was the aim and object of those decrees to grant.³ In 1852, the English practice was assimilated to the Scotch by the enactment of the Chancery Improvement Act,⁴ section 50 of which was two years later re-enacted for the Supreme Courts in India,⁵ and this provision also found a place in our first Code of Civil Procedure.⁶ Section 15 of this Code ran thus:—

Declaration
in England
and Scot-
land.

“No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the civil courts to make binding declarations of right without granting consequential relief.”

Old Indian
law.

It is possible that this provision of law met with a more liberal interpretation in the Indian courts⁷ than did the corresponding

¹ S. R. A., s. 42.

² Cf. Mackey, *Practice of the Court of Session*, vol. II, pp. 93-100. 1 Stokes, *A.-I. Codes*, 934.

³ 1 Seton, *Judgments*, 23; *Fischer v. Secretary of State* [1898] 26 I. A., 28, 22 Mad., 270. Cf. *Hunsbutti v. Ishri Dutt* [1879] 5 Cal., 512, [1883] 10 Cal., 324, P. C. (s. n. *Ishri Dut v. Hunsbutti*);

Bhujendro v. Trigunanath [1882] 8 Cal., 761, 764.

⁴ 15 & 16 Vict., c. 86. *Rooke v. Kensington*, [1856] 2 K. & J., 753.

⁵ Act VI of 1854. s. 29.

⁶ Act VIII of 1859.

⁷ See Broughton, *Declaratory Decrees*, which collects the authorities.

Present law.

provision in the parent Act in England.¹ But the practice which was established under the Civil Procedure Code, and which was sanctioned by the Privy Council, was that a declaratory decree would be made only where there was a right to some consequential relief which, if asked for, might have been given by the same court, or where, in certain circumstances, it was required as a step to relief in some other court.² The Specific Relief Act has altered and to some extent widened the scope of the remedy. A declaratory decree cannot be now made where it is open to the plaintiff to ask for further and consequential relief,³ but where this is not open to him and there can be no executory decree, the court may yet decree a declaration of present and future rights.⁴ The intention of the legislature probably was to authorise an Indian court to grant to a plaintiff the relief which the English Court of Chancery grants in cases where no relief at common law is available. *E.g.*, where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form of relief, *viz.*, a declaration, the more direct kind not being open to him.⁵ It does not appear that in India a suit for a mere declaration can be brought under any other provision of the law.⁶ The general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature, excepting suits of which cognisance is barred by any enactment for the time being in force, does not, says Scott, C. J., carry with it the general power of making declarations, except in so far as such power is expressly conferred by statute.⁷ But this does not mean that declarations may not be embodied in a decree as introductory to other relief granted by the decree. For such

¹ *Cox v. Barker* [1876] 3 Ch. D., 370.

² *Kathama Natchiar v. Dorasinga Tever* [1875] 2 I. A., 169, 15 B.L.R., 83; *Sheo Singh Rai v. Dakho*, [1878] 5 I.A., 87, 1 All., 688; *Sreenarain Mitter v. Kishen Soondery*, [1878] 1 I.A. Sup., 149, 11 B. L. R. 171; *Sadut Ali v. Abdool Gunney* [1873] *ibid.*, 165, 11 B.L.R., 203; *Nilmoney v. Kalee* [1874] 2 I. A., 83, 14 B. L. R., 382.

³ S. R. A., s. 42, proviso. *Deokali v. Kedar* [1912] 39 Cal., 704.

⁴ This important and useful change was introduced at the instance of Mr. Pitt Kennedy, who was Standing Counsel to Government when the Specific Relief Bill was before the Council, 1 Stokes, A.-J. Codes, 934-5.

⁵ *Bholai v. Kali* [1885] 8 All., 70 (Mahmood, J.)

⁶ *Kunhiamma v. Kunhunni* [1892] 16 Mad., 140, 142.

⁷ *Shri Vaktuba v. Agarsingji* [1910] 34 Bom., 676.

declarations legislative sanction is not required, as they rest on long established practice.¹

The utility and importance of the remedy are manifest, for its object is 'to prevent future litigation by removing existing causes of controversy.'² It secures for the Indian litigant the same advantages which were sought by the old equitable bills of peace, bills *quia timet* and bills to perpetuate testimony in England.³ This method of adjusting title by bill in equity proved so convenient that in many of the United States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale.⁴ The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hardship was that a person so in possession could not force his adversary to sue, and thus put the claim to test.⁵ A number of statutes has therefore been passed, with the object of quieting title or compelling the determination of claims to real estate;⁶ and they accomplish a most useful purpose. "It is certainly for the interest of the state," said Field, J., "that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved, because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it,

English bills
in equity.

U.S. statutes.

¹ *Deokali v. Kedar*, supra.

² *Holland v. Challen*, 110 U.S., 20, where the distinction between a bill of peace and a bill *quia timet*, is well brought out. See also *Sharon v. Tucker*, [1892] 144 U.S., 533, 1 Keener, 392.

³ 2 Story, *Eq.*, ch. xxi, xxii, xlii.

⁴ *Wehrman v. Conklin*, 155 U.S., 314.

⁵ *Jersey City v. Lembeck*, 31, N. J. *Eq.*, 255.

⁶ 4 Pomeroy, *Eq.*, J., s. 1396; 2 Pomeroy, *Eq. R.*, p. 1241 n.

much less to erect buildings upon it, with the certainty of litigation and loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as wild and uncultivated land. Few persons would be willing to take possession of such land, inclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity, because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated, should be settled, so that it may be subjected to use and improvement."¹ The Indian enactment, in one respect at any rate, has a more extended scope, for it contemplates the settlement, not only of conflicting claims to property, but also of disputes as to *status*, though it may be doubted if a suit to have the true construction of a statute declared would come within its purview.² It does not sanction every form of declaration.³ A declaratory decree confers no new right, it only clears up the mist that has been gathering round the plaintiff's *status* or title. A man's *status* or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him. There are some attributes which may be said to belong to humanity in general, so long as it does not deviate from the normal type. But individuals may have characteristics peculiar to them, and these peculiar characteristics will constitute the *status* of each. An adopted son, for instance, is not quite the same as a natural-born son, and with neither can be placed on an even footing a natural or illegitimate son.

Status.

¹ *Holland v. Challen*, 110 U. S., 19, 21.

² *Fischer v. Secretary of State*, [1898] 26 I. A., 28.

³ *Ramdas v. Secretary of State* [1913] 17 C. L. J., 75 (declaration that dismissal of a servant of crown was contrary to rules not granted).

The rights of a son, again, may differ from those of a daughter, and the married woman in the eye of the law may be a different person from a widow or even a *divorcee*. The legal character and position of each may be differentiated. According to Holland, the chief varieties of status among natural persons may be referred to the following causes : (1) sex ; (2) minority ; (3) 'patria potestas' and 'manus'; (4) coverture ; (5) celibacy ; (6) mental defect ; (7) bodily defect ; (8) rank, caste, and official position ;¹ (9) slavery ; (10) profession ; (11) civil death ; (12) illegitimacy ; (13) heresy ; (14) foreign nationality ; and (15) hostile nationality.² Now, there may be a question raised regarding a person's *status*, it may, *e.g.*, be disputed if a certain woman is the lawfully wedded wife of a certain person,³ or if she has borne a son to him,⁴ or if a certain child whom a lady is bringing up is the adopted son of her husband.⁵ Upon the settlement of this question, important rights, both personal and real, may depend, and a court may be asked to put an end to dispute and uncertainty by determining the legal character in issue. Where the defendants had made a statement before the revenue authorities, stating that the plaintiffs were Sheikhs, and, as such, not entitled to various rights in the village to which Rajputs alone were entitled, the Punjab Chief Court held that the plaintiffs were entitled to sue for a declaration that they were Rajputs of the specified *got*.⁶

Or, again, the dispute may be regarding a person's rights and interests in property, a cloud may have been cast upon his title. This convenient expression, "cloud upon title," I have used before, but the meaning may not be quite clear to you. I may therefore explain that it is something which is apparently valid, but which is, in fact, invalid.⁷ It is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is, in fact, unfounded, or which it would be inequitable to enforce.⁸

Title.

'Cloud upon title.'

¹ *Cf. Maharaj v. Shashi* [1915] 13 A. L. J. R., 455 ; s. c. 37 All., 313 (office of Honorary Secretary of an association, declaration refused).

² *Jur.*, 340.

³ *Cf. S. R. A.*, s. ill. (h) ; s. 43, ill.

⁴ *Shrivaktuba v. Agarsingji* [1910]

34 Bom. 676.

⁵ *Cf. Ibid.*, s. 42, ill. (f)

⁶ *Tasaddug Husain v. Wazir Ali*, [1906] P. L. R., 9. *Cf. Muhammad v. Secretary of State* [1910] 89 P. L. R.

⁷ *Bissell v. Kellogg*, 60 Barbour, 629.

⁸ *Rigdon v. Shirk*, 127 Ill., 412.

As another American authority puts it, "A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title, which he may remove."¹ *E.g.*, a neighbour may claim a right of way across a field that belongs to another,² or a life-tenant may alienate the property in his possession to the prejudice of the rights of a reversioner or remainderman.³ This cloud may be constituted by a deed or other instrument or proceeding, and if left to gather and not dispersed in time, it is likely to be used to embarrass or affect a party's title injuriously and vexatiously.⁴ Evidence going to establish the unsubstantiality of the cloud may be lost in course of time, the value of the property may fall in the market, the securities may depreciate, and the person lying under the cloud may even be prevented from making definite and certain arrangements for his family. The interests of justice therefore require that this unfortunate person should be permitted to invoke the aid of the court for the removal of the cloud as early as practicable.⁵

Conditions
for relief.

As the remedy is statutory, it is necessary to consider the provisions of the statute for determining the conditions under which the courts will administer relief. These conditions are, first, that the plaintiff should at the time of suit be entitled to any legal character or to any right as to any property; next, that the defendant should then have denied or be interested in denying this character or right; and, lastly, that the plaintiff should not then be in a position to ask for relief consequential upon the declaration prayed for. If, therefore, the plaintiff can show a present existing interest in himself, coupled with a present danger or detriment to such interest, the court, in its discretion, may make a declaration which will avert such danger

¹ *Whitney v. Port Huron*, 88 Mich., 269, 24 Am. St. R., 291.

² *Of. S. R. A.*, s. 42, ill. (a).

³ *Ibid*, ill (d), (e).

⁴ 4 Pomeroy, *Eq. J.*, s. 1398; *Haskell v. Sutton*, 53 W. Va., 206.

⁵ *Lowndes v. Bettie* [1864] 10 Jur. N. S., 226.

or detriment, provided that he is not at the time shown to be also entitled to any other decree capable of execution.¹ It will be convenient to consider the several conditions or elements above-mentioned separately.

(a) There must be a present interest in the plaintiff. If it is an interest in property, it may not be one for immediate enjoyment. In the case of real property, English lawyers distinguish between estates in possession and estates in expectancy,² i.e., lands (to take, as an instance, one species of real property only) of which a party may now be in possession and enjoy the usufruct, or lands in respect of which a party has only a right of future enjoyment. But though actual enjoyment may be postponed, that does not affect the present character of the right. The right is there, but the facts which are to put that right in motion have not yet emerged. Such a right is to be distinguished from a mere *chance* or possibility of right, a vague *expectancy*, inasmuch as it is a distinct and definite interest known to the law, which is capable of alienation, and devolves, at demise of the person of inherence, upon his heirs or representatives.³ Where a suit is brought for the removal of a cloud from a title, the plaintiff can obviously have no *locus standi* to maintain this suit, if he is a stranger to the title. "It is not conceivable, in the nature of things," said McClellan, J., "that any state of facts in regard to the title, any character of muniments evidencing *prima facie* title in others, could be said in any sense to shade and obscure that which has no existence."⁴ He must have some title in himself, for a plaintiff can recover solely on the strength of his own title, and not on the weakness of that of his adversary.⁵ But this title need not be a perfect or absolute one, which will avail against the whole world; it is enough if the plaintiff can show in himself a title which is superior to the alleged cloud.⁶

(a) Present interest.

Now let us examine some of the titles which have been **Proprietary title.**

¹ Collett, 5th. ed. 296. Cf. *Wajid Ali v. Dianatullah* [1885] 8 All., 31. *Onus upon plaintiff, Chitta v. Debi* [1901] 24 All., 170.

² *Fearne, Contingent Remainders*, 2.

³ *Digby, Hist. Real Prop.*, 324.

⁴ *Lyttle v. Sandefur* [1890] 93 Alabama, 396, 1 Keener, 385.

⁵ *Kennedy v. Elliot*, 85 Fed., 832; 2 Pomeroy, *Eq. R.*, s. 730. *Ante*, 50 n.

⁶ *South Chicago Brewing Co. v. Taylor*, 205 Ill., 132.

recognised in decided cases. If the plaintiff is entitled as owner to some property, he has the fullest title that the law recognises, and there can be no question as to his right to maintain a suit in respect of that property. This title may be by inheritance or purchase, or even prescription.¹ But, in any case, if it is jeopardised or clouded by reason of an adverse claim, the plaintiff may have relief. This adverse claim may be based on a deed purporting to be executed by the plaintiff's predecessor-in-title,² or on a fraudulent conveyance made by a stranger to the title,³ or an unlawful alienation made by a co-owner.⁴ Or, the claim may take the form of an order by a magistrate or other executive officer directing the removal of what is described as an obstruction on the public way.⁵ Or the claim may be put forward on behalf of the public with the object of imposing a servitude upon the plaintiff's land: the public, *e.g.*, may claim part of it as a highway.⁶ Or, a neighbour may have committed acts of trespass upon the plaintiff's property,⁷ or collected rents from the plaintiff's tenants.⁸ Or the plaintiff's property may have been attached or even sold in execution of a decree, obtained by a third party against a stranger.⁹ Or, the plaintiff may have failed to reduce to possession the whole estate he has inherited, and the defendant may have falsely set up a claim as heir to it.¹⁰ Or, the plaintiff may be the owner by purchase of certain property, but he may have deemed it expedient to get the conveyance drawn up in favour of a third person and this person,

¹ *Per Sawyer, J.* : "The statute of limitations as against a party claiming under a written title would have performed but half its mission as a statute of repose, if the party relying upon it must wait till he is attacked before he can reduce the evidence of his title to the form of a permanent record." *Arrington v. Liscon*, 34 Calif., 365, 94 Am. Dec., 722. *Sharon v. Tucker* [1892] 144 U. S. 533, 1 Keener, 392.

² *Pixley v. Huggins*, 15 Calif., 127.

³ *Sobha Pandey v. Sahodra Bibi* [1888] 5 All., 322 (fraudulent mortgage followed by notice of foreclosure).

⁴ *Unni v. Kunchi Amma* [1890] 14 Mad., 26 (unauthorised *kanom* of a Malabar *tarwad* by *Karnavan*, since removed from office).

⁵ *Secretary of State v. Jethabhai Kalidas* [1892] 17 Bom., 293 (alleged obstruction was in front of plaintiff's shop on land which he claimed as his).

⁶ *Chuni Lal v. Ram Kishen Sahu* [1888] 15 Cal., 460, F. B.

⁷ *Bissesuri v. Baroda Kanta Roy* [1884] 10 Cal., 1076. If the trespass amounts to ouster, possession must also be claimed.

⁸ *Chinnammal v. Varadarajulu* [1892] 15 Mad., 307; *Mahadeo Singh v. Bachu Singh* [1888] 11 All., 224.

⁹ *Narayanav v. Ballerishna* [1880] 4 Bom., 529, F. B.; *Shivram Chintaman v. Jivu* [1888] 13 Bom., 34.

¹⁰ *Chinnammal v. Varadarajulu*, supra. *Of. 1 Pomeroy, Eq. J.*, 504 n.

relying upon his ostensible or paper title, may choose to play him false.¹ In all these cases, the plaintiff may have a declaration from the civil court that he is the owner of the property, and as such entitled to exercise over it the dominion of a proprietor, as against the adverse claimant. So, if a municipality refuse leave to a proprietor of land to open a market thereupon, he may sue for a declaration to establish his right.²

The title, again, may be possessory. One in lawful possession of property may maintain it against all but the rightful owner; and if a third party interferes with his possession³ or requires him to vacate,⁴ the actual possessor may obtain a declaration of his right to hold the property. And, where property, subject to a mortgage, was sold in execution of a decree and purchased by the plaintiff, who obtained possession, he was allowed to maintain it against a subsequent purchaser in execution of a decree on foot of the mortgage, where it appeared that the mortgagee, though aware of the plaintiff's rights, had not impleaded him as a defendant to his suit for sale.⁵ Possession, *bonâ fide* and lawfully obtained, is, as we have seen before, protected by the courts;⁶ and to require a party in such possession to await the action of a hostile party claiming under the instrument or other matter constituting the cloud, until perhaps the former's evidence and ability to defend against it is lost by lapse of time, would, in many cases, be to deny him any remedy.⁷ But, if the possession has been obtained by violence or by the use of any unfair or corrupt means or by fraud, equity will not lend its aid.⁸ Such possession does not create any interest which the law will recognise.

Possessory
title.

¹ *Lobo v. Brito* [1897] 21 Mad., 231 (land purchased *benami*); *Gour Mohun v. Dinonath* [1897] 25 Cal., 49 (decree purchased *benami*, executed by *benamidar*).

² *Brij Mohan Singh v. Collector of Allahabad* [1881] 4 All., 102.

³ *Ismail Ariff v. Mahomed Ghous*, [1893] 20 Cal., 834, P. C.; *Ayyaparaju v. Secy of State* [1912] 37 Mad., 298; *Mt. Rosa Min. Co. v. Palmer*, [1899] 50 L. R. A. 289.

⁴ *S. R. A.*, s. 42, ill. (g).

⁵ *Nathu Singh v. Gumani Singh* [1896] 18 All., 320. This decision partly turns upon certain views as to

the array of parties in mortgage suits which is peculiar to the Allahabad Court, and may not command unqualified assent in other Indian Courts. See *Protap v. Ishan* [1898] 4 C. W. N. 266; *Ghose, Mortgage*, 735 n. ⁶ *Ante*, 49; *Salmond, Torts*, 175-6; 17 M. L. J., 297 (art.).

⁷ *Per Gilfillan, C.J.*, *Redin v. Branham*, 43 Minn., 283.

⁸ *Cf. Watson v. Lion Brewing Co.*, 61 Mich., 595; *Adler v. Sullivan*, 115 Alabama, 582; *Stetson v. Cook*, 39 Mich., 750; *Hordin v. Jones*, 86 Ill. 313; *Wakefield v. Sunday Lake Min. Co.*, 85 Mich., 605.

Co-owner-
ship.

The plaintiff's title again may be that of a co-owner. A co-parcener in a Hindu joint family may have a declaration that he is entitled to a certain undivided share in, say, the ancestral property, if yet not partitioned.¹ And if a private partition has taken place, whereby the plaintiff has obtained possession in severalty of a specific portion of the property previously joint, he may have his separate rights declared when the Collector directs a partition of the whole property under the Bengal Act VIII of 1876.²

Other titles.

An undivided coparcener of a deceased Hindu may obtain by suit a declaration that he is entitled to collect certain debts payable to the deceased, though the latter's widow has already taken out a succession certificate authorising her to collect them.³ The plaintiff may be a devisee and it may be a question whether he takes an absolute or a qualified estate under the will. *E.g.*, a testator may bequeath his property to three persons 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' If no such children are in existence, the legatees may, by suit against the executor, obtain a declaration as to whether they take the property absolutely or only for their lives, and also as to the interest of the children before their rights are vested.⁴

The plaintiff's title may again be that of an administrator⁵ or of a mortgagee from a deceased owner.⁶ Or the plaintiff may be a mortgagor who is in actual possession of the mortgaged property and stands in need of a declaration that the mortgage has been satisfied.⁷ Or he may be a vendor of immoveable property who has not been paid the full purchase-money and has a lien therefor upon the estate sold.⁸ Or the plaintiff may

¹ *Brij Bhukhan v. Durga Dat*, [1898]. 20 All., 258. Cf. *Ram Autar v. Jagan Nath* [1907] 10 O. C., 204 (jurisdiction of Civil and Revenue Courts considered).

² *Kalup Nath Singh v. Ramdein Lal* [1888] 18 Cal., 117.

³ *Chinnappa v. Thulasi Ammal*, [1904] 15 M. L. J. R., 399.

⁴ S. R. A., s. 42, ill. (b).

⁵ *Pinnie v. Hildreth*, 81 Calif., 127.

⁶ *Wamanrao v. Rustomji, Edulji*, [1896] 21 Bom., 701. (defendants had

contested validity of mortgage upon allegation of coparcenary rights in the mortgaged property along with the deceased mortgagor).

⁷ *Sher Singh v. Devi Dayal* [1913] 302 P. L. R.

⁸ *Sutliff v. Smith*, 58 Kan., 559; 2 Pomeroy, *Eq. R.*, p. 1230 n. An attaching creditor acquires a lien upon personal property and may maintain a suit to remove cloud upon it likely to affect its sale. *Voss v. Murray*, 50 Ohio St., 28.

claim to have acquired a *lakhiraj* tenant-right to certain lands, and if he has been in quiet possession for over twelve years and has not been a party to resumption proceedings taken by the defendant, he may sue for a declaration of such title, with the object of preventing disturbance of his possession at the instance of the defendant.¹

The plaintiff may be a trustee, and even if appointed by the members of a caste cannot be removed capriciously. A caste has power to do what it likes for the internal regulation of its affairs, and all questions relating to them are caste questions. But where a caste deals with its own property and creates civil rights in others according to law, the rights and obligations arising out of such dealing do not appertain to caste questions as such, or the internal regulation of its own domestic or social affairs. They are legal rights and legal obligations enforceable by our courts, as much as if, say, a private person had been a party to their creation.²

Trust of
caste pro-
perty.

Or, the plaintiff's right may be of an even more circumscribed character. It may appertain, *e.g.*, to an office. Take the case of a Hindu temple. The plaintiff may be a trustee of such temple, and if, suppose, the District Temple Committee has ordered him to be removed from office, he may institute a declaratory suit to contest the validity of the order.³ Or, he may be a priest and entitled to officiate as such in the temple and to receive the offerings made there during a certain fixed period. If he is disturbed in his ministrations by a rival priest, he may obtain a declaration of his rights from the civil court.⁴ Or, the plaintiff's position may be still humbler, and he may have a right only to conduct pilgrims and worshippers inside the shrine. If the resident ministers in constant attendance upon the idol inside the temple prohibit access to the arcana, except upon the payment of a fee, the *pandas* may impeach the legality of this interference with their rights of

Right to
office.

¹ *Abhoy Churn Pal v. Kally. Per-shad Chatterjee* [1880] 5 Cal., 949.

² *Chapsey v. Jethabai*, [1907] 9 Bom. L. R., 514.

³ *Ramunuj v. Devanayka*, [1885] 8 Mad., 361. *Gourmani v. Chairman of*

Panhati Municipality [1909] 14 C. W. N. 105.

⁴ *Limbabin Krishna v. Ramabin Pimplu*, [1888] 13 Bom., 548. Cf. *Badriv. Mulloo*, [1905] 8 O. C., 339 (gardener's perquisite).

free access, and obtain a declaration with regard thereto.¹ A person interested in a *wakf* may sue to have an illegal alienation of the endowed property set aside.²

Right to
dignity.

The plaintiff's right may, again, be to a dignity which is not wholly empty. If the use of a particular suffix or title carries with it the right to certain lands, the plaintiff may sue for a declaration of an exclusive right to use the same, and the defendant may be enjoined from adopting such suffix or title, and thus, by implication, asserting a claim to the lands.³

Remainder,
reversion.

The above are all instances of rights of present enjoyment. But the law affords redress even where the plaintiff is not entitled to immediate enjoyment of the subject-matter of the right. Section 42 speaks of "any right as to any property," and the words are large enough to include remainders and reversions, even if remote.⁴ The distinction between these two forms of real rights has already been indicated. When a particular estate is created, any estate expressly created at the same time and so limited as to come into enjoyment upon the determination of the particular estate is a *remainder*, whereas an estate of future enjoyment not thus expressly created is a *reversion*. In the Specific Relief Act, the term 'reversion' is apparently used in a lax sense and includes both a reversion properly so called and a remainder.⁵ As to remainders, a further distinction has to be noted. If the remainder is limited upon an event which is certain to happen, it is called a *vested* remainder; the simplest instance is the case of a bequest of a life-estate to A and the remainder to B. Here A is sure to die sometime or other, and the remainder is vested in B. It may so happen that B may predecease A, but B's interest, *so long as it exists*, is a present vested interest.⁷ If, on the other hand, the remainder is limited upon an event which is uncertain, it is *contingent*. Suppose property is

Vested, con-
tingent.

¹ *Kalidas Jivram v. Parjaram Hirji*, [1890] 15 Bom., 309.

² *Zafaryab Ali v. Bukhtawar Singh* [1883] 5 All., 497; *Jawahra v. Akbar Husain* [1884] 7 All., 178; *Muhammad v. Akbar*, [1910] 7 A.L.J.R., 797; *Kaji Hassan v. Sagun Balkrishna* [1899] 24 Bom., 170.

³ *Ramanuj v. Ramakisore*, [1898] 22 Mad., 189.

⁴ *Govind Pillai v. Thayammal* [1904] 28 Mad., 57. But see App. B, s. 17, *infra*.

⁵ *Ante*, 140.

⁶ *Ibid.* See S. R. A, s. 42, ill. (d).

⁷ *Digby, Hist. Real Prop.*, 231.

bequeathed to *A* for life, with remainder to *B* if he attains the age of 21, and with a gift over to *C*. Now, *B* may die without ever attaining the age of majority, it is therefore uncertain if the remainder will ever vest in him. But "it is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes," says Fearne, "a vested remainder from one that is contingent."¹ A contingent remainder, however, is also a present right, though it cannot secure actual enjoyment of the property, unless before the particular estate determines and the succession opens out, the contingency has so befallen that the remainder has become converted into a vested one.

The above discussion is elementary, but is necessary for determining the precise rights of that familiar figure in our law courts who is compendiously styled the Hindu reversioner.² There can be no question that a person in whom the reversion of an estate is vested has such a title as will support and justify a declaratory decree.³ But, where the right is of a contingent character and it cannot be predicted for certain that it will ever mature into an absolute or even qualified right of present enjoyment, a court, having a discretionary relief to administer, may well pause before solemnly declaring such an inchoate and dubious right. A Division Bench of the Calcutta High Court has roundly declared: "Section 42 refers only to existing and vested rights and not to contingent rights like

Hindu reversioner.

¹ *Contingent Remainders*, 216. Gray, *Perpetuities*, s. 9, also ch. iii; Williams *Real Prop.*, 350.

² The Mahomedan Law does not seem to recognise either remainders or reversions. *Abdul Wahid v. Nuran* [1885] 11 Cal., 597, 606, PC; *Samsuddin v. Abdul* [1906] 31 Bom., 165. *Distinguish Banoo v. Aled Ali* [1907] 32 Bom., 172.

³ *Anant Bahadur Singh v. Raghunath Kuar* [1882] 8 Cal. 769, P.C. Cf. S.R.A., s. 42, ill. (d), (h). In America remaindermen and reversioners seem to have been frequently allowed to sue. *Woodstock Iron Co. v. Fullenwider*, 13 Am. St. R. 73; *Oppenheimer v. Levi* [1903] 60 L.R.A., 729; 2 Pomeroy, *Eq. R.*, p., 1233 n.

those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession of the property."¹

It is usual to speak of a Hindu reversioner's interest as contingent,² and the Judicial Committee has treated it as a *spes successionis* which is inalienable.³ But "the Hindu law," to quote Mayne, "knows nothing of estates for life, or in tail or in fee. It measures estates not by duration, but by use."⁴ Analogies drawn from the real property law of England should therefore be avoided as apt to mislead. A Hindu widow is entitled to full beneficial enjoyment of the property in her possession, so long as she lives,⁵ and she may lease it,⁶ and even alienate it absolutely, in case of such necessity as the law recognises.⁷ The interest of the person presumptively entitled to succeed to the estate upon her death, is in one sense uncertain, because his claim may pass away by his own death, or be defeated by the birth or adoption of one who is nearer than himself.⁸ But as he has the present capacity of taking possession, if the possession were to become vacant by the determination of the widow's estate, his reversionary interest cannot strictly be treated as 'contingent,' in the sense of the distinction pointed out by Fearne.⁹ We accordingly find that the right of the Hindu reversioner to sue in respect of the acts of the female heir which imperil his title and injure the estate, is well established,¹⁰ and the Indian legislature has expressly recognised it in illustrations (e) and (f) of section 42, Specific Relief Act.

Hindu
widow.

¹ *Greeman Singh v. Wahari Lall Singh* [1881] 8 Cal., 12. See article by J. N. Bose, 1 C.L.J., 53 n. sqq; *Samar-enda v. Birendra* [1908] 35 Cal. 777, 789, 794, S. B., *Nagendra v. Probal* [1913] 17 C.W.N., 964.

² *Of. Brahmadeo v. Haryan Singh*, [1898] 25 Cal., 778, 780; *Kathama v. Dorasingha* [1875] 2 I.A., 169; Mayne, *Hindu Law*, 8th. ed., p. 904; *Khairti v. Matab* [1911] 11 I. C. 211.

³ *Bahadur Singh v. Mohar Singh* [1901] 24 All., 94, 107, P.C. *Of. Sham Sundar v. Achhan Kunwar* [1898] 21 All., 71, 80, P. C.

⁴ *Hindu Law*, 8th. ed. s. 605, p. 846.

⁵ *Ibid.*, s. 625, p. 871; *Hurrydass v. Rungunmoney* [1851] Sev., 657; *Moni-*

ram v. Keri [1879] 5 Cal., 776, 789, P.C.

⁶ *Madhu Sudhan v. Rooke* [1897] 25 Cal., 1, P. C.

⁷ Mayne, *op. cit.*, s. 634 sqq.

⁸ *Ibid.*, s. 638, p. 888.

⁹ *Of. Collett*, 5th. ed. 302; Nelson, 270; Gray, *Perpetuities*, 85.

¹⁰ *Raj Lukhee v. Gokool* [1869] 13 M.I.A., 209, 224; *Goolab v. Kurun* [1871] 14 M.I.A., 176; *Kathama v. Dorasinga*, *supra*, *Jumaana v. Bama-soondari* [1876] 1 Cal., 289; Mayne, *op. cit.*, s. 646, p. 904; *Hem Chunder v. Sarnamoyi* [1894] 22 Cal., 854; *Adideo Narain Singh v. Dukharansingh*, [1883] 5 All., 532, 538; *Chiruvolu v. Chiruvolu* [1906] 29 Mad., 390, F.B.

Where the lady in possession alienates part of the property,¹ the person presumptively entitled to possess it, if he survive her,² may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity³ and was therefore void beyond the alienor's life-time. And if the lady adopts a son to her deceased husband, the reversioner presumptively entitled to succeed on her death without a son, may, in a suit against the adopted son, obtain a declaration that the adoption is invalid.⁴ The general rule no doubt is, as these illustrations show, that the immediate reversioner should sue for a declaration in respect of the female heir's acts, but the rule admits of exceptions, as was pointed out by the Privy Council in the leading case of *Rani Anand Kunwar v. Court of Wards*.⁵ A more distant reversioner may sue, if those nearer in succession are in collusion with the widow, have concurred in her act, or have precluded themselves from interfering, or refuse without sufficient cause to institute proceedings.⁶ This means that the presumptive heirs in succession may, by reason of acquiescence in the act complained of⁷ or estoppel, whether legal or equitable, be not in a position to impeach that act, or they may not simply be willing to do so. The conduct of the nearer reversioners need not necessarily be fraudulent,⁸ and mere omission to sue within the statutory period may give a remoter reversioner a right of suit.⁹ But the exceptions

¹ Without the consent of the persons constituting the next reversion, *Bajrangi v. Manokarnika*, [1907] 30 All., 1, P. C. Distinguish *Hari v. Bajrang* [1909] 13 C. W. N. 544 (mortgage); *Muthuveera v. Vythilinga* [1908] 19 M.L. J. R. 88. Where the consenting party is a female reversioner, the alienation may not be valid, *Bepin Behari v. Durga Charan* [1908] 8 C.L. J., 120; *Vinayak v. Govind* [1900] 25 Bom., 129.

² An heir presumptive is defined by Stephen as "one who, if the ancestor should die immediately, would be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born, 1 Com., 400.

³ *Gouri v. Tirumaya* [1907] 18 M.L. J.R., 17; *Singam v. Drupadi* [1907] 31 Mad., 159.

⁴ *Kotamarti v. Kotamarti* [1874] 7 Mad., H. C., 351.

⁵ [1880] 6 Cal., 764, P. C. *Sri Pal v. Sura bali* [1901] 24 All., 82, 84.

⁶ Their lordships added, "In such a case, the facts justifying the distant reversioner's suit ought to be set out and, probably, the nearer reversioner ought to be made a party to the suit." This suggested requisition as to the array of parties, was enforced in *Ramabai v. Rangrav* [1894] 19 Bom., 614.

⁷ *Raghunath v. Thakuri* [1881] 4 All., 16; *Gurulingaswami v. Ramalakshamma*, [1894] 18 Mad., 53, 57.

⁸ *Gurulingaswami v. Ramalakshamma*, supra *Ramabai v. Rangrav*, supra.

⁹ *Govinda Pillai v. Thayammal* [1904] 28 Mad., 57; *Abinash Mazumdar v. Harinath Shaha* [1904] 32 Cal., 62.

specifically mentioned by the Judicial Committee cannot exhaust the list. The next reversioner, *e.g.*, may not be on the spot to question the act with the promptitude that its nature demands,¹ he may not have been heard of for years, and though nobody can testify for certain that he is dead, his whereabouts may not be known.² The protection of the estate by this reversioner in such a case is as much withdrawn as when he fraudulently colludes with the female heir. Or, the next heir in the line of succession may be another female who, when her turn comes, will hold only a limited estate.³ There has been some difference of opinion on this case in the Allahabad High Court. There are two decisions, consecutively reported in I. L. R., 6 All., in which diametrically opposite views are expressed.⁴ They were given much about the same time and without reference to each other. But in a later case, another Division Bench of the Court refused to recognise an exception to the general rule where the immediate reversioner was herself not entitled to more than a widow's estate.⁵ Not much attempt was, however, made to meet the arguments embodied in the judgment of Mahmood, J., in the earlier case;⁶ and his conclusion has more recently been adopted by other Judges of the Allahabad Court.⁷ The Madras High Court has consistently taken the more liberal view,⁸ which has also been adopted by the Calcutta Court.⁹ The authorities on the subject have been elaborately reviewed by Mookerjee, J., in the last case;¹⁰ and this learned judge, as usual, has not left much for any subsequent enquirer to add.

Rule of discretion not jurisdiction.

In fact, what I have called the general rule above embodies, I apprehend, a rule only of discretion and not jurisdiction. Section 42 makes no distinction between the rights of a near and those of a remote reversioner; and the general words of the

¹ *Of. Jagadamba v. Dakhina* [1886] 13 I. A., 84, 13 Cal., 308.

² *Kulicharan v. Ruchi* [1904] 1. A. L. J. R., 375. See also *Sheo Narain v. Damodar*, *ibid.*, 380.

³ Mayne, *Hindu Law*, 8th. ed. s. 686, p. 904.

⁴ *Madari v. Malki* [1884] 6 All., 428; *Balagobinda v. Ramkumar*, *ibid.* 431.

⁵ *Iswar Narain v. Janki* [1893] 15 All., 132.

⁶ *Balagobind v. Ramkumar* [1884] 6 All., 431.

⁷ *Hanuman v. Jota Kunwar* [1908] 28 A. W. N. 207; *Raju v. Ummed* [1912] 34 All., 207; *Sheoraji v. Ramdas* [1911] 33 All., 430.

⁸ *Kandasami v. Akkammal* [1889] 13 Mad., 195; *Raghupati v. Tirumalai* [1892] 15 Mad., 422; *Chidambara v. Nallammal*, 33 Mad., 410, *Re Govindammal* [1911] 10 M. L. T. 95.

⁹ *Abinash v. Harinath* [1904] 32 Cal., 62. But consider *Anant v. Raghunath* [1882] 9 I. A., 41, 8 Cal., 76.

¹⁰ *Abinash v. Harinath*, *supra*.

enactment cannot be controlled by any limiting words used in one or more of the illustrations.¹ It does not therefore seem correct to say that only the immediate reversioners can bring such a suit,² though, where it is sought to be maintained by a more remote reversioner, the court, in the exercise of its discretion, will have to determine if, in view of all the circumstances, it will be justified in making a declaration in favour of the plaintiff.³ The enactment is remedial and highly beneficial, and it deserves to be construed liberally, as a statute of repose.⁴

Contingent
right of suc-
cession.

The above considerations show, I believe, that the *dictum* in *Greeman Singh's case*,⁵ already referred to, is too broadly expressed. A reversionary right is as much a right to property as any other, and the fact whether the reversioner can claim an interest which is apparent and indefeasible⁶ or is merely presumptive, does not give rise to any difference in kind. There seems ground, therefore, for the dissent from the Calcutta view which has been expressed at Madras⁷ and Allahabad.⁸ In the Madras case the alienation in dispute was challenged by the sons of the uncle of the husband of the Hindu widow who had made it, and in the Allahabad case the suit was brought by a person who under a will claimed to be entitled to succeed to the property immediately on the death of the lady (mother of a Hindu testator) whose acts were impugned. In a more recent Madras case, the presumptive reversioner was allowed to maintain a suit for a declaration that a will, alleged to have been executed by the last male owner, was made under undue influence and coercion, and as such was invalid as against his reversionary interest, though the widow of the alleged testator was alive, and no collusion, acquiescence or laches on her part was shown. The right of such a reversioner to sue for a declaration is not confined to the case of transactions by the widow herself, as are referred to in illustrations (e) and (f) to section

¹ *Govinda Pillai v. Thayammal*, *supra*.

² *Mayne, H. L.* 904; *Sheopal Singh v. Bundoo Kuor*, [1905] 8 O. C. 81.

³ *Gyanendro Nath Roy v. Lobongomunjori* [1882] 11 C. L. R., 198; see also *Roghunath v. Thakuri* [1881] 4 All. 16.

⁴ *Oj. Holmes v. Chester*, 26 N. J. Eq.,

81.

⁵ [1881] 8 Cal., 12, S. C., 9 C. L. R., 249.

⁶ S.R.A., s. 42, ill. (d).

⁷ *Gangayya v. Mahalakshmi* [1886] 10 Mad., 90.

⁸ *Manmatha Biswas v. Rohilli Moni* [1904] 27 All., 406.

42.¹ The widow may act merely as guardian, and yet the act may be prejudicial to the estate.² Similarly, in Calcutta, a Hindu daughter has been held entitled during the life-time of her mother, to maintain a suit for the construction of the will of her deceased father and declaration incidental thereto, especially where the mother had allowed her rights, if any, to be barred by limitation, and where the immediate conduct of the executors would be determined by the construction.³ It is by no means necessary that the right in reversion should arise by operation of law, independently of the acts of parties. A daughter of a deceased Hindu coparcener possesses under the law no reversionary right in respect of the joint family property, but if, by a family arrangement any such right has been declared in her favour, that will make her competent to maintain a suit for declaration of the invalidity of an alienation of this property as against her.⁴

Trust to
preserve
contingent
remainder.

A trustee to preserve contingent remainders will apparently have the same rights as the remainderman, whose interests he is under an obligation to safeguard. *E.g.*, suppose an estate is limited to *A* for life, remainder to *B* as trustee during *A*'s life to preserve contingent remainders, and then the remaindermen are indicated. If *A* improperly alienates the property, *B* may sue for a declaration that the transfer is invalid.⁵

Contingent
right to non-
existent
moveables.

The court may also make a declaration in respect of a contingent right which relates to moveable property that is not yet in existence, where it finds the right established, though its exercise is dependent on a contingency. The Bombay Court, accordingly, declared a right to a preferential dividend from the profits of a trading company, though the fund from which this dividend could be claimed was not then in existence, and might never be.⁶ A joint creditor of a partnership may have his rights declared, but not those of other creditors which

¹ *Puttanna v. Ramakrishna* [1906] 30 Mad., 195.

² *Sunkara v. Sunkara* [1912] M. W. N., 70.

³ *Srinibash Das v. Monmohini*, [1906] 3 C. L. J., 224. Suit to preserve the present interest of reversioner, *Ram Nandan v. Sheo Parshad* [1910] 11 C. L. J., 623.

⁴ *Ammaconnu v. Ranganatha* [1905] 15 M. L. J. R., 392. In *Lahori v. Radha* [1906] P. R. no. 72, plaintiff claimed on basis of a customary right.

⁵ See *Garth v. Cotton* [1753] 2 Wh. & T., 8th. ed. 992, and notes.

⁶ *Bombay Burmah Trading Corporation v. Yorke Smith* [1892] 17 Bom., 197.

it is not necessary to ascertain, in order to give the plaintiff the appropriate relief.¹

A present obligation to a future liability may also give a right of suit. If a person, *e.g.*, covenants that if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts, he may, before any such property accrues, or any persons entitled under the trusts are ascertained, by suit obtain a declaration that the covenant is void for uncertainty.²

Present obligation to future liability.

Having indicated the nature of the *status* or title which the law requires in the plaintiff to a declaratory suit, I will now call your attention to some interests which have not been considered enough. The expectation of a future interest, or rather of a future event that may give an interest, has been said in England to be not a thing which would justify a court in entertaining a suit at the instance of a party having that and "nothing more."³ It cannot be the law, it has been authoritatively declared, that any one who may have a possibility of succeeding on the death of a Hindu widow can maintain the suit, for, if so, the right to sue would belong to every one in the line of succession, however remote.⁴ The plaintiff must show that at the time of suit he can claim an existing right and not a mere chance⁵ of obtaining a right at some future time⁶.

Possibility of right.

Rights that may not be transferred by law cannot be availed of by any so-called assignee; and it has been questioned if one Hindu reversioner by surrendering his rights, such as they are, to another, can confer upon him any competency to sue.⁶ There may, again, be rights perfectly good in law, but which are not of such character, even if assignable, as would justify a court of equity to grant an essentially discretionary remedy to an assignee of those rights.⁷ It may be doubted, *e.g.*, if the promisee of a contract to make a testamentary disposition were to transfer the benefit of this contract to a third person, whether

Assignee.

¹ *Woopendra v. Aghore* [1905] 9 C. W. N., 498.

² *S. R. A.*, s. 42, ill. (c).

³ *Davis v. Angel* [1862] 4 DeG. F. & J., 524.

⁴ *Anand v. Court of Wards* [1880] 8 I. A., 14, 6 Cal., 764, P. C.

⁵ *Tara Singh v. Chandi* [1908] P. L. R., 51.

⁶ *Of. Raicharan v. Pyari Mani* [1869] 3 B. L. R. (O C. J.), 70; but this seems doubtful.

⁷ *Of. Bhu'endra Chatterjee v. Trigu-nanath Mukerji* [1882] 8 Cal., 761.

the latter could, on the strength of such transfer, sue for a declaration of his rights.¹

Title not
clear.

Where one Mahomedan brought a suit against another, who was in possession of certain property, for a declaration that this property was *wakf*, but could not show that he was interested in this property in any way other than as being a Mahomedan, and his character as such had not been disputed by anybody, he was held to have no *locus standi* under section 42, Specific Relief Act.² And a similar conclusion was reached where the plaintiffs, who had sued for a declaration that they, as managers of a *ghat*, were entitled to one-third of the donations made by pilgrims, and the defendants were not solely entitled thereto, failed to establish by definite proof the particular title set up, and only succeeded in showing that they had some rights in the *ghat* in dispute.³

Section 42 speaks of "a right as to any property." Where the right, therefore, does not relate to any property, the section apparently does not apply. "It is hardly to be imagined," says Lindsay, I. C., "that a person who, under the common law, has a right, say, to personal safety or freedom or to reputation, can come to court with a suit under section 42, and ask for a declaration against another person, whose interference with the exercise of the right has been confined to a bare statement that the right does not exist."⁴ In recent years, suits have been brought in parts of upper India for a declaration as to an alleged right to slaughter cows.⁵ It is apprehended that such a declaration is not contemplated by the statute.

If a person is managing what is alleged to be a hereditary trust, but the devolution of the trust follows the descent of separate property, an adopted son of such manager, so long as the latter holds it, cannot claim any right inherent in the office.⁶

¹ *Prag Dat v. Chote Singh* [1905] 9 O. C., 55 (see judgment of Chamier, A. J. C.)

² *Wajid Ali Shah v. Dianat-ul-lah Beg* [1885] 8 All., 31.

³ *Maina v. Bri'mohun* [1890] 12 All., 587, P. C. Cf. *Shah Muhammad v. Kashi Dass* [1884] 7 All., 199;

Basdeo v. Damodarunand [1904] 1 A. L. J. R., 44.

⁴ *Ori Lal v. Mohammad Yakub* [1914] 17 O. C., 354, 361.

⁵ *Ibid*; *Shahbaz Khan v. Umrao Puri* [1908] 30 All., 181.

⁶ *Nataraja Chetty v. Kolandavelu Chetty* [1905] 15 M. L. J. R., 456.

Where the plaintiff sues in respect of a dignity, spiritual privilege or office, which is not recognised in law, there can be no declaratory decree in his favour, even if there are fees in the shape of voluntary payments attached to the office.¹ For voluntary payments no one is under any legal obligation to make to any particular individual in preference to another, nor to any person at all against his will.² Each *jujman*, e.g., has a right to select his own priest, and the priest can maintain no suit in the civil court to enforce such a right.³

Office remunerated by voluntary payments.

(b) But it is not enough for the plaintiff to show that he has a present existing interest. The court does not make declarations of abstract right or of trust, exclusive of any practical equity.⁴ No cause of action accrues to a plaintiff, until there is some infringement⁵ or threatened infringement of his right. A cloud must be cast before he can ask for its removal, no court will move on purely speculative grounds.⁶ The plaintiff, therefore, has to allege and prove hostility on the part of the defendant,⁷ a hostility that had come into existence before his plaint was filed,⁸ for the cause of action must be antecedent to the suit and not subsequent.⁹ If the defendant does not deny or is not interested in denying either the plaintiff's *status* or his title, the latter has no business to drag him into court, and must be content to have his suit dismissed with costs. This is what happened in the case already referred to of the Mahomedan, who sued to have certain property declared to be *wakf*, but failed to show that he had asserted any right to any property, and that the defendant had either by action or conduct denied any such

(b) Infringement.

¹ *Tholappa v. Venkata* [1895] 19 Mad., 62 (priest unconnected with temple); *Mahammad v. Asan Mohidin* [1907] 17 M. L. J. R., 421 (*Khatib*); *Barasati v. Chamru* [1907] 4 A. L. J. R., 715 (*Ohaudhr*); *Madhusudan v. Madhav* [1908] 11 Bom. L. R., 58 (*Shankaracharya*). *Chunnu v. Babu* [1910] 32 All. 527, *Gourmoni v. Panihati Municipality* [1910] 12 C. L. J., 75 (cremation ceremony priest) Cf. *Mundancheri v. Mundancheri* (1911) M. W. N., 353 (plaint allowed to be amended).

² *Ram Deehul v. Chukhoo* [1869] 1 N. W. P. H. C. R., 208; *Bhinuk v. Collector of Jounpore* [1867] 2 Agra, 271.

³ *Behari Lal v. Baboo* [1867] 2 Agra, 80; *Dwarka v. Rampertab* [1911] 13 C. L. J., 449.

⁴ *Muzhar Hossan v. Dinobondo Sen* [1865] Bourke, O. C., 8 Cor., 94.

⁵ *Gokul v. Bande* [1910] 8 I. C. 9.

⁶ 2 Story, Eq., s. 1511.

⁷ *Promotho Nath Ghose v. Jadoo Nath Sen* [1886] 1 Ind. Jur. N. S., 293; *Ram Khelawan Singh v. Oudh Kooer* [1873] W. R., 101; *Chintaman v. Mahadeo* [1904] 6 Bom. L. R., 283.

⁸ *Cowie v. Elias* [1869] 11 W. R., 40.

⁹ Cf. *Prannath v. Madhu* [1886] 13 Cal., 96, 98; C. P. C., s. 50 (d); Act V of 1908, Sec. 1, Or 7, r. 1 (e).

right.¹ So, where a Receiving Officer, appointed by the Collector under the Municipal election rules, refused to accept the nomination paper of the plaintiff, who was a candidate at a by-election for a councillorship of the Surat City Municipality, with the result that the list of candidates was published without the plaintiff's name, a suit for declaration of his title to come forward as a candidate was dismissed against the Municipality, because it was not shown that the defendant had any control over the Receiving Officer, and the Board had neither denied, nor was interested to deny, the character or right which the plaintiff sought to establish.²

So, again, where a Hindu widow in possession of her deceased husband's estate made a gift in favour of her daughter, the legal effect of the transaction was to accelerate the succession³ and put the next heir in possession of her limited estate by anticipation, and it was held to afford no cause of action to the next male reversioner, who had brought a declaratory suit to try the validity of the gift.⁴ Where a Hindu widow makes an alienation that is not justified by legal necessity, she may be taken to deny the reversioner's title, and her alienee is manifestly interested in denying the same.⁵ So, where property is vested in the Government, as, *e.g.*, public roads in the Bombay presidency,⁶ and the plaintiff is charged with having encroached on such property, if he sues for a declaration regarding the invalidity of the executive order so charging him, the Secretary of State for India in Council may properly be arrayed as the defendant to this suit. If, the magistrate having made an order under section 133, Code of Criminal Procedure, 1882, for removal of an obstruction of the public way, the plaintiff claims the land to be his property, there is an issue between the plaintiff

Interest to
deny title.

¹ *Wa'id Ali Shah v. Dianat-ul-lah Beg* [1885] 8 All., 31.

² *Surat City Municipality v. Chunilal* [1906] 30 Bom. 409.

³ *Behari Lal v. Madho Lal* [1891] 19 Cal., 236 P. C.; *Hemchunder v. Sarnumoyi* [1894] 22 Cal., 354, but *qy.*, as to partial surrender, *Marudamuthu v. Srinivasa* [1898] 21 Mad., 128, 132, 133, *F.B. Rangappa v. Pamti* [1908] 18 M. L. J. R. 309, *F. B. But see Pulin v. Bolai* [1908] 12 C. W. N. 837.

⁴ *Bhupal Ram v. Lachma Kuar*, [1888] 11 All., 253. *Tulsa v. Baru* [1907] 4 A. L. J. R. 677. Distinguish *Isri Dut v. Bausbutti* [1883] 10 Cal., 324, P. C. Cf. 32 All., 594.

⁵ Any person holding adversely to the lady in possession may be properly made defendant to a declaratory suit. *Adi Deo Narayan v. Dukharan Singh* [1883] 5 All., 532.

⁶ *Bombay Land Revenue Act*, V of 1879.

and the Government, and the latter is clearly interested in denying the former's title.¹

A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.² Such is a 'trustee to preserve contingent remainders.'

(c) But there may be a real dispute as to the plaintiff's legal character or right to property, and the parties may be properly arrayed, and yet the court shall refuse to make any declaration in favour of the plaintiff where, being able to seek further relief than a mere declaration, he omits to do so.³ The object of this provision is "to avoid a multiplicity of suits and to prevent a person getting a declaration of right in one suit and immediately after the remedy, already available, in another."⁴ But this does not mean that the plaintiff must include in his prayer for relief all and every claim that he can make against all and sundry.⁵ What the legislature means is that, if the plaintiff at the date of his suit is entitled to claim, as against the defendant to the cause, some relief other than and consequential upon a bare declaration of right, he must not vex the defendant twice, but he is bound to have the matter settled once for all in one suit. It may be that there are third parties who also support some of the contentions of the defendant, but sufficient unto the day is the evil thereof, and while the plaintiff is fighting his battle against the defendant, he need not bother himself about the others yet.⁶ There is a separate cause of action against every person who has denied his right or title, or may deny it. It may be, again, that after a suit has been instituted, the plaintiff becomes entitled to a larger relief than that originally claimed. *E.g.*, a Hindu reversioner, who has filed a suit impeaching the validity of an alienation made by the female heir in possession, may afterwards, by reason of

(c) Consequential relief.

¹ *Secretary of State for India v. Jethabhai* [1892] 17 Bom., 293. Where magistrate acted at deft's intance, deft. alone may be sued, *Ekhur v. Anu* [1910] 6 I. C., 46.

² S. R. A., s. 42, expln.

³ S. R. A., s. 42, proviso.

⁴ *Per M. Aiyar, J., Kombi v. Aundi*

[1889] 13 Mad., 75. See also *Kunhi-amma v. Kunhunni* [1892] 16 Mad. 140, 141-42.

⁵ *Parasram v. Bhimbhai* [1905] 5 Bom. L. R., 195.

⁶ *Subramanyan v. Paramaswaran* [1887] 11 Mad., 116.

the death of this heir, become entitled to take possession of the estate. But this subsequent event would neither prevent his proceeding with the claim as laid,¹ nor entitle him to amend his plaint and add a prayer for possession, after the cause has been dealt with by the court of first instance.²

'Further relief.'

The reasonable construction of section 42 is that the 'further relief' which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish, and of which he prays for a declaration.³ The relief must be in relation to the legal character or right as to any property which the plaintiff is entitled to, and whose title to such character or right the defendant denies or is interested in denying,⁴ and it must be relief appropriate to and consequent on the right or title asserted.⁵ When a person is out of possession of the land, in respect of which he seeks to have his title declared, possession of the land in dispute is further consequential relief appropriate to the declaration prayed and should, as a general rule, be also asked for.⁶ But a declaratory decree is all that a plaintiff requires when he has no need of the assistance of the court to replace him in possession.⁷ The further relief must be such as the plaintiff can ask for and he need ask for. If the plaintiff is not able to seek further relief, *cadit quæstio*, the proviso does not apply. *E.g.*, the plaintiff may claim to be a member of a Hindu joint family, and as such entitled to a certain cultivatory holding from which he has been ousted. Now, in the United Provinces, the civil court is not competent to replace him in possession as a tenant the plaintiff must go to the revenue court for that. But this will not prevent the civil court granting to the plaintiff such (declaratory) relief as it can grant, and as the plaintiff may

Where court cannot grant such relief.

¹ *Ram Adhar v. Ram Shankar* [1903] 26 All., 215; *Surjan Singh v. Buldeo Prasad* [1900] 20 A. W. N., 172.

² *Govinda v. Perumdevi* [1888] 12 Mad., 136.

³ *Abdulkadar v. Mahomed*, [1891] 15 Mad., 15, 18.

⁴ *Fakir Chand v. Amunda Chunder* [1887] 14 Cal., 586.

⁵ *Kannan v. Krishnan* [1890] 13

Mad., 324; *Erfan v. Samiruddin* [1912] 15 I. C., 552.

⁶ *Basavayya v. Abbas* [1900] 24, Mad., 20; *Panga v. Unnikutti*, *ibid.*, 275. *Ramasamy v. Muniyandi* [1910] 20 M. L. J. R., 709.

⁷ *Ramanuja v. Devanayaka* [1885] 8 Mad., 361, 364; *Vemavarapu v. Karedla* [1911] 21 M. L. J. R., 952.

legally ask from it.¹ So, where in Bengal, the defendant, having set up a right to a permanent *malguzari* tenure in certain lands, the plaintiff, admitting that he held a *kursa-jama* tenure therein, sought to eject him from this holding and also prayed for a declaration that the defendant was not a permanent *malguzar*, the court held that the plaintiff might have the declaration, though, by reason of failure to prove the service upon the defendant of a reasonable notice to quit, ejectment could not be decreed in the plaintiff's favour.²

Where
declaration
sufficient.

And, if the plaintiff thinks that a bare declaration will serve his purpose, and the court is not satisfied that he is wrong, he need not ask for any further relief. The proviso to section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want.³ A plaintiff, *e.g.*, who asks for a mere declaration that he is entitled to collect the debts owing to his deceased undivided nephew, cannot be compelled to ask that a succession certificate, previously granted to his niece-at-law, should be cancelled. It may be that he requires nothing more than a mere declaration, and in those circumstances to refuse to make the decree asked for, will be a denial of justice.⁴ The possession of the defendant may, for instance, be admitted, and the only question may be as to the nature of that possession.⁵ An injunction may sometimes be a consequential relief,⁶ but unless it is absolutely necessary to stop further proceedings on the part of the defendant, the plaintiff is not bound to ask for it.⁷ The plaintiff, *e.g.*, may have purchased a decree ostensibly in the

¹ *Brij Bhukhan v. Durgu Dat* [1898] 20 All., 258. *Of. Najib Ullah v. Gulsher* [1909] 6 A. L. J. R., 343, F. B.

² *Kali Kishen Tagore v. Golam Ali* [1886] 13 Cal., 3.

³ *Kunj Bihari v. Keshavlal* [1904] 28 Bom., 567.

⁴ *Chinnappa v. Thulasi Ammal* [1904] 15 M. L. J. R., 399.

⁵ *Ram Manrata v. Dilraji* [1914] 12 A. L. J. R., 66.

⁶ *Kulabhai v. Secretary of State for India* [1904] 29 Bom., 19; *Deokali v. Kedar* [1912] 39 Cal., 704. *Contra*,

Rathnasabapathy v. Ramasami [1910] 33 Mad., 452.

⁷ *Of. Sethurayar v. Shanmugam* [1897] 21 Mad., 353, in which it was held that a person entitled to the benefit of a decree obtained by the first defendant against the second, did not require an injunction, as a declaration of his right would be sufficient and entitle him to apply for execution of the decree in place of the decree-holder, *Sundar v. Ram Ghulam* [1906] 3 A. L. J. R., 316.

Deliberate
omission to
sue.

name of the defendant, which the latter applies to execute. A declaration that the defendant is only a *benamidar* will quite serve the plaintiff's purpose, for, armed with this declaration, he may apply to the executing court to have his name brought upon the record as the real representative of the decree-holder, and this will put an end to all proceedings antagonistic to him in the execution department.¹ As an injunction is an equitable relief which, having regard to all the circumstances of the case, a court may or may not grant, B. Ayyangar, J., has even doubted if it is "further relief," as contemplated by the proviso to section 42.² A declaratory decree may be made, notwithstanding that the plaintiff does not sue for possession of the land in dispute, but in such a case, apparently, the court will proceed with great caution.³ But if the plaintiff deliberately *omits to sue* for consequential relief, the court will not help him. In a case which came before the Madras High Court, the plaintiffs, who were members of a Malabar *tarwad*, had in the court of first instance actually claimed in their plaint two reliefs, *viz*, (i) cancellation of a deed of gift affecting the *tarwad* property, and (ii) restoration of this property. The suit was dismissed, whereupon they appealed, but, being unable to pay the full court fees, they were allowed by the court of first appeal to withdraw the second claim. The court held on second appeal that this second claim for restoration of the property was further relief which the plaintiffs were able to ask for, and their omission to do so amounted to an evasion of section 42. The suit in its maimed form was therefore not maintainable.⁴

The Bombay High Court holds that section 42, Specific Relief Act, does not empower a court to dismiss a suit where the plaintiff, being able to seek further relief, omits to do so. All that is enacted by the section, says Jenkins, C. J., is that in such a case no court shall make a declaration,⁵ not that the court shall not grant any relief that is prayed for.⁶ If, therefore,

¹ *Gour Mohun v. Denonath* [1897] 25 Cal., 49.

² *Ratnamasari v. Akilandammal* [1902] 26 Mad., 291, 321.

³ *Loke Nath Surma v. Keshab Ram Dass* [1888] 13 Cal., 147.

⁴ *Bikutti v. Kalendan* [1890] 14 Mad.,

267.

⁵ *Kun' Bihari v. Keshavlal* [1904] 28 Bom., 567. Not followed in *Rathnasabapathy v. Ramasami* [1910] 33 Mad., 452.

⁶ *Sakharam v. Coll. of Ratnagiri*, *ibid*, 332. In *Ohomu v. Sankara* [1910]

there is other relief also prayed for, this may be granted. And, according to the Calcutta Court, it would be a meaningless technicality in this class of cases to dismiss the suit on the ground that the relief which the plaintiff is entitled to obtain is different from the relief he has actually sought.¹ But, where declaration is the only relief prayed for, the practice in all parts of British India is to dismiss the suit,² provided the court is satisfied beyond all doubt that the plaintiff ought to seek further relief.³

Plaintiff in
possession.

I will now consider the cases in which "further relief" is properly claimable. As I have already indicated, where the plaintiff is in possession of certain property or office, there is no "further relief" available to him within the meaning of the proviso. If, *e.g.*, he is the owner in possession of immoveable property, purchased in the name of a *benamidar*, he may have it simply declared that the latter has no title.⁴ If he is a member of a joint family, and the manager or *karnavan* has made an improper alienation, but possession has not yet been transferred to the alienee, he may obtain a declaration of the invalidity of the alienation, and rest there, for the possession of the manager is, in ordinary circumstances, that of all the co-owners.⁵ Actual possession of a part of a tract, coupled with constructive possession of the remainder, is sufficient possession to entitle a plaintiff to maintain a suit to remove a cloud from the whole tract,⁶ and actual possession by the tenant may be sufficient to support the landlord's suit.⁷ So, if the plaintiff is only entitled to what is called constructive possession by receipt of rent from the defendant, a declaration of title is all he needs, for, under the circum-

8 M. L. T., 358, plff., suing for invalidity of mortgage of several items of property, was found in possession of some items, and given a declaration in respect of them.

¹ *Jhunan v. Debu Lal* [1913] 16 I. C., 898 (confirmation, instead of recovery, of possession claimed).

² *Kedar Sahu v. Bhagwanti* [1911] 8 A. L. J. R., 462.

³ *Aisa Siddika v. Bidhu* [1913] 17 C. L. J., 30.

⁴ *Lobo v. Brito* [1897] 21 Mad., 231 (purchase in contravention of Government orders forbidding its officers to acquire immoveable property, held not to be illegal); *Aghore Nath v.*

Ram Churn [1896] 23 Cal., 805 (purchase by judgment-debtor's pleader in name of his clerk; possession not delivered to any at date of suit, pleader held to be trustee for his client).

⁵ *Padammah v. Themana* [1894] 17 Mad., 232; 20 M. L. J. R. 709.

⁶ *Sullivan v. Finnegan*, 101 Mass., 447; *Yard v. Ocean Beach Assn.*, 49 N. J. Eq., 306.

⁷ *Fulkerson v. Chisna M. & I. Co.*, 122 Fed., 782; 2 Pomeroy, *Eq. R.*, p. 1246. But not apparently actual possession in defendant's right by one out of two plaintiffs, *Akbar v. Turaban* [1908] 5 A. L. J. R., 640.

stances, possession, if he also asks for it, can only be delivered by notifying the declaration of the plaintiff's title as already prayed for.¹ So, where the father of the plaintiffs, who together with them constituted a Hindu joint family, had mortgaged the family property to the defendant, and the latter obtained a decree for sale against his mortgagor, and in execution thereof attached the property and obtained an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving it from him by purchase, gift, or otherwise,² and this attachment the plaintiffs failed by motion to have removed, it was held that they might maintain a suit for a declaration of their title to two-thirds of the attached property without further relief. The attachment did not constitute a dispossession from the property in dispute of either the plaintiffs or their father, it simply prohibited alienation; and so long as the plaintiffs admitted the interest of their father in the attached property, they could not ask for the attachment to be raised and the prohibitory order to their father (judgment-debtor) to be cancelled.³ Where the plaintiff is in possession of certain property and claims that a mortgage thereof made by the defendant does not bind him, he need not pray either for cancellation of the deed or for the setting aside of a decree for sale obtained by the mortgagee on foot of that deed.⁴ Where the plaintiff is one of several sharers and sues to have it declared that a decree passed on a hypothecation made by his co-sharers does not affect his share, he need not ask for a general partition, even if he impleads those co-sharers as defendants.⁵ Where the right is of an incorporeal nature, there is no property capable of possession,⁶ and the further relief, if any, available will apparently be an injunction.⁷ So,

¹ *Loke Nath. Surma v. Keshabram Doss* [1886] 13 Cal., 147; *Nirmal v. Mahomed* [1898] 26 Cal. 11, P.C.; *Satish v. Satya* [1910] 14 C. W. N., 576; *Farasram v. Bhimbhai* [1903] 5 Bom. L. R., 195. Distinguish *Suryanarayana v. Tammanna* [1901] 25 Mad., 504. Cf. *Bharath Singh v. Balbhadur* [1913] 20 I. C., 429 (possession through lambar-dar).

² Act XIV of 1882, s. 274; Act V of 1908, Sch. I., Or. 21, r. 54.

³ *Narayanrao v. Balkrishna* [1880] 4 Bom, 529, F. B.

⁴ *Ganga Ghulam v. Tapesbri*, [1904] 26 All., 607.

⁵ *Velammal v. Vavammal* [1910] 20 M. L. J. R., 349. Distinguish *Ganapathy v. Butchu*, *ibid*, 759.

⁶ *Ante*, 63; *Basarayya v. Abbas* [1900] 24 Mad., 20; *Rambutty v. Kamessur* [1874] 22 W. R., C. R., 36.

⁷ Cf. *Vengun v. Patchamuthu* [1904] 14 M. L. J. R., 290.

where the plaintiff claimed a title by inheritance to certain land which her predecessor-in-title had mortgaged to the defendant, and this mortgaged land, together with other land in the possession of the defendant, was taken up by the Government under the Land Acquisition Act, but the value thereof was still in the hands of the Collector and not paid over to the defendant, it was held that the plaintiff might sue the mortgagee for a declaration of her title, and need not make the Government a party for further relief in respect of the money.¹ Where the property in dispute is *in custodia legis*, and neither the plaintiff nor the defendant is in actual possession, obviously the former cannot sue the latter for possession: he can only have a declaration of his title.²

In custodia legis.

Nor, apparently, is a decree for arrears of rent a consequential relief which a plaintiff, claiming to be the owner of certain land, is bound to join to a prayer for declaration of title in respect of this land.³ Where the plaintiff sued for arrears of ground-rent, with regard to a house, in a court of small causes and his title to the land was denied by the defendant and the suit dismissed, the Allahabad High Court held that the plaintiff might bring another suit for a declaration of proprietary title and right to receive rent in the ordinary civil court, and he need not add a prayer for the arrears of ground-rent which had accrued due.⁴ Nor does the Allahabad Court think it necessary that an auction-purchaser of immoveable property, subject to a mortgage, who was not made a party to a subsequent suit on foot of that mortgage or the decree passed therein, but whose possession a later purchaser of the same property in execution of the mortgage-decree attempts to disturb, should, in a suit for declaration of his title against this purchaser, tender the mortgage-money or offer to redeem.⁵

Arrears of rent.

Similarly, the trustee of a temple, who has not yet been

Religious office.

¹ *Chomu v. Umma* [1890] 14 Mad., 46.

² *Vedanayagi v. Vedammal* [1904] 27 Mad., 591 (plaintiff himself held the property as receiver); *Admr. Genl. v. Bhagwan* [1911] 15 C. W. N., 758 (Collector receiver, Cr. P. C., s. 146); *Jagannath v. Tirguna Nand* [1915]

13 A. L. J. R., 252 (Court of Wards in possession).

³ *Fakir Chund v. Anunda Chunder* [1887] 14 Cal., 586.

⁴ *Somkali v. Bhai o* [1882] 5 All., 55.

⁵ *Nathu Singh v. Gumani Singh* [1896] 18 All., 320. *Ante*, 495 n.

ousted from office, may sue for a bare declaration to establish his right to remain in office, as against the Temple Committee, which has taken proceedings for removing him.¹ And a suit by such a trustee for the declaration of the invalidity of the appointment of a *pattamali*² by other trustees of the temple; does not offend against the proviso to section 42, since the temple property in the charge of a *pattamali* remains in the possession of the trustees, and so there is nothing of which the plaintiff can seek delivery of possession.³

Cancel-
lation.

A plaintiff, who sues for a declaration that the assessment of a tax upon him is *ultra vires* and illegal,⁴ or that an order of Government reversing an order of a Collector is void, need not ask for further relief in the shape of a formal cancellation of the order complained of.⁵ In a suit for a declaration of the invalidity of a conveyance executed by the defendant, the cancellation and delivery up of the deed impeached may be said to be a species of auxiliary equitable relief, and need not be separately prayed for.⁶ Where the plaintiff came into court upon the allegation that her consent to an arbitration had been obtained by fraud, and sought to have it declared that the subsequent award, wholly or partially, was null and void against her and the decree passed on the basis of that award was invalid, it was held that section 42, Specific Relief Act, had no application and the suit was maintainable.⁷

Ouster.

But where there has been an actual ouster, either from property⁸ or from office,⁹ consequential relief is appropriate, and should be asked for. If a landlords's title is jeopardised by the aggressions of a neighbouring landowner, who denies his title, the former may and should claim to have the cloud

¹ *Ramanuja v. Devanayaka*, [1885] 8 Mad., 361.

² A servant of the temple.

³ *Janardana v. Badava*, [1899] 23 Mad., 385.

⁴ *Kameshwar Pershad v. Bhabua Municipality* [1900] 27 Cal., 849.

⁵ *Fischer v. Secretary of State for India* [1898] 22 Mad., 270 P. C. (Collector's order had been duly sanctioned by Board of Revenue, Madras Act I of 1876., ss. 5, 6).

⁶ *Kannan v. Krishnan* [1890] 13

Mad., 324.

⁷ *Gomti v. Darab* [1902] 22 A. W. N., 187.

⁸ *Padammah v. Themana* [1894] 17 Mad., 232; *Basavayya v. Abbas* [1900] 24 Mad., 20; *Kedar v. Bhagvanti* [1911] 8 A. L. J. R., 462.

⁹ *Ramanuja v. Devanayaka* [1885] 8 Mad., 361, 364; *Abdulkadar v. Mahomed* [1891] 15 Mad., 15; *Rathnususabapathy v. Ramasami* [1910] 20 M. L. J. R., 306 (dismissed trustee).

removed from the title and also to be put in possession of the land trespassed upon.¹ A true owner of land may be dispossessed by an order of the court. A's property may be sold, e.g., in execution of a decree obtained by B against C, and the auction-purchaser may be put in possession by the court.² In such a case, even if the possession obtained by the auction-purchaser is only symbolical or constructive, and the judgment-debtor held as a trustee from the real owner, there is a dis-possession of the latter, and a bare declaration of title will not be enough.³ Or, an order may be passed under section 59, Bengal Land Registration Act.⁴ As the effect of such an order is to "settle the actual possession," it determines that the person against whom it is passed, cannot in a law court be treated as any longer in possession, and he cannot maintain a suit for a declaration of his title without seeking to recover possession also,⁵ even though, as a matter of fact, he may be in physical possession of the property at the time.⁶ A prayer for confirmation of possession is a prayer for consequential relief.⁷

Illustrations

Where the plaintiffs asked for several declarations, viz., (1) that they were members of an undivided *Aliyasantana* family with the defendants, (2) that certain property belonged to the family, and (3) that the first plaintiff, as the senior member of the family, was entitled to have the lands registered in his name, the Madras Court held that, upon the plaintiffs' own showing, as there was no prayer for the first plaintiff to be put in possession and management of the family property as the *de jure* *ejaman*, they were out of court.⁸ Where the plaintiff, again, sued for a declaration of the invalidity of a will on the ground that the property bequeathed was joint family property, the suit was held bad, as he had not asked for partition of his share in such property; the land was in the actual possession of tenants, but

¹ *Bissesuri v. Baroda Kanta* [1884] 10 Cal., 1076.

² *Kunhiamma v. Kunhunni* [1892] 16 Mad., 140; *Shib Charan v. Raghu Nath* [1895] 17 All., 174, 196.

³ *Krishnabhupati v. Ramamurti* [1894] 18 Mad., 405 (possession delivered under section 319, C.P.C., Act. V of 1908, sch. I, Or. 21, r. 96).

⁴ Act VII of 1876, B.C.

⁵ *Ram Mundur v. Janki Pershad* [1882] 12 C.L.R., 139.

⁶ *Raj Narain Das v. Shama Nando*, [1899] 26 Cal., 845, revd. [1900] 33 Cal., 1362; 11 C.W.N., 186.

⁷ *Jhunan v. Debu Lal* [1913] 16 I. C., 898.

⁸ *Muttakke v. Thimmappa* [1891] 15 Mad., 186. Cf. *Panga v. Unnikutti*, [1900] 24 Mad., 275.

this could be no bar to a partition of the property among the members of the family.¹ So, where the plaintiff sued for a declaration in respect of what he described as a hereditary trust under the management of his adoptive father, the same court held that, if the devolution of the office of hereditary trustee, vested in the defendant, was to be held as governed by the rules bearing on the holding of joint family property, the plaintiff could have claimed joint possession and management, and a suit for a mere declaratory decree was unsustainable with reference to the proviso to section 42.² And the same conclusion was reached where three disciples of a *math* sued upon the allegation that the defendant had falsely claimed to be the successor of the late *jheer* and taken possession as such of the *math*, and they prayed for a declaration that he was not the duly appointed successor to the deceased *jheer* and for an appointment to the vacant office of the *jheer* by the court. It was held that the plaintiffs should have further asked that a duly qualified person be appointed as the head of the *math* with the approval of the court, that the defendant be ejected from the *math* and its properties, and that the same be handed over to the person appointed as the head.³

Injunction.

So priests, who had enjoyed the privilege of escorting their patrons to the most sacred part of a temple of Shri Ranchhod Raiji, at Dakor, but who were, by the resident ministers there, subsequently forbidden access to such part except upon the payment of a fee, were held by the Bombay Court to be entitled to supplement a declaration of their title by an injunction, permanently restraining the defendant ministers from interfering with their enjoyment of the property-right, which had been threatened by the new rules about the payment of fee.⁴

If a plaintiff sues for a declaration against the Government that he is entitled to hold certain lands free from the payment of revenue and other cesses, he should apparently also ask for

¹ *Suryanarayana v. Tammanna* [1901] 25 Mad., 504.

² *Nataraja v. Kolandavelu* [1905] 15 M.L.J.R., 456.

³ *Strinivasa Ayyangar v. Strinivasa Swami* [1892] 16 Mad., 31. *Erfan v.*

Samiruddin [1912] 15 I. C., 552. *Distinguish Neti Rama v. Venkatacharlu* [1902] 26 Mad., 450; *Jugalkishore v. Lakshmandas* [1899] 23 Bom., 659.

⁴ *Kalidas Jivram v. Parjaram Hirji* [1890] 15 Bom., 309.

Claim for
money.

an injunction restraining the defendant from realising such dues from him.¹ And if the defendant has received from the Government a *malikana* allowance distributable among the various *stanomdars*, but has refused to pay any share thereof to the plaintiff, who claimed to be entitled to the *stanom* of the fifth Raja of Palghat, the plaintiff must sue not only for a declaration of his title, but also for recovery of money had and received by the defendant-Raja to his account.² So, where it is open to the plaintiff to ask for an account against the defendant of moneys received by the latter under a certificate of heirship, and for payment of money not properly accounted for, the proviso to section 42 will prevent him from suing merely for a declaration.³ In a case where the plaintiff claimed to be solely entitled to succeed to the *talukdari* estate of his deceased father, and averred that the first defendant was a supposititious child set up by the plaintiff's step-mother to defeat his right of inheritance, but it appeared that the first defendant had in the lifetime of the plaintiff's father obtained a decree against him establishing his legitimacy and right to receive maintenance out of the estate and that, in accordance with this decree, the *talukdari* settlement officer (second defendant), who was managing the estate, paid the child a monthly allowance of Rs. 200,—a payment which the plaintiff alleged to be illegal and wrongful,—the Bombay Court held that, over and above a declaration respecting his title, the plaintiff should also pray for an injunction restraining the first defendant from receiving, and the second defendant from making, the payment by way of maintenance.⁴

Discretion.

But the mere fact that an existing right or title of the plaintiff is disputed and he cannot seek any further relief, will not of itself entitle the plaintiff to a declaratory decree. "The words of the section are clear," said Mahmood, J., "and it only affirms the practice of the English Court of Chancery when it says that a declaratory relief is not a matter of right, and is in the

¹ *Kalabhai v. Secretary of State for India* [1904] 29 Bom., 19.

² *Kombi v. Aundi* [1889] 13 Mad. 75.

³ *Bai Anope v. Mulchand Girdhar* [1885] 9 Bom., 355.

⁴ *Sardarsingji v. Ganpatsingji* [1889] 14 Bom., 395.

discretion of the courts."¹ This discretion must be exercised with great caution,² for the mere quieting of a doubtful title is not always a sufficient reason for making a declaration of title. If such a principle were acted upon, the door might be opened to the determination of future interests, whenever one party chose to think it desirable that a dispute as to title, which might at any time afterwards crop up, should be determined by a declaratory decree.³ The bringing into existence of any and every piece of evidence against the plaintiff's rights could not entitle him to get relief by way of declaration,⁴ for "perpetuation of testimony" is not the only ground on which Indian courts interfere.⁵ A judgment in a declaratory suit does not operate *in rem*.⁶ It binds only the parties to the suit and those who claim through them respectively, and, where any of the parties are trustees, those persons also for whom, if in existence at the date of the declaration, such parties would be trustees.⁷ *E.g.*, a person may obtain a declaration that a certain woman is his duly married wife and get a decree for the restitution of his conjugal rights. But the decree and the declaration will not bind a stranger, who also claims the same woman as his wife and sues in his turn for recovering her from the former decree-holder.⁸ There is a declaration of *status* in the first suit, but that is only *inter partes*. Where the subject-matter or the ground of action is different or the parties are not the same, nor their respective privies, a judgment *in personam* cannot conclude subsequent litigation as *res judicata*, and a court will naturally hesitate to promulgate a decree that may eventually turn out to be a *brutum fulmen*.⁹ Take the rather frequent case, where

Judgment in
personam.

Res *Judi-*
cata.

¹ *Bhupal Ram v. Lachma Kuar* [1888] 11 All., 253, 256.

² *Bhujendro Bhusan v. Trigunath* [1882] 8 Cal., 761, 765; *Chokalingapeshana v. Achiyar* [1875] 1 Mad. 40; *Sreenarain v. Kishen Soondery*, [1873] 11 B. L. R., 171, P. C.; *Hunsbutti v. Isri Dutt* [1879] 5 Cal., 512.

³ *Kathama v. Dorasingha* [1875] 2 I. A., 169; [1871] 6 Mad. H. C., 310; *Bholai v. Kali* [1885] 8 All., 70; *Maganlal v. Govindlal* [1891] 15 Bom., 697.

⁴ *Jaipal Kunwar v. Indar* [1904] 26 All., 238, 243, 31 I. A., 67, 69; *Vijiasamy v. Sasivarma* [1905] 28 Mad., 560.

⁵ *Srinibash v. Monmohini* [1906] 3 C. L. J., 224, where authorities are collected. See also *Chiruvolu v. Chiruvolu* [1906] 29 Mad., 390, F. B.

⁶ Pomeroy thinks, "While a decree quieting title is not, strictly speaking, *in rem*, it fixes and settles the title to real estate, and to that extent it partakes of the nature of a judgment *in rem*," 2 Eq. R., s. 743, p. 1252. See 2 Black, *Judgments*, s. 664.

⁷ S. R. A., s. 43.

⁸ S. R. A., s. 43, ill.

⁹ *Cf. Ram Devi v. Bindesri* [1911] 8 A. L. J. R., 940 (declaration refused

a reversioner sues to have declared the invalidity of an alienation or an adoption made by a Hindu heiress in possession. Now, no reversioner claims under another, each claims under the last male *propositus*.¹ Therefore a matter, however, solemnly determined, between a Hindu lady or some person claiming through her, and the reversioner for the time being cannot conclude the party, who actually happens to be entitled to the estate, when the succession opens out on the death of the lady.² The court may therefore well pause,³ unless circumstances are present which make it desirable that the point of dispute should be set at rest early and promptly. In England the general practice seems to be not to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are other special circumstances to satisfy the court that it is desirable at once to decide on the future rights.⁴ And the Privy Council has refused to give any declaration as to the effect of a will upon the rights, if any, of an unborn son, on the ground that no judgment which it could give would affect his rights.⁵ In the famous *Tagore Case*, however, it did make a declaration of the future interests of the parties, subject to a valid prior life-interest, "because," said Willes, J., "all the existing parties interested are in court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose, of the rights of those parties, ought to be incorporated in the decree."⁶ Where all the parties concerned or likely to be concerned are before

because infructuous by reason of final order of revenue court); *Tavakul v. Jiwa* [1913] 129 P. L. R.

¹ *Bhagwanta v. Sukhi* [1899] 22 All., 33, F. B.; *Abinash v. Harinath* [1904] 32 Cal., 62, 71; *Harakh Chand v. Bi'oy Chand* [1905] 2 C. L. J., 87, 95; *Govinda v. Thayammal* [1904] 28 Mad., 57. In *Chirunolu v. Chirunolu*, [1906] 29 Mad., 390, F. B., a distinction is taken between suits involving questions as to adoptions and suits impeaching the validity of alienations, which is not easy to follow.

² *Chhiddu v. Durga Dei* [1900] 22 All., 382. *Jaipal Kunwar v. Indar*, *supra*. Cf. *Jumona v. Bamasoondari* [1876] 1 Cal., 289, P. C.; *Mayno, H. L.*, 8th ed. s. 652, p. 910.

³ *Muthukaruppan v. Kasinathan* [1907] 2 M. L. T., 67.

⁴ *Curtis v. Sheffield* [1882] 21 Ch. D., 1, 4.

⁵ *Ram Lal Mookerjee v. Secretary of State* [1881] 7 Cal., 304, P. C.

⁶ [1872] 1 A. Sup., 84, 9 B. L. R., 377, 18 W. R., 359, P. C.

the court, and of age or properly represented, the court ought not to refuse jurisdiction.¹

Inexpedien-
cy.

A strong case of inexpediency, the Judicial Committee has said, should be shown for refusing declaratory relief to classes of persons expressly recognised by the law as suitors for such relief.² The only practical mode of enforcing the presumptive heir's right to interfere with an alienation made by a Hindu widow is to have it declared as operative only for her life, and the difficulty of the question raised or the expense of litigation does not seem to be a sufficient ground for refusing the declaration.³ The court will, however, not entertain a suit for a declaration of reversionary rights, where the same are not vested or indefeasible.⁴ During the life-time of a Hindu widow, *e.g.*, no one can bring a suit to have it declared that he will be the next heir at her death. The title of the claimant must depend upon the state of things existing at her death, and a suit before that time would be an unnecessary and useless litigation of a question which may never arise, or may only arise in a different form.⁵ Nor will the court view with favour a suit, the real object of which is to obtain a judicial pronouncement regarding a doubtful title. Where certain trusts are declared for life, subject to forfeiture on the happening of certain events specified, and there were further trusts in favour of the issue of the first beneficiaries, and the settlor died, leaving a will, the Calcutta Court ruled that an assignee of the remainderman under this will could not sue the life-tenant and the *cestuis que trustent* for declarations as to his rights and as to the forfeiture of the trusts. "To hold otherwise," said Wilson, J., "would be to lay down that any one who claims

Reversion-
ary right.

¹ Cf. Collett, 5th. ed. 295. *Govinda Pillai v. Thayammal* [1904] 28 Mad., 57. Otherwise, where all interested parties are not before the court, *Maharaja of Benares v. Ram i* [1904] 27 All., 138; *Shamarendra v. Birendra* [1908] 12 C. W. N., 777, 790, F. B.

² *Isri Dut v. Hunsbutti* [1883] 10 Cal., 324, 333, P. C.

³ *Isri Dut v. Hunsbutti*, *supra*.

⁴ Cf. S. R. A., s. 42, III. (d). *Shamarendra v. Birendra*, *supra*.

⁵ *Pranputtee v. Futteh* [1863] 2 Hay, 608; *Kathama Natchiar v. Dorasinga* [1875] 2 I. A., 169, 189, 23 W. R., 371; Mayne, *H. L.*, 8th ed. s. 648, p. 907. Cf. *Jagdeep Narain v. Jaibasi* [1914] 22 I. C., 928. But a prayer by a reversioner for a declaration that a sale by the widow was not binding on his reversionary interest beyond her life, should not be too strictly construed. *Chandi Singh v. Jangi Singh* [1905] 8 O. C., 21.

any interest in property, present or future, ought to be allowed to ask the court to give him an opinion on his title, and it cannot have been the intention of the legislature to lay down any such rule."¹ Where a suit was brought to have a transfer by a Hindu widow declared invalid beyond her life-time, and the plaintiff's claim to be the next reversioner was doubtful by reason of there being another person in existence who was admittedly nearer, but was alleged to be illegitimate, and the transfer in dispute was a mortgage for a comparatively small amount, which the widow might easily discharge out of the usufruct, the Calcutta Court refused the declaration as premature.²

Real object
of suit
different.

As the court has to administer a discretionary and equitable relief, it is entitled to enquire into the real object of a suit which is framed as merely declaratory. Where a zemindar sued for a declaration that some of his tenants (defendants) had falsely asserted that they held under a special tenure under which the rent was not liable to enhancement, and the real object of the suit appeared to be to smooth, by a side-wind as it were, the plaintiff's path for proceedings in the revenue courts for enhancement of rent, the Judicial Committee said he should seek such relief directly, if he was entitled to it.³ In another case, the plaintiff, a landlord, prayed for a declaration against a certain ryot that under a custom he was entitled to take the latter's lands for cultivating indigo. The court saw that the plaintiff's real object was to secure the ejectment, even if temporary, of an occupancy tenant, and it rejected the suit.⁴ So, where the claim is not *bonâ fide*, but has been instituted in collusion with or at the instance and expense of one of the defendants, for his personal benefit and to cause injury to the other and real defendants, by a nominal plaintiff, I apprehend the court will stay its hand.⁵

A court may also refuse to exercise its discretion in favour of a plaintiff, whose real object is to eject parties in possession,

Attempt to
evade stamp
law.

¹ *Bhujendro Bhushan v. Trigunath* [1882] 8 Cal., 761, 765.

² *Chhotu v. Sheobarti* [1901] 5 C. W. N., 445.

³ *Nilmoy v. Kally* [1874] 2 I. A., 83, 14 B. L. R., 383.

⁴ *Sheobaran v. Bhairo Prasad* [1885] 7 All., 880, F. B.

⁵ *Of. Forrest v. Manchester. S. & L. Ry. Co.* [1861] 4 De G. F. & J., 126. 16 Cyc. 197.

but who attempts to evade the stamp law by framing his action as one for a declaratory relief.¹ Where, therefore, the defendant was in possession of the estate of a deceased *goswami* as his spiritual son (*shishya*), and the plaintiff sought to establish his title to this estate by suing for a declaration that he was the true *shishya* by a previous adoption, the Bombay Court ruled that the plaintiff could not, on a stamp of Rs. 10, obtain a relief which the legislature intended should be chargeable with a higher fee.²

No fear of
real injury.

And so it will, where there is no apprehension of any real injury to the plaintiff's rights. An American court has said that a mere verbal claim or oral assertion of ownership in property, is not a cloud which equity will remove,³ and the Madras Court took the same view of an act of the defendant which did not amount to more than a mere assertion on his part. He was said to have incorrectly and fraudulently antedated a *patta* and affixed a copy of it to the plaintiff's house. But it did not appear that the plaintiff had ever asked for a proper *patta*, or that the affixing of the copy had caused him any harm. He wanted it to be cancelled, because he was afraid it might be used as evidence against him on some future occasion.⁴ The same court said in a later case: "It would be extravagant to hold that the bringing into existence of any and every piece of evidence would give a right to such discretionary relief. Were it otherwise, such relief might be prayed for even in respect of oral declarations of similar evidentiary character."⁵ But "the mere parol assertion of a status could not give rise to a cause of action, or create a status that had no existence at all."⁶ Where a *taluqdar* died, leaving a son and a widow, and this son

¹ *Chokalingapeshana v. Achiyar*, [1875] 1 Mad., 40. Distinguish *Kunj v. Keshanlal* [1904] 28 Bom., 567, 572. A court-fee stamp of Rs. 10 only is required on the plaint in a declaratory suit, whereas *ad valorem* fee is charged in action for ejectment. Act VII of 1870, Sec. 11, art. 17, cl. iii; *Fulkumari v. Ghaushyam* [1903] 31 Cal. 511, revd. *Phul v. Ghaushyam* [1907] 35 Cal., 202 P.C.; *Sagarjirao v. Smith* [1895] 20 Bom., 726. Court-fee on the consequential relief is determined by the

value put upon same in plaint, Act VII of 1870, s. 7, subs. 4, cl. (c); *Zinnut-unnessa v. Girindra* [1903] 10 Cal., 788.

² *Ganpatgir Bholagir v. Ganpatgir* [1879] 3 Bom., 230.

³ *Parker v. Shannon*, 121 Ill., 452; 2 Pomeroy, *Eq. R.*, 1223.

⁴ *Nurdin v. Alavudin* [1888] 12 Mad., 134.

⁵ *Vijiasamy v. Sasivarma* [1905] 18 Mad., 560, 562-3.

⁶ *Per Parsons, J., Barot v. Barot*, [1900] 25 Bom., 26, 28.

afterwards died, leaving a widow, who succeeded to the estate, it was held by the Privy Council that she was not competent to maintain a suit for a declaration that an adoption made by her mother-in-law was invalid.¹ The ground of suit was stated to be that, at some time or other after the death of the plaintiff, this adopted son might obtain the *taluqdari*, unless his adoption was at once negatived. But the plaintiff had no right which was affected by the alleged adoption, her possession had not been disturbed, and there was no cloud upon her title.² Where the conditions warranting the validity of the adoption were in truth wanting, but the party alleging the adoption pretends that those conditions existed, a person, whose rights would in law be affected by the adoption so set up, will have the right to sue for, and obtain, a declaration that that adoption was invalid, in order that the cloud sought by the adoption to be cast upon the plaintiff's title might be removed. Where, therefore, a transaction of gift and acceptance in adoption of the defendant was totally nugatory and ineffective in relation to the zemindari to which the plaintiff wanted to establish his title, S. Ayyar, O. C. J., and Nair, J., held that it would be futile to make the alleged adoption the subject of judicial investigation, for the purpose of the grant of specific relief by way of declaration.³ But the same learned judges thought that, where an adoption alleged to have been made by the plaintiff had been set up under circumstances, which would operate to his prejudice, if he did not take steps to have it declared not true, there was such an infringement of the plaintiff's rights, if he was the sole owner, as to entitle him to sue for and obtain a declaration that the defendant (alleged adoptee) had never been adopted by him in fact. And their lordships considered it immaterial that the claim had not been set up by the adoptee himself.⁴ But no declaration will be made as to merely collateral matters, *e.g.*, the existence of agreements to give and receive in adoption, where the declaration, when made, would

¹ This adoption could manifestly pass no title to the estate, *Bhoobun Mayee v. Ramkishore* [1865] 10 M. I. A., 279.

² *Pirthy Pal Kumcar v. Guman*

Kunwar [1890] 17 Cal., 933, P. C.

³ *Vijayasamy v. Sasivarma*, *supra*.

⁴ *Chimaswamy v. Ambalavana* [1905] 29 Mad., 48.

not affect the validity of the adoption.¹ And a suit by a reversioner to declare that an authority to adopt, alleged to have been given by a Hindu husband to his wife, is not genuine, will not lie, for such a document is a mere preparation, and not a distinct and separate act, which can entitle him to a separate relief.²

More
appropriate
remedy
available.

A suit for declaration will also not be entertained where the law provides for a different and more appropriate remedy. *E.g.*, a decree, made by a competent court, which, if wrong, might have been set aside on appeal, cannot be invalidated by a declaration under section 42. The plaintiff's remedy was an appeal.³ And if the plaintiff's complaint is that the defendant bribed the judge of a subordinate court, and so induced him to pass a fraudulent decree, his proper remedy is by way of an injunction restraining the guilty party from executing his decree.⁴ So a sub-mortgagee, who alleges that the decree held by a mortgagee has been paid up and satisfied, should sue, not for a declaration that his decree is incapable of execution, but for redemption of the earlier mortgage, in which suit accounts may be taken and the truth of the plaintiff's allegations investigated, and, if they are found correct, he may have a decree with costs.⁵ Where a decree is alleged to have been satisfied by an agreement out of court, but satisfaction has not been certified to the court, a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied, and for an injunction restraining the decree-holder from executing the decree.⁶ Where the members of a Hindu co-parcenary agreed to have their widowed sister-in-law's name entered upon the proprietary registers in place of her deceased husband's by way of compliment and consolation, and also to let her receive the profits of the share recorded in her name in lieu of maintenance, and the widow subsequently mortgaged the property without

¹ *Sreenarain v. Kishen* [1875] 11 B. L. R. 171, P. C.

² *Ramsarup v. Rukmin Kuar* [1885] 7 All., 884.

³ *Venkataramana v. Ramalakshamma* [1911] 2 M. W. N., 194.

⁴ *Kunhamed v. Kutti* [1891] 14 Mad.,

167; *Dhuranidhur v. Agra Bank* [1879] 5 Cal., 86.

⁵ *Har Prashad v. Phul Chand* [1905] 2 A. L. J. R., 609.

⁶ *Deno Bundhu v. Hari Mati* [1903] 31 Cal. 480 (Act V of 1908, s. 47 bars the suit).

defining the share) and executed a bond, on foot of which the obligee obtained a decree and attached the obligor's recorded share, the Allahabad Court held that the proper course for the co-parceners to adopt was not to sue for a declaration about the invalidity of the widow's act, but to seek relief by ejectment.¹ And where certain property, which had been purchased at court sale by the plaintiff,—a sale afterwards wrongfully (as he alleged) set aside,—was attached and advertised for a second sale in execution of a decree held by the defendants against third parties, the same court held that a suit brought by the plaintiff for the cancellation of the order setting aside the first sale and for the confirmation of that sale in his favour and for a declaration of the invalidity of the proceedings taken in execution against the property in question by the defendants, should not be entertained. Looking at section 42, Specific Relief Act, alone, it was said, such a suit might be maintainable, but section 244, Code of Civil Procedure, indicated the intention of the legislature that such questions should be determined in the execution department, and the proper mode therefore for contesting the validity of execution proceedings was the one indicated by sections 278 and 283² of the Code.³ But it should be remembered that, where the law gives two remedies, one should not be construed as in derogation of the other,⁴ and where the property of one has been wrongfully attached in execution as the property of another, the former's right of suit to establish his title against the attaching decree-holder is not condition upon his previously preferring a claim under sec. 278.⁵

A civil court does not seem to have jurisdiction to make a decree reversing an order for the registration of the name of

Jurisdiction
of Civil
Court.

¹ *Bholai v. Kali* [1885] 8 All., 70. If land is held adversely by another, under colour of title, the complainant in America must first recover possession by an action at law, *Daniel v. Stewart*, 55 Alabama, 278. But where plaintiff is in actual possession, the fact that he may maintain ejectment will not deprive a court of equity of jurisdiction to remove a cloud on his title, *Whitehouse v. Jones* [1906] 12 L. R. A., N. S., 49.

² Act V of 1908, sch. 1, Or. 21, rr. 58, 63.

³ *Man Kuar v. Tara Singh* [1885] 7 All., 583. Cf. *Mulhewson v. Gobardhan* [1885] 28 Cal., 492.

⁴ *Ajudhia Prasad v. Balmukand* [1886] 8 All., 354, 361 (Mahmood, J.)

⁵ *Sundar v. Ghasi* [1894] 18 All., 410; *Raghunath v. Sarosh* [1899] 23 Bom., 266; *Makbul v. Latta* [1907] 4 A.L.J.R., 574. See *Allagappu v. Nazamat* [1908] 4 L. B. R., 263. A suit brought under C.P.C. s. 283, is not affected by S.R.A., s. 42, prov., *Kya Get v. Bu Nwe* [1907] 22 Travancore L. R., 88.

any person made by a registering officer under Bengal Act VII of 1866; it can only declare the title of an individual or give him a decree for possession, and then the registering officer will amend his registers, in accordance with the rights of the parties as settled by the civil court.¹

Conduct of parties and merits of claim.

As the court has to exercise a discretion, it will consider the conduct of the parties and the merits of a claim on other than merely legal grounds. In the suit brought by a Mahomedan for a declaration that certain property was *waqf*, already referred to, the court observed that a decree might well be refused to the plaintiff on the ground that the defendant was using the property for charitable purposes. The plaintiff in that case, it will be remembered, was only a man in the street.² Where the case, upon which the declaration is sought to be obtained, is not only not the case made in the plaint, but is one that is wholly inconsistent with it, the court will refuse the declaration.³

Cloud threatened.

The court may in its discretion interpose its authority even where a cloud upon the plaintiff's title is only threatened. But in such cases the danger must be imminent, and not merely speculative or potential, and there must appear to be a determination to create a cloud.⁴ As to the density of an actual cloud which would give rise to a cause of action, the test in America has been suggested to be this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed.⁵ If the action would fall by its

¹ *Omruntissa v. Dilawar Ally* [1884] 10 Cal., 350. The same rule will apparently apply to entries in the record of rights prepared by revenue officers in the U. P.

² *Wajid Ali Shah v. Dianat-ul-lah Beg* [1885] 8 All., 31, 35.

³ *Jatindra v. Amrita* [1900] 5 C.W.N., 20.

⁴ *Clark v. Davenport* [1884] 95 N.Y., 477, 1 Keener, 345. *King v. Townshend* [1894] 141 N.Y., 358, 1 Keener, 401.

⁵ *Per Field, C. J., Pixley v. Huggins,*

15 Calif., 127. See also *Castro v. Barry*, 79 Calif., 446; *Thompson v. Etowah Iron Co.*, 91 Ga., 538. It was said in *Landregan v. Peppin*, 94 Calif., 465, 467, that, though the defendant's claim was worthless and void upon its face, yet if it were hostile to the plaintiff and clouded his title, so as to depreciate the market-value in the estimation of business-men, the action could be maintained. 2 Pomeroy, *Eq. R.*, s. 739, p. 1248.

own weight, without proof in rebuttal, no occasion could exist for equitable interposition.¹

Neither
party in
possession

It is a beneficial jurisdiction which the court exercises and where neither party is in possession, or the lands are wild and unoccupied, the ordinary legal remedies are generally admitted to be inadequate, and a court of equity will interfere to remove or prevent a cloud.² The proviso to section 42, as we have seen, does not bar a suit for a declaration of title brought by the widows of even a *sudra shrotriendur* as against his illegitimate son, where possession of the whole property is not shown to be with either party. Of the ryots in actual occupation of the major portion of the property, some had attorned to the plaintiffs and some to the defendant. "Such a case," thought the Madras Court, "is eminently one in which a declaratory decree is desirable, to avoid multiplicity of suits and to obtain a decision once and for all, which shall secure peaceful possession of the property."³

It is a part of the ordinary jurisdiction of a court of equity to perfect and complete the means by which the right, estate or interest of parties, that is, their title, may be proved and secured, or to remove obstacles which hinder its enjoyment.⁴ It will therefore interpose in the case of lost deeds and instruments and may direct a re-conveyance or re-execution of the deeds or accomplish the same object by a declaratory decree, establishing the existence of the deeds in question. The powers of the court are flexible, and the form of the remedy will vary according to the particular circumstances of each case.⁵ But the court will decline to interfere where the application is not one to remove a cloud upon a title, but to remedy a defect in the plaintiff's title, and, in fact, to transfer the title of the original rightful owners to the plaintiff.⁶

Lost deeds.

The discretion which a court has to exercise is a judicial

¹ *Lytle v. Sandefur* [1890] 93 Alabama, 396, 1 Keener, 385.

² 1 Pomeroy, *Eq. J.*, p. 504 n.; 2 Pomeroy, *Eq. R.*, p. 1234. *Abdul Karim v. Sahib Jan* [1908] P. R., 5.

³ *Chinnamma v. Varadarajulu* [1892] 15 Mad., 307. *Boyanapalli v. Pothapali* [1911] 2 M. W. N., 384; *Lachmi Bai*

v. Hondi Bai [1913] P. R., No. 100.

⁴ 1 Pomeroy, *Eq. J.*, s. 171; *Sharon v. Tucker* [1892] 144 U. S., 533, 1 Keener, 392.

⁵ *Ibid.*

⁶ *Contee v. Lyons* [1890] 19 D.C., 207, 1 Keener, 379.

Appeal from
discretion.

discretion; consequently it is open to a court of appeal, whether first or second,¹ to examine if the action of the court below is arbitrary or according to settled equitable principles.² Where the court below has purported to act in the exercise of its discretion, an appellate court should ordinarily refrain from interfering with its decree,³ and if it does, should state its reasons for so doing.⁴ Where a plaintiff's title had been denied by the defendant, but the court of first instance found such denial established by the evidence and made a decree in the plaintiff's favour, the court of appeal, said the Calcutta High Court, could not reverse this decree on the sole ground that the plaintiff disclosed no cause of action, without being satisfied that no such cause of action was established on the evidence.⁵ An improper or irregular exercise of the discretionary power conferred by section 42 does not in itself constitute sufficient ground for the reversal of a decree, as section 578, Code of Civil Procedure, provides that no decree should be modified or reversed, unless open to objection on the score of jurisdiction or of the merits of the case.⁶

Pleadings.

It now remains to notice a few points of procedure. No Indian court will lay much stress upon defective pleadings⁷ or an ill-expressed prayer for relief.⁸ And, where a claim is likely to fail by reason of "further relief" not having been asked for, a court will be disposed to aid the plaintiff by affording him an opportunity to amend his plaint. There can be no amendment, the result of which will be to convert a suit of one character into that of a different and inconsistent

Amendment.

¹ *Chintaman v. Mahadev* [1904] 6 Bom. L. R., 283.

² S. R. A., s. 22. Cf. *Chinnappa v. Thulasi Aminal* [1904] 15 M. L. J. R., 399.

³ *Govindu Pillai v. Thayammal* [1904] 28 Mad., 57; *Anant v. Raghunath* [1882] 9 I. A., 41; *Jaipal v. Indar* [1904] 26 All., 238, P. C.

⁴ *Kali Kishen Tagore v. Golam Ali* [1886] 13 Cal., 3.

⁵ *Ahmed Sujad v. Taree Rai* [1881] 7 Cal., 343; *Sailendra v. Karali* [1905] 2 C. L. J., 534. Cf. *Kollipara v. Kolli-*

para [1908] 3 M. L. T., 309.

⁶ Act V of 1908, s. 99, *Sant Kumar v. Deo Saran* [1886] 8 All., 365; *Muhammad Mashuk Ali v. Khuda Buksh* [1887] 9 All., 622. Cf. *Sheo Narain v. Damodar* [1904] 1 A. L. J. R., 380.

⁷ Cf. *Ahmed Sujad v. Taree Rai*, supra; *Nawab Nazim v. Amrao Begam* [1873] 21 W. R., C. R., 59. *Chandramoni v. Halijenessa* [1908] 9 C. L. J. R., 464.

⁸ Cf. *Chandi Singh v. Jangi Singh* [1905] 8 O. C., 21; *Nasir v. Arman* [1913] 17 C. L. J., 118 (misdescription of land).

character.¹ But, where a plaintiff sues for a declaration of title to hold lands free from payment, say, of Government revenue, the addition of a prayer for injunction by way of consequential relief introduces an amendment, which is really a matter of form, that neither affects the merits of the claim nor transforms the nature of the suit.² If the plaintiff asks for it at a late stage, that is no good reason for refusing the prayer for amendment, though it may be a good reason for directing the plaintiff to pay the costs incurred by the defendant up to the date of making the amendment.³ An amendment will be more readily permitted in the court of first instance, and may be there allowed even where the plaintiff's rights have been enlarged by the happening of some event subsequent to the institution of the suit, and the plaintiff desires to alter or extend the scope of his prayer for relief accordingly.⁴ In any case, no action on the part of the defendant, subsequent to the institution of the suit, should be held to affect or prejudice the right of the plaintiff.⁵ And, where an objection, based on the proviso to section 42, has not been raised or pressed in the first court, an appellate court may permit the plaintiff to amend his plaint and ask for consequential relief.⁶ A case in point is *Abdulkadar v. Mahomed*.⁷ The plaintiff here had alleged that he was entitled to the office of Sheikh of Kallai and to the properties attached thereto, and had prayed for (i) a declaration that the defendant was not so entitled, (ii) an injunction restraining the latter from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and (iii) further and other relief. There was no issue raised in the court of first instance regarding the maintainability of the suit, in view of the proviso

¹ C.P.C., s. 53. Under the new Code all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Or. 6, r. 17, Act V of 1908, sch. I. Cf. *Re Crichton Corp.* [1910] 2 K. B., 738.

² *Kalabhai v. Secretary of State for India* [1904] 29 Bom., 19. Cf. *Sardarsinghi v. Ganpatsinghi* [1889] 14 Bom., 395.

³ *Kalabhai v. Secretary of State*, supra. But see *Suryanarayam v. Yammana* [1901] 25 Mad., 504.

⁴ Cf. *Govinda v. Perumdevi* [1888] 12 Mad., 136; *Sat Bahari v. Sat* [1913] 65 P. R.

⁵ *Ram Adhar v. Ram Shankar* [1903] 26 All., 215 (plaintiff dispossessed after suit).

⁶ *Limba bin Krishna v. Rama bin Pimplu* [1888] 13 Bom., 548; *Chamu v. Umma* [1890] 14 Mad., 46; *Hazara v. Bishen* [1907] P. R. no. 128; *Thakur v. Punkal* [1907] 8 C. L. J., 485. *Distinguish Mohabharat v. Abdul Hamid* [1904] 1 C. L. J. 73.

⁷ [1891] 15 Mad., 15.

to section 42, and it decreed the claim. The appellate court found that the defendant was actually in possession of part of the properties in suit, and permitted the plaintiff to pay additional court fee and amend his plaint by inserting therein a prayer for recovery of possession. But if an objection, based upon the proviso relating to consequential relief is raised in the court of first instance, and the plaintiff joins issue thereon and contends that the suit in its actual form is maintainable, he may not be allowed to turn round in the court of appeal and obtain belated permission to amend his plaint.¹ Nor is it open to a court, of its own accord, to convert a suit for declaration into one for possession.²

C. P. C. s. 43;
Act V of
1908, sch. I.
or 2, r. 2.

The dismissal of a suit for a declaration of title, on the ground that the plaintiff was not in possession of the property in suit, will not bar the institution of a second suit by the same plaintiff to enforce his entire cause of action and regain possession of the property to which he claimed title.³

Objection in
appeal.

An objection, raised by the defendant for the first time in a court of appeal, that the circumstances of a case are not such as to justify a court in exercising its discretion in favour of the plaintiff and granting him the declaration prayed for, will be generally considered too late and not be given effect to.⁴ Where a party cannot contest a decree on the merits, a sound discretion manifestly requires that that decree should be upheld.

Death of
plaintiff.

Where a Hindu reversioner disputes an alienation or adoption, made by a female proprietor, and institutes a suit for a declaration in respect thereof, the suit will abate on his death and no appeal will lie, for there is no privity of estate between one reversioner and another.⁵ But recently the Privy Council

¹ *Narayana v. Shankunni* [1891] 15 Mad., 255; (but as to this case, see *Choma v. Sankara* [1910] 8 M. L. T., 358). *Raj Narain v. Shama Nando* [1899] 26 Cal., 845.

² *Venkatachala v. Narayana* [1913] 24 M. L. J. R., 455.

³ *Komola Kamini v. Lokenath Kur* [1882] 11 C. L. R., 183. Cf. *Shib Charan v. Raghunath* [1895] 17 All., 174; *Akbar Khan v. Turaban* [1908] 5 A. L. J. R., 640. Principle extended to suit for injunction in *Bande v. Gokul* [1912] 34 All., 172.

⁴ *Limba bin Krishna v. Rama bin Pimplu*, supra; *Chomu v. Umma* supra; *Maganlal v. Govindlal*, [1891] 15 Bom., 697; *Bombay B. Trading Corp. v. Yorke Smith* [1892] 17 Bom., 197; *Ram Kanaye Chackerbutty v. Prosunno Sein* [1870] 13 W. R., C. R., 176.

⁵ *Sakyahani v. Bhayani* [1904] 27 Mad., 588; *Bhola v. Moona* [1905] 8 O. C., 124; *Kommeneni v. Kommeneni* [1912] 22 M. L. J. R., 375. Distinguish *Muthusawmi v. Masilamani*, [1910] 20 M. L. J. R., 49, 65.

has held that a suit to set aside an adoption made by a widow brought by a near reversioner will not abate by reason of the death of that reversioner and the 'right to sue' survives to the next contingent reversioner.¹ This ruling extends the principle to the case of an alienation made by a widow.

Onus probandi.

As we have seen before, a suit to remove cloud over the title to land cannot be maintained, unless the plaintiff has both title and actual possession. He cannot rely on the weakness of the title of his adversary.² When, *e.g.*, a patent or deed includes, within the exterior bounds of the lands thereby conveyed, land which is excepted by such grant or deed from its operation, a plaintiff, suing to remove cloud from his title, must show that the land he claims against the defendant is not the land so excepted.³

Limitation.

A suit for a declaration under section 42, Specific Relief Act, is not provided for by any special article in schedule I, Indian Limitation Act. The omnibus article 120, therefore, applies, and the suit will be in time if instituted within six years of the date when the cause of action accrues.⁴ Mere lapse of time short of this period, in the institution of a suit, will not, in ordinary circumstances, disentitle the plaintiff to the specific relief claimed.⁵ Where the declaration asked for is only incidental and subsidiary to the main relief which it is the object of the suit to secure, the period of limitation will have to be determined with reference to this principal relief.⁶ There were some decisions which suggest a doubt as to the applicability of this principle in cases where the validity of an adoption comes in

¹ *Venkatanarayana v. Subbammal*, [1915] 38 Mad., 406, P. C.

² *Ante*, 493.

³ *Logan v. Ward* [1905] 5 L. R. A., N. S., 156.

⁴ *Mohabbarat v. Abdul Hamid* [1904] 1 C. L. J., 73; *Sripal Singh v. Rani* [1905] 8 O. C., 303. *Tukabai v. Vinayak* [1890] 15 Bom., 422; *Dattatraya v. Ramchandra* [1900] 24 Bom., 533, 538; *Legge v. Rambaran* [1897] 20 All., 35, F. B.; *Rampal v. Balbhaddar* [1902] 25 All., 1, P. C.; *Akbar Khan v. Turabai* [1908] 5 A. L. J. R., 637; *Mitra, Lim.*, 951 sqq. For a suit under Agra Tenancy Act, s. 201, *prov.*, see *Skinner v. Shankar Lal* [1908] 5 A. L. J. R., 638 n. Where successive and fresh

invasions of plaintiff's right, he may pass by an earlier invasion and sue in respect of a later, *Elahi v. Harnam* [1898] 18 A. W. N., 215; *Hakim v. Waryaman* [1907] P. R. No. 140; *Rahmatullah v. Shamsuddin* [1913] 11 A. L. J. R., 877. See also *Krishna v. Lakshmi* [1908] 3 M. L. T., 319 (plaintiffs joint, one plaintiff born after alienation in dispute, attained majority within 6 years of suit, barred).

⁵ *Athikarath v. Erathanikat* [1897] 21 Mad., 42.

⁶ *Dhanuk Singh v. Tulsi* [1912] 15 I. C., 545. *Cf. Rampal Singh v. Balbhaddar Singh* [1902] 25 All., 1, 16, P. C. *Distinguish Mulkarjan v. Narhari* [1900] 25 Bom., 337, P. C.

issue.¹ The ordinary rule is that an adoption must be affirmed or negatived within six years.² Now, an adoption may have been made by a widow, say, in 1880, the widow dies in 1890, and the next reversioner (in the absence of the adopted son) brings a suit for recovery of the estate in 1900. He, of course, denies the adoption, and cannot succeed, if the adopted son has a title. Is his suit within time? The balance of judicial opinion answered this question in the affirmative,³ and this view has now the sanction of the Privy Council too.⁴ But the Bombay High Court still adheres to the view that a suit questioning the validity of an adoption would be time-barred if not brought within six years under article 118, and considers the observations in the case of *Thakur Tirbhuwan v. Rameshar*, do not purport to overrule the Full Bench case of *Shrinivas v. Hanmant*.⁵ Where the suit is in essence one for declaration of title to land and for confirmation of possession, and not for specific performance of a contract, article 120 applies.⁶

Execution
of decree.

A declaratory decree is not capable of enforcement by the ordinary process of execution, and even if a decree in words makes future *mesne profits* payable, if it fixes no date for such payment in different years, and in the plaint the claim was limited to a recovery of the arrears for three years past, the court may construe the decree as merely declaratory.⁷ But where a decree declared that the plaintiffs were "entitled to the keys of the temple," it was held that plaintiffs or their representatives might execute the decree and recover possession of the keys.⁸

¹ *Shrinivas v. Hanmant* [1899] 24 Bom., 260, F. B.; *Ratnamasari v. Akilandammal* [1902] 26 Mad., 291, F. B. Cf. *Chunni v. Sita* [1911] 8 A. L. J. R., 1101.

² Act IX of 1908; sch. I, arts. 118, 119. Cf. *Karamdad v. Nathu* [1905] P. R., 86; *Anukul v. Susadhar* [1905] 2 C. L. J., 16; *Laxmawa v. Ramappa* [1907] 9 Bom., L. R., 1054.

³ *Baikanta v. Kalicharan* [1904] 9 C. W. N., 222; *Ram v. Ranjit* [1899] 27 Cal., 242; *Lali v. Murlidhar* [1901] 24 All., 195. *Chandania v. Saligram* [1903] 26 All., 40; *Ohintamun v. Mohan* [1887] 3 C. P. L. R., 32; *Surjan v. Kharak* [1908] P. W. R., 79; *Velaga v. Bandlamudi* [1907] 30 Mad., See

also judgment of B. Ayyangar, J., *Ratnamasari v. Akilandammal*, supra; *Rama Row v. Venkoba* [1907] 17 M. L. J. R., 282; *Bhagwat v. Murari* [1910] 15 C. W. N., 524, *Mtira, Lim.*, 942, sqq.

⁴ *Muhammad Umar v. Muhammad Niaz* [1912] 39 Cal., 418. P. C. See also *Tirbhuwan v. Rameshar* [1906] 28 All., 727, P. C.

⁵ *Shrinivas v. Balwant* [1913] 37 Bom. 513

⁶ *Akhil Proddhan v. Manmatha* [1913] 18 C. L. J., 616 (fictitious conveyance and decree.)

⁷ *Dorasamy v. Idangapiranthan* [1905] 1 M. L. T., 69.

⁸ *Ramasami v. Srirangachariar* [1910] 6 I. C., 681.

LECTURE XI.

MANDAMUS: RECEIVERS.

It is not private rights and duties alone with which our courts deal. Private rights sometimes give rise to public duties. Besides, there are officers and institutions upon whom it is incumbent to discharge duties and obligations of a more or less public character, and, as they sometimes may fail to discharge such duties and obligations, public interest requires that adequate provisions should be made for their enforcement. The common law of England made such provision by the writ of *mandamus*.¹ The prerogative writ was of a most extensive remedial nature and was issued in the form of a command in the King's name from the Court of King's Bench to any person, corporation, or inferior court of judicature and required him or it to do some particular thing therein specified which appertained to his or its office and duty and which was consonant to right and justice.² It was issued only where the ordinary courts of law could afford no effectual remedy,³ and relief was sought in respect of some public right or duty,⁴ though the interests, possibly contractual, of a private individual were involved therein.⁵ It was applied as "a corrective of official inaction, and for the

Writ of
Mandamus.

¹ For the present practice, see Judicature Act, 1873, s. 25 (8). For early history, see 1 Pollock & Maitland, *Hist. Eng. Law*, 292.

² Blackstone, *Com.*, bk. iii, 110; 3 Stephen, *Com.*, 684-7. Judge Sanborn gives this definition: "Mandamus is an action or judicial proceeding of a civil nature, extraordinary in the sense that it can be maintained only where there is no other adequate remedy, prerogative in its character to the extent that the issue of both the alternative and the peremptory or final command is discretionary, to enforce only clear legal rights, and to compel courts to take jurisdiction or proceed in the exercise of their

jurisdiction, or to compel corporations, public and private, and public boards, commissions, or officers, to exercise their jurisdiction or discretion and to perform ministerial duties, which duties result from an office, trust, or station, and are clearly and peremptorily enjoined by law as absolute and official," 26 *Cyc.*, 139.

³ *R. v. Barker* [1762] 1 W. Bl., 352; *R. v. Askew*, [1768] 4 Burr., 2188; *R. v. Univ. of Cambridge* [1765] *ibid.*, 552; *R. v. Stewart* [1898] 1 Q.B., 552.

⁴ *R. v. Bank of England* [1818] 2 B. & Ald., 620.

⁵ *Norris v. Irish Land Co.* [1853] 8 El. & Bl., 519.

purpose of setting in motion inferior tribunals and officers.”¹ Said Lord Mansfield, “Where there is a right to execute an office, perform a service or exercise a franchise, more especially if it be in a matter of public concern or attended with profit, and a person is kept out of possession or dispossessed of such right and has no other specific legal remedy, the court ought to assist by a mandamus.”² A statutory writ of mandamus³ was also issued “compelling the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested,” but this was also limited to cases where the duty concerned the public too.⁴

High Courts
in Presi-
dency
towns.

Chapter VIII, Specific Relief Act, purports to confer similar constitutional powers upon the High Courts of Judicature, in the three presidency towns of Calcutta, Madras and Bombay, within the local limits of their respective ordinary original civil jurisdiction. These courts formerly enjoyed the right to issue the writ of mandamus as part of this ordinary jurisdiction. The conditions under which the statutory powers now given in substitution may be exercised, are as follows :—

S. R. A., s.
45, condi-
tions.

(i) there must be within such jurisdiction a person holding a public office, whether of a permanent or a temporary nature, or a corporation or inferior court of judicature ;

(ii) the doing or forbearing of a specific act must, under any law for the time being in force, be clearly incumbent on such person or court in his or its public character, or on such corporation in its corporate character ;

(iii) such doing or forbearing should in the opinion of the High Court be also consonant to right or justice ;

(iv) the property, franchise, or personal right of some person should be liable to injury by the forbearing or doing, as the case may be, of the said specific act ;

(v) this person should have no other specific and adequate

¹ High *Extr. Leg. Rem.*, ch. i, s. 2,

² *R. v. Barker*, *supra*.

³ Under Common Law Procedure Act, 1854, s. 68, now repealed by 46 & 47 Vict., c. 49, s. 3.

⁴ *Norris v. Irish Land Co.*, *supra*.

“The writ of mandamus cannot be

substituted for a decree for specific performance of duties other than those growing out of public relations, or such as are clearly imposed by statute, or in some respects involving a trust,” *Spelling*, s. 1379.

remedy for enforcing the doing or forbearing from the specific act; but

(vi) an order of the High Court requiring such specific act to be done or forborne will afford complete remedy to this person.

Where these conditions, and they have been held to be cumulative,¹ are satisfied, it is competent to any one of the High Courts above mentioned, upon a petition to that effect made by the person whose property, franchise or personal right has been or is likely to be injured, to make an order for the enforcement or inhibition of the specific act in question.² The procedure prescribed here has also been borrowed from English practice,³ and the High Courts generally follow the principles applicable to a writ of mandamus in dealing with an application under chapter VIII.⁴ Procedure.

So long as the act complained of is done in the name of and for an officer within jurisdiction, it will not matter that his assistant, who actually does the work, is personally absent from the local limits of the jurisdiction of the court.⁵ The application should clearly state the act or forbearance to be directed and the individual against whom the order should be made.⁶ It must be supported by an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof. If the application is not summarily rejected, the court may make an order absolute in the first instance, or grant a rule to show cause why the order applied for should not be made, and at the hearing of this rule may make an order in the alternative,⁷ which may subsequently be made peremptory and absolute in the event of the party, court, or corporation served with notice of the previous order, failing to answer or making an insufficient or false answer.⁸

¹ *Rustum v. Kennedy* [1901] 4 Bom. J. R., 310.
L. R., 1.

² S. R. A., s. 45.

³ *R. v. Ledgard* [1841] 1 Q. B., 616.

⁴ *Board of Examiners v. Provas* [1913] 40 Cal., 588.

⁵ *Re Haji Hassam* [1902] 4 Bom. L. R., 773.

⁶ *Re Vijayaraghavalu* [1914] 26 M. L.

⁷ S. R. A., s. 46.

⁸ S. R. A., s. 47. Orders made under this chapter are executable and appealable as decrees made in exercise of the ordinary original civil jurisdiction of the High Court, *ibid.*, s. 48.

But the High Court shall not make an order binding on the Secretary of State for India in Council, or on the Governor-General in Council or on the Governor of Bombay or Madras in Council or on the Lientenat-Governor of Bengal;¹ nor an order on any servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown;² nor any other order which the law in force for the time forbids.³ The Court in such a proceeding will not try a question of title; therefore, where a plaintiff had obtained a decree for ejectment of an infant, whose estate was held by the Court of Wards, and pending the defendant's appeal, the plaintiff moved for an order calling upon the members of the Board of Revenue forming the Court of Wards to release the estate from its charge, the Calcutta High Court declined to take action under section 45.⁴ It may be further explained that the 'personal right,' injury to which the courts aim at preventing or remedying, means a right personal to the individual seeking the remedy, and not merely such a right *in rem* as every member of a society has independently of any act of his own.⁵ The existence of such a legal right is the foundation of every writ of mandamus, and the proceeding may affect the consummation of the relator's title, if he have one, but it cannot confer one not already existing.⁶

Illustrations.

Under this chapter of the Specific Relief Act, applications have been made for orders against a Presidency Magistrate,⁷ a Commissioner of Police,⁸ the Chairman of a Municipality,⁹ the Chief Judge of the Bombay Court of Small Causes,¹⁰ the University of Bombay,¹¹ a Board of Examiners for Pleadership¹² or Attorneyship,¹³ and a Fire Insurance Co.¹⁴ The duty sought

¹ S. R. A., s. 45 (f).

² *Ibid.* (g).

³ *Ibid.* (h).

⁴ *Re Kesho Prasad* [1911] 38 Cal., 553.

⁵ *Re A. Rasul* [1914] 18, C.W.N., 430, *R. v. Brown* 3 T. R. 574 *n. contra. Re Rustom* [1901] 3 Bom. L. R., 653. *Cf. Bank of Bombay v. Suleman* [1908] 12 C. W. N., 825, P. C.

⁶ *Re A. Rasul*, [1914] 18 C. W. N., 430; [2 East 75.

R. v. Clarke.

⁷ *Bank of Bengal v. Dinonath Roy*, [1881] 8 Cal., 166.

⁸ *Rustom v. Kennedy* [1901] 26

Bom., 396; *Gell v. Tujanoora* [1903] 27 Bom., 307; *Re Tarabhai* [1905] 7 Bom., L. R., 161.

⁹ *Re Mutty Lal Ghose* [1892] 19 Cal., 192. *Cf. Surat City Municipality v. Chuni Lal* [1906] 8 Bom. L. R., 209.

¹⁰ *Re Sharafuly Mamooji*, [1910] 34 Bom 659

¹¹ *Re Darasha Rustom'i* [1898] 23 Bom., 465.

¹² *Re Rudra Narain Roy* [1901] 28 Cal., 479.

¹³ *Re Purna Chandra Dutt* [1908] 12 C. W. N., 873.

¹⁴ *Re Bombay Fire Insurance Co.*,

to be enforced must be clear and obligatory. A Presidency Magistrate, *e.g.*, is bound in law to issue to a complainant copies of the order made by, and the depositions taken before, him, where he dismisses the complaint and discharges the accused.¹ So is a Commissioner of Police bound to license an eating-house, when the granting of the license is not left to his absolute discretion,² and in exercising his discretion in the matter of granting licenses to public conveyances, he is not to fetter himself with rules which would prevent him in each case from being free to consider the merits of each particular carriage.³ So the Commissioner of Police at Bombay is authorised to serve a notice under section 28, Bombay City Police Act (IV of 1902), only upon a person who comes within the scope of that section, and if he issues it to a person whom he merely suspects of being guilty of the conduct therein referred to, the High Court may be moved to cancel the notice.⁴ But if the chairman of a municipal board is not shown to be clearly bound to exercise any judicial discretion or take any judicial action with regard to the list of candidates for election prepared under the Bengal Act II of 1888, section 31, he cannot be compelled to remove a particular candidate's name from the aforesaid list.⁵

Where a public body has a discretion to exercise, it may be useful to point out that the duty is to exercise that discretion Discretion.

[1892] 16 Bom., 398. In view of the heading of Ch. VIII, it was doubted in this case if a private company could be said to be a corporation within the meaning thereof. But this doubt does not seem well-founded, because, first, a heading can apparently be no more the part of an enactment than a marginal note or an illustration (*Cf. Balraj Kuar v. Jagat Pal*, [1904] 26 All., 393, P. C.) and, next, English precedents recognise the right to a writ of *mandamus* in such a case. *Cf. Ganesh Bakhsh v. Harihar Bakhsh* [1904] 26 All., 299, 310, P. C.

¹ *Bank of Bengal v. Dinonath Roy*, supra, referring to Presidency Magistrates Act (IV of 1887), s. 170 (now see Act V of 1898, s. 548).

² *Rustom v. Kennedy*, supra. Distinguish *Ismail v. Municipal Commr.* [1903] 28 Bom., 253 (discretion of municipal commissioner).

³ *Gell v. Taja Noora*, supra, affg 4 Bom., L. R. 768 (sealed pattern notified by commissioner).

⁴ *Re Tarabai*, supra.

⁵ *Re Mutty Lal Ghose*, supra. (It was suggested that the commissioners as a body and the candidate whose name was objected to, should have been served with notice.) In *Re Corkhill* [1895] 22 Cal., 717, a person not duly elected municipal commissioner was restrained by the Calcutta High Court from exercising any functions as such by a *quo warranto* proceeding. For a case under C.P.C., of 1882, s. 622, where the question of issuing a *mandamus* for not using discretion under a mistaken notion as to a Judge's legal powers arose, see *Maharaja of Vizianagram v. Lingum Krishna Bhupati* [1902] 12 M. L. J. R., 473.

conscientiously. If there is a refusal to exercise that discretion, or if it is not exercised honestly and conscientiously,¹ the court will interfere. But the court cannot compel the public body to exercise their discretion in any particular way—to approve what it approves, to say what it says,—and where there has been a conscientious exercise of discretion, the court will not enquire into the grounds on which it is based.² Section 23 of the Madras Court of Wards Act³ empowers the court to make such arrangements as to it may seem fit in respect of the marriage of a ward; where it had therefore arranged to marry a ward to a certain lady and the High Court was moved to interfere, an order in the nature of mandamus was refused because, in the opinion of White, C. J., it was impossible to allege that the Court of Wards had committed a breach of duty by making the order it had made, and, in the opinion of K. Aiyar, J., there was no “specific act” within the meaning of section 45 which the Court of Wards was required to do under section 23 aforesaid.⁴

Other legal
remedy.

The court will not also interfere if other specific and adequate legal remedy is open to the applicant. A person, who has bought some shares in a company but not been registered as a shareholder by the directors, cannot move the High Court for an order to compel them to do, as section 58, Indian Companies Act (VI of 1882), affords a remedy “both specific, adequate and appropriate.”⁵

Corporation,
ultra vires.

The question whether a particular act or omission on the part of a corporation is *ultra vires* or *intra vires*, is likely to arise in applications under section 45, Specific Relief Act. I have already touched upon this question,⁶ but a few more general remarks here may not be out of place. The rule of law applicable was thus stated by Lord Cottenham, C.: “The limits within which the court interferes with the act of public functionaries are clear and unambiguous. So long as they

¹ *Prosad De v Calcutta Corp.* (1913) 40 Cal., 836.

² *Re Purna Chandra Dutt*, *supra*.
Shortt, Mandamus, 260; *R. v. Justices of Middlesex*. [1839] 9 Ad. & El., 546.
26 Cyc., 159 sqq. Cf. post, 542.

³ Act I of 1902 (Madras).

⁴ *Vellai Nachiar v. Court of Wards* [1910] 5 I. C. 740.

⁵ *Re Bombay Fire Ins. Co. Ltd.* [1892] 16 Bom., 398.

Ante, 204 sqq.

confine themselves within the exercise of those duties which are confided to them by law, the court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the court will no longer consider them as acting under the authority of their commission, but treat them, whether they be a corporation or individuals, merely as people dealing with property without legal authority."¹ Where statutory or common law powers are directly transgressed, there can be no difficulty, but where a case lies on the border-line between authority and no authority, the question is often a knotty one to solve.² An interesting case is *Tinkler v. Wandsworth District Board*,³ where the District Board, by the Act of incorporation, had authority to compel the owner of a house, which was inefficiently supplied with latrine accommodation, to provide a particular form of such accommodation. The Board issued an order compelling all house-owners to erect water-closets instead of privies. The court held that the authority was particular and not general, the Board was bound to exercise their discretion in each case and could not lay down a general rule, and the order therefore was illegal and *ultra vires*. So it is *ultra vires* of a corporation to create new offences by its bye-laws.⁴ But it is seldom easy to determine whether an act, not expressly forbidden by the constituting instruments, is yet valid as being incidental to the objects for which the company is formed or to the business which it has to carry on.⁵ In a suit against the Trustees of the Port of Bombay, the plaintiff contended that it was *ultra vires* of the defendants to record a minute reflecting upon his character. The court held that the trustees had the power, in any matter connected with or arising out of the business they

¹ *Frewin v. Lewis* [1828] 4 My. & Cr., 254; *Burnett v. Berry* [1896] 65 L. J. M. C., 118.

² *Ashbury Ry. Co. v. Riche* [1874] 7 H. L., 653; *Atty. Genl. v. Great Eastern Ry. Co.* [1880] 5 A. C., 478.

³ [1858] 2 Deg. & J., 261.

⁴ *Strickland v. Hayes* [1851] 51 J. P., 629.

⁵ *Simpson v. Westminster Palace Hotel Co.* [1880] 8 H. L. C., 712.

Discretion.

were empowered to transact, to express a decision, opinion, or advice, for the guidance in the future of themselves and their successors, though it might be prejudicial to the rights of others.¹ Where a discretionary power is conferred on a public body in the discharge of certain duties, *e.g.*, upon a municipal corporation in the matter of levying and collecting specified rates, it is not for a court to veto the exercise of its discretion or to prohibit it from discharging its duty.² In the matter of giving gratuities and making other payments out of the corporate funds, Bowen, L. J., said: "It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop. They are not to keep their pockets buttoned up and defy the world, unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business, for the company's benefit."³ The directors or managing partners have to exercise a wise discretion in the interest of the business.⁴ Accordingly, where a trading company paid gratuities to the extent of a week's wages to their servants,⁵ or an insurance company paid the loss sustained by insurers on account of an explosion, which was not within the terms of their policies,⁶ the payments were held to be *intra vires*.

¹ *Shepherd v. Trustees etc. Bombay*, [1876] 1 Bom., 132.

² *Municipal Commrs. of Madras v. Branson* [1881] 3 Mad., 201. *Re Jogendra Nath* [1909] 36 Cal., 271 (lease granted without calling for tenders).

³ *Hutton v. West Cork Ry. Co.* [1883] 23 Ch. D., 673.

⁴ *Per James, L. J.*: "It appears to me that, whether as regards a private partnership, a joint stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority of managing partners may be trusted and ought to be trusted, in determining for them-

selves what they may do and to what extent they may go in matters indirectly connected with or arising out of their business with others," *Atty. Genl. v. Great Eastern Ry. Co.* [1879] 11 Ch. D., 480. *Of. Henderson v. Bank of Australasia* [1888] 40 Ch. D., 170.

⁵ *Hampson v. Price's Patent Candle Co.* [1876] 45 L. J., Ch., 437 (Jessel, M. R., thought such liberal dealing would ease the friction between masters and servants, and in the end benefit the company.)

⁶ *Taunton v. Royal Ins. Co.*, [1864] 2 H. & M., 135 (*per Wood, V. C.*, "This is not a case of applying funds to

In the case of a joint stock company, incorporated and registered under the Indian Companies Act,¹ the objects are determined by the memorandum of association. That may be regarded as the charter of incorporation of the company,² and it can no more be altered by the articles of association than by a special resolution.³

Joint stock company.

Where any conditions for the protection of the public have been expressly imposed upon a public company by statute, the court will see that they are carried out. If, *e.g.*, an Act provides that a railway train shall not travel over a bridge at a speed exceeding the rate of four miles per hour, the railway company will be enjoined breaking this rule, even if no damage to the public by reason of such breach be proved.⁴ Where the infringement of a legal right by a company acting under statutory powers injures the plaintiff's rights beyond reparation by damages, the reason for issuing a prohibitory order is even stronger.⁵

Statutory condition for protection of public.

But a writ of *mandamus* will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the court, that he has claimed to exercise that right and none other, and that his claim has been refused. Where therefore the plaintiff had claimed an absolute right to inspect and take extracts from a Bank's register of share-holders—to which he was not entitled—and was refused, but it appeared that the plaintiff had no special interest in any of the matters he complained of or any interest other than or different from that of every other shareholder, and he had no definite right or object of his own to aid or serve in asking for inspection of the register, nor any right or object which the register would illustrate, but his object was to obtain the inspection, in order to communicate with the share-holders, with the view of securing their help in bringing

Conditions for issue of writ of mandamus.

purposes wholly foreign to the object of the company, but it is an expenditure designed to secure to the company the largest amount of profits in its own proper business.")

¹ Act VI of 1882, s. 6 (corresponding to same section of the English Joint Stock Companies Act, 1862).

² *Ashbury Ry. Carriage Co. v. Riche* [1874] 7 H. L., 607.

³ *Guinness v. Land Corporation of Ireland* [1883] 22 Ch. D., 357.

⁴ *Atty. Genl. v. London & N. W. Ry. Co.* [1900] 1 Q. B., 78.

⁵ *Jordeson v. Sutton Gas Co.* [1899] 2 Ch., 217.

about an improvement in the administration of the Bank's affairs, the Privy Council held that a suit for declaration of a right to inspect and take extracts from the Bank's register by a share-holder should be dismissed.¹

Suits out-
side Presi-
dency
towns.

Where an order of the nature of a writ of *mandamus* is not asked for by application, but is sought by a regular suit in the ordinary courts, section 45, Specific Relief Act, has manifestly no application. It has accordingly been held that civil courts, other than the three specified High Courts, have jurisdiction, in a case otherwise proper, to issue injunctions against mofussil municipalities in India.² There seems to be no reason why the power to make orders in the nature of a *mandamus* should not be conferred upon the High Court at Allahabad and the Chief Courts of the Punjab and Burmah. It is true that these courts never had an ordinary original civil jurisdiction. But there seems to be no reason even in the case of the Presidency High Courts to limit the power within this jurisdiction. It would be useful to empower these courts too to control mofussil municipalities.³

Appointment of Receivers.

Receivers.

Another form in which specific relief is given in India is by appointing a receiver.⁴ A *receiver* has been described as an indifferent person between the parties to a cause appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it,⁵ or where a party is incompetent to do so by reason, *e.g.*, of infancy or lunacy.⁶

Object of
appointment.

The object of appointing such an indifferent or impartial person is to keep the object-matter of the litigation in the grasp of the court, so as to prevent waste or damage, while the suit is being tried out, and protect the rights of the party who may

¹ *Bank of Bombay v. Suleman* [1908] 12 C. W. N., 825, P. C.; *Rex v. Merchant Taylors Co.* [1831] 2 B. & Ad., 115. As to the right of inspection, see 2 Taylor, *Ev.*, s. 1495.

² *Strachey v. Municipal Board of Cawnpore*, [1899] 21 All., 348; *Kameshwar Pershad v. Bhabua Municipality*

[1900] 27 Cal., 849.

³ 1 Stokes A.-J. *Codes*, 930, 937.

⁴ S. R. A., s. 5 (e).

⁵ *High, Receivers*, s. 1.

⁶ *Kerr, Rec.*, 3. A party may sometimes be appointed a receiver, as, *e.g.*, in partnership cases, see *infra*; *Woodroffe, Rec.*, 45-6.

subsequently be found entitled.¹ The appointment of a receiver, therefore, is a branch of protective or preventive justice administered by courts of equity, upon the principle *quia timet*, and is analogous to the relief granted by way of interlocutory injunctions.² The court assists the party who seeks its aid, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred which requires to be compensated or otherwise relieved.³

The Code of Civil Procedure, which contains the law upon the subject,⁴ provides for the appointment of a receiver in respect of property, whether moveable or immoveable, which is the subject of a suit or under attachment,⁵ or belongs to insolvent judgment-debtors.⁶ In the last two cases,⁷ the appointment is "rather a matter of ministerial procedure than by specific relief;"⁸ and I will confine my observations to the appointment of a receiver where a suit is depending. In fact, unless there is a pending cause, it has been said, there can be no specific relief granted in this form.⁹

The appointment of a receiver pending a suit is a matter resting in the discretion of the court.¹⁰ A court may appoint

Pending suit.

Jurisdiction of court.

¹ "The object in all such cases is to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or diminished or lost by gross negligence, the interference of the court becomes indispensable; as, where property in the hands of a trustee for certain specified uses or trusts (express or implied), is in danger of being diverted or squandered to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured in the manner deemed best fitted to the end, as by the appointment of a receiver or otherwise." 2 Story, *Eq.*, s. 827.

² In England, protective relief is also granted by a direction to pay over money or give security, or by payment of a fund into court. *Cf.* C. P. C., Or. 39, r. 7.

³ Woodroffe, *Rec.*, 13; 2 Story, *Eq.*, s. 826; *Satoor v. Satoor*, [1864] 2 Mad. H. C. R., 8, 10 (plaintiff must show (i) a title in possession or expectancy in himself and (ii) danger to the

property).

⁴ S. R. A., s. 44, para 2. Under s. 146, Criminal Proc. Code (V of 1898), a Magistrate, who attaches the subject of dispute, may, if he thinks fit, appoint a receiver thereof, who, subject to this control, will have all the powers of a receiver appointed under the Civil Procedure Code.

⁵ C. P. C., s. 503. *Cf.* Act V of 1908, Sch. i, Or. 40.

⁶ C. P. C., Ch. xx, of Act xiv of 1882. See Provincial Insolvency Act, ss. 18-22.

⁷ Property may be attached for the first time in execution of a decree, C. P. C., sch. iv, form 168; Act V of 1908, sch. i, Or. 21, r. 42-54. A receiver in a case of insolvency is the agent of the creditors, *Badal Singh v. Birch* [1888] 15 Cal., 762, 764. *Ex parte Warren* [1875] 10 Ch., 222. Insolvent's property vests in the receiver, except such as are not liable to attachment, *Kanhai v. Kalka* [1905] 27 All., 670; Prov. Ins. Act, ss. 18, 16 (2).

⁸ Collett, 5th ed. 819.

⁹ *Ex parte Whitfield* [1742] 2 Atk., 315. ¹⁰ S. R. A., s. 44.

a receiver only when it has seizin of the property sought to be protected or preserved.¹ This it will have, when a suit in respect of it has been instituted in the court, and this suit discloses a cause of action² and is within the pecuniary³ or territorial⁴ jurisdiction of the court.⁵ The courts in India have but limited powers of making a decree *in personam*.⁶ If the suit is one "for land," or directly relates to immoveable property, and the defendant's personal obedience will not secure for the plaintiff the relief he wants, only the *forum rei sitæ* will have jurisdiction. The test in all such cases is rather the nature of the claim made in respect of the property in suit than the actual situation of such property.⁷ There can be no specific relief for the mere purpose of enforcing a penal law,⁸ but a criminal offence may also be a civil wrong, and when it affects rights in property, the appointment of a receiver of this property may be a proper relief.⁹

Discretion.

The Indian law on the subject of appointment of receivers has been now brought almost into line with the English law,¹⁰ and the present Code of Civil Procedure enacts that where it appears to the court to be *just and convenient*,¹¹ it may by order appoint a receiver of any property, whether before or after decree, remove any person from the possession or custody of the property, commit the same to the possession, custody or management of the receiver, and confer upon him such powers as the court thinks fit.¹² The old Code authorised such appointment only where it was necessary for the realisation, preservation or better custody or management of the property in

¹ *Marullasida v. Siddalinga* [1913] 17 J. C. 16; *Pana v. Ana* [1911] 8 J. C., 1191.

² *Woodroffe, Rec.*, 18.

³ *Boidya Nath v. Makhan Lal* [1890] 17 Cal., 680.

⁴ *Poresh Nath v. Omerto Nauth* [1890] 17 Cal., 614. *Delhi & London Bank v. Wordie* [1876] 1 Cal., 249, 257; *Kellie v. Fraser* [1877] 2 Cal., 453, 457.

⁵ *High, Rec.*, s. 39A.

⁶ C. P. C., ss. 16, 16A; Act V of 1908, ss. 16, 18. The ordinary original civil jurisdiction of the Presidency High Courts is governed by their by respective Letters Patent.

⁷ *Woodroffe, Rec.*, 22; as to High

Court practice, see *Juggodumba v. Puddomoney* [1875] 15 B. L. R., 318, 324 5, 330; *Jairam v. Atmaram* [1880] 4 Bom. 482, 484-5.

⁸ S. R. A., s. 7.

⁹ *Bonumayya v. Venkatasubbayya* [1894] 18 Mad., 23 (criminal misappropriation of property).

¹⁰ *Ramji v. Saligram* [1910] 14 C.W.N., 248; *Mulhuria v. Shibdayal*, *ibid.*, 252; *Sivagnanathammal v. Arunuchalam* [1911] 21 M. L. J. R., 821; *Pana v. Ana* [1911] 8 J. C., 1911; *Ahmed v. Chatty* [1910] 5 L.B.R., 135.

¹¹ "Just or convenient," *Judicature Act*, 1873, s. 25, subs. 8.

¹² Act V of 1908, Or. 40, r. 1.

suit or under attachment¹ The discretion of the court has therefore been widened, and it may appoint a receiver now in a case where formerly it would not have interfered.² But the discretion has still to be exercised according to sound and settled principles and, so far as they purport to enounce and apply such principles, old rulings are by no means obsolete.³

The court is not bound to grant such relief merely because it is lawful to do so, or because the appointment of a receiver can do no harm.⁴ The court has a judicial discretion to exercise, and must consider the nature of the plaintiff's claim and the situation of the property and of the parties. At the stage when a receiver is generally applied for, the court is not called upon to go minutely into the merits of the case, and should abstain from prejudging it in any way.⁵ But the court should not interfere unless satisfied, upon such materials as are before it at the time, that the plaintiff has made out a *prima facie* title to the property, over which the receiver is sought to be appointed. As I have observed, the appointment of a receiver *pendente lite*, and the issue of a temporary injunction are kindred remedies. Both are exceptional equitable remedies, essentially preventive in their nature, and having for their common object the preservation of the *res* or object-matter of the litigation unimpaired for disposal, in accordance with the future decree or order of the court.⁶ But injunction is strictly a conservative remedy, which merely restrains action and preserves matters *in statu quo*, without affecting the possession of the property or fund in controversy ;

Temporary
injunction
and receiver.

¹ Act XIV of 1882, s. 503 ; *Per M. Ayyar and Best, JJ.* : " Whether property is wasted or misappropriated makes no difference for the purposes of this section. The future institution of a criminal prosecution will not enable a party to recover property that may have been misappropriated." *Hannumayya v. Venkatasubbayya*, *supra*. Cf. *Haines v. Carpenter*, 1 Woods, 262.

² *Ramji v. Saligram*, *supra* (exclusion from joint family, but no waste established). Court may act *suo motu*, *Bidya v. Asrafi*, [1913] 40 Cal., 862 ; *Dan v. Gopi* [1913] 11 A. L. J. R., 973 (doubtful decision on the merits). But

see *Bukht v. Isa* [1911] 62 P. W. R.

³ Cf. *Holmes v. Millage* [1893] 1 Q. B., 551, 557. *Riviere*, 3. *Morgan v. Hart* [1914] 2 K. B., 183.

⁴ *Prasonomoyi v. Beni Madhub* [1888] 5 All., 556.

⁵ *Ibid* ; *Sidheswari v. Abhoyeswari* [1888] 15 Cal., 823 ; *Sia Ram Das v. Mahabir Das* [1899] 27 Cal., 282 ; *Ram Sundar v. Kamal Jha* [1905] 32 Cal., 741 ; *Sivagnanathmmal v. Arumuchalam* [1911] 21 M. L. J. R., 821 ; *Skinner's Co v. Irish Society* [1836] 1 M. & C., 162, 164 ; *Fripp v. Chard Ry. Co.*, [1853] 11 Hare, 241, 264.

High, Rec., 16, 17.

whereas the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property.¹ A receiver will not therefore be necessarily appointed where an *interim* injunction may be granted, but a stronger case for extraordinary relief must be made out.² In either case it must be shown that the property should be preserved from waste or alienation, but for injunctive remedy it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while for the appointment of a receiver, a good *prima facie* title has to be made out.³ If, therefore, the plaintiff presents a *prima facie* case, showing an apparent right or title to the thing in controversy, and that there is an imminent danger of loss unless there be intervention on the part of the court, this relief may be granted without going further into the merits upon the preliminary application.⁴ The principles upon which English courts act were thus stated by Lord Cranworth: "The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation, which is to decide the right of the litigant parties. In such cases, the court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of *interim* protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending

Lord Cranworth's views.

¹ Woodroffe, *Rec.*, 11.

² In fact, an order for an injunction is always more or less included in an order for a receiver. It is not necessary if a receiver be appointed, to go on and grant an injunction in terms. *Kerr, Rec.*, 9-10; but the converse does not hold.

³ *Chandidat Jha v. Padmanand Singh* [1895] 22 Cal., 459, 465; *Sivagnanathammal v. Arunuchalam*, *supra*.

⁴ *Re Leney and Sons Ltd.* (1908) 1. K. B., 79 C. A. High, *Rec.*, s. 6; *Leavitt*

v. Yates, 4 Ewd. Ch., 162 (*per* Mc Conn. V.C. : "Insolvency and danger to the fund, pending the litigation, with a *prima facie* case and probable cause for sustaining the bill, are or ought to be sufficient in the first instance to found an injunction and a receivership upon, without going minutely into the merits") *Sham Chand v. Bhaya Ram* [1894] 5 C. W. N., 365; *Sia Ram v. Mahabir*, *supra* (waste by deft.); *Shankar v. Sadashiv* [1905] 7 Bom. L. R., 926.

a litigation in the ecclesiastical court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it, and preserving it for the benefit of the successful litigant. But, where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases, an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its *interim* interference have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case."¹ Among such circumstances is the conduct of the applicant, which, if blameable² or dilatory,³ will induce the court to hold its hand. All questions of discretion may in a sense be questions of degree,⁴ and it is open to an appellate court to correct an arbitrary exercise of discretion by a lower court.⁵ But the opinion of the court of first instance is, in these matters, of great weight. It has all the facts and the parties before it, and is probably the best tribunal to decide whether it is necessary or expedient, having regard to the circumstances of the case, that a receiver should be appointed.⁶

The court must exercise a sound discretion⁷ on a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for

Right clear,
danger im-
minent, da-
mage sub-
stantial.

¹ *Owen v. Homan* [1853] 4 H. L. C., 997, 1032-3.

² *Baxter v. West* [1859] 28 L. J., Ch. 169.

³ *Gray v. Chaplin* [1826] 2 Russ., 126, 147, 34 Cyc 23.

⁴ *Ghanashom v. Moroba* [1894] 18 Bom., 493.

⁵ *S. R. A.*, s. 22; *Shadi v. Anup Singh* [1889] 12 All. 438 (burden upon appellant to show improper exercise).

⁶ *Per Garth, C. J., Oriental Bank Corp. v. Govindoll Seal* [1884] 10 Cal., 713; 737. *Ram Sundar v. Kamal Jha* [1905] 32 Cal., 741; *Raja Ram v. Sheorani* [1910] 7 J. C., 344; *Sant v. Ram* [1910] P. R. No. 36; *Jibanessa v. Majid-unnessa* [1913] 17 C. W. N., 581.

⁷ *Skip v. Harwood* [1747] 3 Atk., 564; *Greville v. Fleming*, 2 J. & L., 339; *Re Prytherch* [1889] 42 Ch. D., 590.

the protection of the property, but all the circumstances connected with the right which is asserted and has to be established.¹ Where there is acceptable evidence,² which is very clear in favour of the plaintiff, the risk of eventual injury to the defendant is slight, and the court does not hesitate to interfere. And the appointment of a receiver has been said to be almost a matter of course³ in such a case, where the court is convinced of danger to the property if left in the possession of the party defendant,⁴ or of the risk of an alteration for the worse in the situation of the applicant, if the appointment be delayed.⁵ Before the court will consider whether it shall appoint a receiver or not, said Pearson, J., "it must be clearly shown that actual damage has occurred, or that there is imminent danger thereof, and that the apprehended damage, if it comes, will be very substantial, almost, if not quite, irreparable."⁶

Multiplicity of action.

A court may interfere to prevent a multiplicity of action, *e.g.*, where there may be difficulty in executing a decree for maintenance out of property charged with payment of the allowance, and fresh suits may be necessary upon default in payment of the instalments, a receiver will be appointed under the decree itself, with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale-proceeds to pay the allowance decreed.⁷

Illustrations.

In order to see how the above principles have been applied in practice, we may examine some of the cases where a receiver has been either appointed or denied. Any kind of property may be made over to a receiver, houses, lands, or rents⁸ and profits thereof, securities in the public funds, mortgage decrees,⁹

¹ *Sidheswari v. Abhoyeswari*, [1888] 15 Cal., 818, 823.

² *Prosonmoyi v. Beni Madhub* [1883] 5 All., 553.

³ *Middleton v. Dodswell* [1806] 13 Ves., 266; *Oldfield v. Cobbett* [1835] 4 L. J., Ch., 272.

⁴ *Whitworth v. Whyddon* [1850] 2 M. & G., 52, 55; *Evans v. Coventry* [1854] 5 De G. M. & G., 911, 918. *Cf. Re Jamnabhai* [1911] 13 Bom. L. R., 487 (minor's property).

⁵ *Aberdeen v. Chitty* [1838] 3 Y. & C., 379, 382; *Thomas v. Davies* [1847] 11 Beav., 29.

⁶ *Fletcher v. Bealey* [1885] 28 Ch. D., 688, 698.

⁷ *Hemanginee v. Kamode Dass* [1898] 26 Cal., 441.

⁸ Query as to rents and profits not accrued due at date of appointment. *Keshubati v. Mohan* [1912] 39 Cal., 1010.

⁹ *Pratub Singh v. Delhi & London Bank* [1908] 5 A. L. J. R., 583.

judgment-debts,¹ stock in trade, shares in companies, or outstanding assets of a partnership; and the applicant may either claim a present right of enjoyment to this property, or a future, and, it may be, only a contingent, right. Where the property in dispute is *in medio*, the court will, as we have seen, seldom hesitate to prevent a scramble and take it *in custodia legis*.² The Bombay Court, accordingly, appointed a receiver in a testamentary suit.³ But, after probate has been granted, if it is impeached, say, upon the ground of fraud, and a revocation is sought, the court will be slow to move.⁴ "The general principle," said Turner, L. J., "is that where there is a legal title to receive, the court ought not to interfere, unless where the legal title is abused or there is proof that it is in danger of being so."⁵

Property *in medio*.

This principle is often illustrated in cases where the plaintiff possesses an admitted interest, but the defendant has a particular estate vested in him. Take the ordinary case of a Hindu widow in possession of her deceased husband's estate. If she grossly mismanages the property and commits spoliation and destructive waste, the female heir cannot, at the instance of the reversioner, be removed from possession with an allowance for maintenance, but a receiver may be appointed of the estate.⁶ This will, however, be done only in an exceptional case, and not merely because the plaintiff makes violent and wholesale charges of waste or malversation unsubstantiated by satisfactory evidence.⁷ As between co-owners, joint tenants or tenants-in-common, the court is also slow to interfere, unless destructive waste or gross exclusion⁸ is shown. Where, *e.g.*, one of two brothers took possession of the whole estate upon

Life tenancy.

¹ *Raj v. Kanhiya* [1913] 18 C. W. N., 222, 229.

² *Parker v. Siddons* [1873] 16 Eq., 34 (case of vacant possession); *Jibannessa v. Ma, id-un-nessa* [1913] 17 C. W. N., 581.

³ *Yeshwant v. Shankar* [1892] 17 Bom., 390. But see *Kesar Devi v. Partab* [1908] P. R., no. 39. *Re Siva i Rajah Sahib* [1915] 29 M. L. J., 209.

⁴ *Newton v. Ricketts* [1847] 10 Beav., 525; *Kerr, Rec.*, 25.

⁵ *Devv v. Thornton* [1851] 9 Hare,

⁶ *Maharani v. Nandu Misser* [1868] 1 B. L. R., A. C. J., 27; *Guruva v. Ragummal* [1910] 8 M. L. T., 189.

⁷ *Cf. Prosonomoyi v. Beni Madhub* [1883] 5 All., 556; *Te bul v. Ramra* [1912] 11 J. C., 703.

⁸ *Milbank v. Rixett* [1817] 2 Mer., 405; *Tyson v. Fairclough* [1824] 2 S. & S., 142, 144; *Searle v. Smalls* [1855] 3 W. R. (Eng.), 437; *Sant v. Rani* [1910] P. R., no. 36; *Rum'i v. Saligram* [1910] 14 C. W. N., 248.

Mines.

Suit for
partition.

Partnership.

the allegation that the other was illegitimate, but there had been one decision in favour of the latter's legitimacy, a receiver was, at his instance, appointed of the rents and profits of a moiety of the estate, and the tenants thereof were directed to pay a moiety of their rents to such receiver.¹ An exception to the general rule has been recognised in the case of mines, as property of this character derives its chief value from continued working, and a stoppage is likely to lead to considerable loss; besides, it cannot be conveniently carried on by a large number of persons, each employing independently a manager and workmen.² Joint owners may barter away their right to joint management, and yet retain a right to see that their interest in the joint property is protected;³ and receivers have frequently been appointed, in this country, in suits for partition of such property.⁴ In a suit for partition, the receiver may be placed in charge of the entire joint estate, for that is the property in suit, the plaintiff being interested in every portion of this property before it is partitioned.⁵ And in such a suit, a defendant may also move for a receiver for the protection of the property.⁶

A court is loth to appoint a receiver of a partnership concern where dissolution is not proved or sought.⁷ "It may be a question," said Lord Eldon, "whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future; but if what he has done, does not give

¹ *Hargrave v. Hargrave* [1846] 9 Beav., 549.

² *Kerr, Rec.*, 94; *Woodroffe, Rec.*, 113.

³ *Tirumalai v. Bungaru* [1898] 21 Mad., 310.

⁴ *Woodroffe, Rec.*, 119. *Pirithi v. Jowahir* [1887] 14 C. 493, 513, P. C.

⁵ *Poresh Nath v. Omerto Nauth* [1890] 17 Cal., 614. *Suprasanna v. Upendra* [1913] 18 C. L. J., 638.

⁶ *Porter v. Lopes* [1878] 7 Ch. D., 358.

⁷ *Roberts v. Eberhardt* [1853] Kay, 148; *Smith v. Jeyes* [1841] 4 Beav., 503. *Per Langdale, M. R.*: "Where an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty; on the one hand,

if it grants the motion, the effect of it is to put an end to the partnership which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably at the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties." *Madgwick v. Wimble* [1843] 6 Beav., 495, 500.

the other party a right to have a dissolution of the partnership, what right has the court to appoint a receiver and make itself the manager of every trade in the kingdom?"¹ In another case it was said, "A receiver operates as an injunction; and the principle on which this court acts with regard to the appointment of a receiver in these cases is this: it will not appoint one upon motion, unless it sees that there is an actual present dissolution arising from the acts of the parties, or that at the hearing it would, upon the merits, dissolve the partnership. If the partnership is a continuing one and may continue, it will direct an account."² There must be some breach of the duty of a partner or of the contract of partnership,³ some unrighteous conduct⁴ to justify interference, and the circumstance of one partner having taken upon himself the power to exclude another partner, from as full a share in the management of the partnership as he who assumes that power himself enjoys, has been declared by Lord Eldon to be "the most prominent point on which the court acts in appointing a receiver of a partnership concern."⁵ The court will not undertake the management of a going concern, but it may appoint an *interim* receiver for a limited purpose which does not displace the management, and so may leave it eventually to continue."⁶ Where, however, the fact of the partnership is not *prima facie* established, the plaintiff cannot have this equitable relief; where it is, a plea to the contrary in the written statement may furnish ground for interference.⁷

In mortgage suits, applications are frequently made for the appointment of a receiver. If the mortgagee is in possession of the mortgaged property and the mortgagor is the plaintiff, in a suit for redemption, the defendant's possession will seldom

Mortgage suits.

¹ *Goodman v. Whitcomb* [1820] 1 J. & W., 589.

² *Baxter v. West* [1860] 1 Dr. & Sm., 173. Cf. *Anand v. Ganesh* [1914] 21 J. C., 969 (Act III of 1907, s. 20, c).

³ *Harding v. Glover* [1810] 18 Ves., 281. A surviving partner is entitled to manage for the purpose of winding up, and will not be displaced unless there is evidence of breach or neglect of duty, *Phillips v. Atkinson* [1787] 2

Bro. C. C., 272.

⁴ *Texeira v. Da Costa*, 2 Daniell, Ch. P. 1565y.

⁵ *Const v. Harris* [1824] 1 Turn. & Russ., 496.

⁶ *Ibid*; *Hall v. Hall* [1850] 3 M. & G. 79, 91; *Medwin v. Dilchman* [1883] 47 L. T., 250.

⁷ *Peacock v. Peacock* [1809] 16 Ves., 49; *Hale v. Hale* [1841] 4 Beav., 369.

be interfered with, unless strong evidence is adduced to prove imminent danger of the property being lost.¹ Nor will a court be disposed to interfere in favour of a mortgagor-judgment-debtor, when a decree for sale has been obtained against him by the mortgagee.² But a receiver may be granted in aid of suits for foreclosure or sale brought by mortgagees, the latter thus getting the benefits of possession without being reduced to the position of a mortgagee in possession, which may be both unpleasant and disadvantageous.³ In *Jaikisondas v. Zena Bai*,⁴ in a suit by the mortgagee for foreclosure or sale in default of payment of the mortgage-money, the original court had decreed the claim, but refused to appoint a receiver of the rents and profits of the mortgaged property. Upon appeal by the mortgagee, Sargent, C. J., said, "In the present case we think it is 'just and convenient' that a receiver should be appointed. There are exceptional circumstances here. The mortgage-debt is for a very large amount. The value of the property is said to be insufficient to cover the debt,⁵ and there is a large sum owing for arrears of interest⁶. It is, therefore, a case in which a receiver is desirable, and we think he ought to have been appointed by the decree made by the court below."⁷

Where the dispute is between two or more incumbrancers, if the first mortgagee has not taken possession, puisne mortgagees may have a receiver appointed;⁸ but if he has, he is entitled to retain that possession till he is fully paid,⁹

Prior and
subsequent
mortgagees.

¹ *Tribhoban v. Jamuna* [1889] Bom. P. J., 184; *Ghose, Mortgage*, 910.

² *Latufat Hossein v. Anunt Chowdhry* [1896] 23 Cal., 517. Cf. *Vankata v. Basivi* [1915] 29 M. L. J., 457.

³ *Gaskell v. Gosling* [1896] 1 Q.B., 669, 691; *Appasami v. Jotha* [1899] 22 Mad., 448; *Ghanashyam v. Gobinda Moni* [1902] 7 C. W. N., 452. Cf. *Re Prytherch* [1889] 42 Ch. D. 590. Appointment may be after sale, as suit does not terminate with it, *Madaneswar v. Mahamaya* [1911] 15 C. W. N., 672.

⁴ [1890] 14 Bom., 431.

⁵ *Almad v. Chetty* [1910] 5 L. B. R., 135; *Khubsurat v. Saroda* [1911] 14 C. L. J., 526 (decree for sale).

⁶ *Eastern M. & A. Co. v. Rakea* [1912] 16 C. W. N., 997; *E. M. & A. Co. v. Fakuruddin* [1912] 17 C. W. N., 16.

Weatherall v. E. M. A. Co. [1911] 13 C. L. J., 495.

⁷ Upon appeal in this case, the High Court had appointed an *interim* receiver, and he was continued by the decree. Cf. *Re Teweksbury Gas Co.* [1911] 2 Ch., 279.

⁸ *Dalmer v. Dashwood* [1793] 2 Cox, 378, 383.

⁹ *Per Eldon, L. C.*: "If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage; that is, if there is a prior mortgagee, then if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but if he is in possession, you cannot come here for

and will not be disturbed, unless a specific charge of gross mismanagement of the estate can be clearly established against him.¹ A charge which falls short of a mortgage may be treated in the same way as a mortgage for the purposes of an application under Order 40, rule 1, schedule 1, Civil Procedure Code.² But where an unpaid vendor's lien was sought to be enforced against a railway company, which had taken land under compulsory powers, but not paid for the whole of it, a temporary injunction against the use of the railway was refused as a monstrous and vexatious interference with the use of the railway and public convenience, and a receiver for the particular portion of the line left unpaid for was not appointed as a practically unproductive form of relief.³

Creditors, even before judgment, may have such a special or equitable charge or lien upon the property of the debtor as to entitle them to a receiver.⁴ American courts have not favoured the claims of mere general creditors, whose rights rest only in contract and are not yet reduced to judgment, and who have not acquired any lien upon the debtor's property.⁵ Indian and English courts will not refuse jurisdiction in such a case, though they will certainly refuse, unless a clear case for interference be established to deprive a person of property in respect of which the claimant has no specific claim, in order that if he establish his claim as a creditor there may be assets wherewith to satisfy it.⁶ A court has power to appoint a receiver of the mortgaged property, where the decree has been passed for the sale on a simple mortgage, though the personal remedy is time-barred.⁷ There is no question as to the jurisdiction where the debt has merged into a decree, but, as we have seen, the appointment of a receiver in aid of execution, at the instance of a judgment-creditor, is not, strictly speaking, a form of specific relief.⁸

Other creditors.

a receiver; you must redeem him and then, in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent encumbrance." *Berney v. Sewell* [1820] 1 J. and W., 647. For the purposes of the present discussion, no distinction between mortgages as legal and equitable need be made.

¹ *Kerr. Rec.*, 36; *Rowe v. Wood* [1822] 2 J. & W. 553, 557.

² *Holmes v. Bell* [1840] 2 Beav., 298; *Tanfield v. Irvine* [1826] 2 Russ., 149.

³ *Latimer v. A. B. Ry. Co.* [1878] 9 Ch. D., 385.

⁴ *High, Rec.*, s. 408; *Cummins v. Perkins* [1899] 1 Ch., 16, 19.

⁵ *High, Rec.*, s. 406.

⁶ *Woodroffe, Rec.*, 152.

⁷ *Vankata v. Bosivi* [1915] 29 M.L.J., 457.

⁸ As to the English doctrine of 'equitable execution,' see *Re Sheppard*,

Trust property.

Where there is a trust, either express or implied, and the defendant holds a fiduciary position, if waste, misconduct or mismanagement on his part jeopardises the trust estate, the court may appoint a receiver.¹ A receiver will be granted where it is shown that there is any danger of loss, improper disposition of assets, improper management, breach of trust, omission to perform, bias in favour of one of the contending parties, denial of the trust, refusal to pay and removal from the jurisdiction, fraud, refusal to act, unfitness, or withholding of trust funds;² so where trustees cannot act together through disagreement, or some of them act separately and against a dissenting trustee.³ But the court will not lightly displace a trustee or executor, who is willing to act, even if he be poor.⁴ It is for the settlor or testator, and not the court, to say in whom the trust for the administration of the property shall be reposed, and the court will refuse to interfere, unless it is satisfied that the trust property is in danger and the party in possession is irresponsible.⁵ In the case of the executor of the will of a Mahomedan testator,⁶ or of an administrator appointed in the event of an intestacy by the court,⁷ the same reasons do not apply. The guardian of an infant is in the position of a trustee, and may be removed for sufficient cause,⁸ and if the infant's property is in the adverse possession of a person hostile to his interests, equity will afford the protection of a receiver, but not appoint one who sustains a relation of trust towards the minor.⁹ A court, however, has no authority to place an endowed property permanently in the hands of a receiver.¹⁰

A large class of cases relating to property arises where its

Title in dispute.

[1890] 43 Ch. D., 131. In India, there being no separate courts of law and equity, the doctrine is out of place. Woodroffe, *Rec.*, 154.

¹ *Vann v. Barnett* [1787] 2 Bro. C. C. 158 (appointment made before defendant put in answer); *Allbright v. Allbright*, 91 N. C., 220. *Ajapa v. Ramalingam* [1913] 24 M. L. J. R., 658 (suit under s. 92, C. P. C.)

² *Everett v. Prythergch* [1841] 12 Sim., 363, 365, 367. Woodroffe, *Rec.*, 135-6. *Vururaghava v. Krishna Samy* [1910] 20 M. L. J. R., 638.

³ *Swale v. Swale* [1856] 22 Beav., 584.

⁴ *Anon.* [1806] 12 Ves., 4.

⁵ *Haines v. Carpenter*, 1 Woods, 262.

⁶ *Hafizabai v. Abdul Karim* [1893] 19 Bom., 83, 85.

⁷ *Bennet, Rec.*, 33; Woodroffe, *ibid*, 140.

⁸ *Duke of Beaufort v. Berty* [1721] 1 P. Wms., 703; *Fowler v. Odel* [1881] 16 Ch. D., 723.

⁹ *Sykes v. Hastings* [1805] 11 Ves., 363.

¹⁰ *Raj v. Bepin* [1913] 40 Cal., 251.

ownership is in dispute. In such cases the *bona fide* possessor is not to be deprived of any of the just rights attached to his title, unless there be some equitable ground for interference,¹ and the court, if asked to appoint a receiver, should proceed with the greatest care and caution.² As was said in a famous case, that the tenant is to be indemnified and saved harmless, is manifest equity, but that does not substantiate the equity of a person, who is out of possession, to come to court and oust, in effect, by means of a receiver, another claimant who has been more fortunate in obtaining possession, and with it the legal right which possession gives.³ If a right is, therefore, asserted to property in the possession of the defendant, claiming to hold under a legal title, a court does not interfere by appointing a receiver, unless a very strong case is made out, for, otherwise, in the event of the plaintiff eventually failing, the defendant may sustain irreparable damage by reason of *interim* dispossession.⁴ An instance where the relief was given, is *John v. John*.⁵ That was an action of ejectment and the plaintiff claimed a legal title, which appeared to be good, subject to a point on the construction of a will, which, too, was *prima facie* strong, whereas the defendant was a man of poor means and his title seemed shadowy.⁶

In some cases of specific performance of contracts, the appointment of a receiver may be necessary.⁷ A vendor of real estate (plaintiff) obtained a receiver by showing that the defendant was insolvent and that all his property, including the object-matter of the suit, was about to be conveyed to trustees for the benefit of his creditors.⁸ And the vendee plaintiff in a Contracts.

¹ *Dulmir Puri v. Hetnarain* [1880] 6 C. L. R., 467, 469; *Muthuria v. Shibdayal* [1910] 14 C. W. N., 252; *Sivaganathammal v. Arunuchalam* [1911] 21 M. L. J. R., 821.

² *Prasonomoyi v. Beni Mudhub* [1883] 5 All., 556; *Pana v. Ana* [1911] 8 J. C., 1191.

³ *Per Wood, V. C., Talbot v. Hope-Scott* [1858] 4 K. & J., 96, 121.

⁴ *Sidheswari v. Abhoyeswari* [1888] 15 Cal., 818. See *Toldervy v. Colt* [1836] 1 Y. & C. Ex., 621; *Lancashire v. Lancashire* [1845] 9 Beav., 120.

⁵ [1898] 2 Ch., 573; see *Sangappa v. Shivbasawa* [1899] 24 Bom., 38. Cf.

Stitwell v. Williams [1821] 6 Madd. 49 (defendant's answer showed a weak title). Cf. *Raja Ram v. Sheorani* [1910] 7 J. C., 344.

⁶ As the defendant to an action of ejectment may find it necessary to disclose to some extent his title, the discretion conferred upon a court to appoint a receiver may somewhat interfere with the "sacrosanct position" heretofore occupied by him, *Woodroffe, Rec.*, 147.

⁷ *Halsbury*, vol. 24, p. 350.

⁸ *Hall v. Jenkinson* [1813] 2 Ves. & B., 125.

converse action had a receiver to secure the property *pendente lite* by showing that the vendor had fraudulently repossessed himself of the property.¹ Where, upon an advance of money, the defendant had agreed to execute a mortgage of certain lands, but failed to do so, and arrears of interest had accrued due upon the loan, upon a suit for specific performance by the creditor, a receiver was appointed of the lands.² In a case of rescission of a contract of sale on the ground of fraud, the property in question being a coal mine, which it was essential to keep working, a receiver and manager was appointed upon the application of the plaintiff-purchaser.³ And in the well-known case of *Huguenin v. Basely*,⁴ there being a strong suspicion of the defendants having abused the confidence reposed in them by the plaintiff and thus obtained from him a conveyance of the legal estate, the court appointed a receiver.

The above illustrations by no means exhaust the various classes of cases in which this species of specific relief has been found appropriate. In fact, our Code of Civil Procedure does not purport to restrict in any way the nature of the suit or property or occasion for an application under Order XL, rule 1. But the illustrations will serve to show how courts in India and elsewhere have exercised the beneficial jurisdiction of protective relief vested in them.

Position of
receiver.

I will now consider the position of a receiver when appointed, and his rights and duties. A receiver is an officer of the court authorised to take possession of the object-matter of dispute; property in his possession is therefore in the possession of the court, *in gremio legis*, for the party who can make a title to it.⁵ The receiver has no sort of personal right to or interest in the property, and whatever he does in regard to it, he does it simply in the character of an agent for the owners of the property or the persons interested in it and, with certain exceptions, in no sense as a principal.⁶ He

¹ *Dawson v. Yates* [1839] 1 Beav., 301.

² *Shakel v. Duke of Marlborough*, [1819] 4 Madd., 463.

³ *Gibbs v. David* [1875] 20 Eq., 373.

⁴ [1806] 13 Ves., 107, 1 Wh. & T., 8th. ed. 59.

⁵ *Secus* as to money, *Re Hoare*,

Hoare v. Owen [1892] 3 Ch., 64, disappg. *Delaney v. Mansfield*, 1 Hog., 235. But see *Orr v. Muthia*, *infra*; *Harihar v. Harendra* [1910] 12 C. L. J., 252.

⁶ *Wilkinson v. Gangadhar Sirkar* [1871] 6 B. L. R., 486, 487-8, 493-4.

exercises his functions in the interest of neither the plaintiff, nor the defendant,¹ and the ordinary law of principal and agent applies to this extent only that what the receiver rightly does, he does in the character of agent for the owner (whoever he be) of the property, and this is so even in the case of parties who opposed his appointment or objected to his receiving particular powers.² The appointment, though it may operate to change possession, has no effect itself upon the title to the property in any way, and determines no right as between the parties.³ The receiver is the "hand of the court,"⁴ put forward on behalf and for the benefit of all the parties to the suit in which he is appointed,⁵ and the person who has the title to the property must be deemed to be in possession during the custody of the court.⁶ If therefore a trespasser has been in possession of immoveable property, before a receiver, appointed pending a suit, displaces him, the effect of such displacement will be to destroy the adverse possession of the trespasser and revive the possession of the party who ultimately turns out to be the true owner and entitled to possession as such.⁷ But the mere appointment of a receiver will not generally suspend the operation of the statute of limitation.⁸

Now, the receiver being the officer of the court, he will be protected and assisted by it in the due discharge of the proper duties of his office, and anybody who disturbs his possession without the special leave of the court shall be deemed to have committed contempt.⁹ The court will define his powers and

Officer of
court.

¹ High, *Rec.*, s. 1.

² *Poresh Nath v. Omerto Nauth* [1890] 17 Cal., 614, 616 (refg. to *Wilkinson v. Gangadhur*, *supra*, as the "leading case" on the position of a receiver in this country.)

³ *Beach, Rec.*, s. 1; *Orr v. Muthia* [1893] 17 Mad., 501, 503.

⁴ *Woodroffe, Rec.*, 8-9; *Administrator-General v. Premiall Mullick* [1895] 22 Cal., 1015-6; *Bell v. Amer. Protective League*, 28 L. R. A., 452; 1 *Pomeroy, Eq. R.*, 286.

⁵ *Orr v. Mulhia*, *supra*; *Kartick v. Padmanund* [1885] 11 Cal., 496, 498; *Prem Lall Mullick v. Sumbhoo Nath Roy* [1895] 22 Cal., 960, 973; *Jagat Tarini v. Naba Gopal* [1907] 34 Cal.,

305, 317. Where a receiver is appointed of the property of insolvents, the appointment is for the benefit of the whole body of creditors, C. P. C., s. 351; *Badal Singh v. Birch* [1888] 15 Cal., 762; 764 *Prov. Ins. Act*, s. 20.

⁶ *Tribhuwan Sundar v. Srinarain Singh* [1898] 20 All., 341, 344.

⁷ *Sarala Sundari v. Sarada Prasad* [1904] 2 C. L. J., 602.

⁸ *Kerr, Rec.*, 161.

⁹ *Angel v. Smith* [1804] 9 Ves., 335; *Doulat Koer v. Rameswari Kuar* [1899] 26 Cal., 625, 629. Cf. *Sassoon v. Moosaji* [1911] 9 I. C., 485. 24 *Halsbury* p. 384.

prescribe his duties, and since he is a servant of the court, and not of the parties, it will be a contempt of court on the part of any of the latter to enter into an agreement with the receiver restricting and controlling such powers.¹ But as he is such an officer, even a stranger can bring to the court's notice any act the receiver is about to commit in excess of his authority, and the court has inherent power to review the latter's conduct and to make an appropriate order, so that the stranger may not be prejudiced by an unlawful act of its own officer, and for this purpose may hold a summary enquiry.²

Appoint-
ment.

The court, as a general rule, appoints a person as receiver who is wholly disinterested³ in the subject-matter of the suit, and does not occupy a relation of trust to the property in dispute. The reason of this rule is that the court is exceedingly jealous of appointing any person to a receivership whose duty it would otherwise be to watch the proceedings of the receiver or to call him to an account for his management.⁴ It is only in very special cases, where the benefit of the estate so requires or all the parties to the cause consent, that an exception will be admitted to the above rule.⁵ Residence at a great distance from the property which is to be subject to the receiver's management and control, while not regarded as an absolute disqualification for the office, is an important circumstance to be taken into consideration; and when a non-resident is appointed receiver, there must be adequate guarantee that he will be subject to the effective control of the court.⁶ Except in emergent cases and where the appointment is for short periods only,⁷ every receiver shall give such security, as the court thinks fit, duly to account

¹ *Manick Lal Seal v. Surrat Coomary* [1895] 22 Cal., 648, 656. Cf. *Prokash v. Adlam* [1903] 30 Cal., 696. Cf. *Fazlur v. Anath* [1911] 16 C. W. N., 114 (agreement interfering with work of receiver opposed to public policy.)

² *Hanseshur v. Rakhai* [1913] 18 C. W. N., 366.

³ A party interested may be appointed because of special knowledge or aptitude, *Gibbs v. David* [1875] L. R. 20 Eq., 373; *Re Makins* [1891] 1 Ch., 133.

⁴ *Woodroffe, Rec.*, 46.

⁵ *Kerr, Rec.*, 122. Where such an exception is made, the party or person interested or trustee appointed receiver does not generally get any remuneration. *Re Bignell*, [1892] 1 Ch., 59. But a party should not ordinarily be appointed, *Kali v. Bachhan* [1913] 17 C. W. N., 974; *Suprasanna v. Upendra* [1913] 18 C. L. J. 638.

⁶ *Kali v. Bachhan*, *supra*.

⁷ *Taylor v. Eekersley* [1876] 2 Ch. D., 302 [1877] 5 Ch. D., 741.

for what he shall receive in respect of the property.¹ As against parties to the suit, the receiver's *status* as such is complete from the date of the order for the appointment,² and they may be immediately restrained from touching the property;³ but as against outsiders, the appointment is not perfected till the security required to be given has been completed.⁴ The appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver, except by permission of the court.⁵ There can be no transfer, therefore, without leave of the court, of an estate or anything that appertains to it, when the estate is vested in a receiver duly appointed,⁶ nor any proceeding by way of attachment thereof, at the instance of a judgment-creditor.⁷ A magistrate, in a proceeding under section 145, Criminal Procedure Code, has no jurisdiction to interfere with a receiver in respect of his possession of the estate, without the sanction of the civil court which appointed him, and cannot make him a party to the proceeding.⁸ But the possession of the receiver is subject to all valid and existing liens upon the property at the time of his appointment.⁹ A lien, previously acquired in good faith, will not therefore be divested, nor the rights of the parties to a pending action be interfered with by the appointment of a receiver in another suit.¹⁰ The appointment does not affect any

Effect of

Subsisting
liens.

¹ C. P. C., s. 503 (e); Act V of 1908, Sch. i, Or. 40, r. 3. For forms, see *ibid.*, Ap. F., nos. 6-7.

² *Lloyd v. Mason* [1827] 2 M. & C., 487; *Re Birt* [1883] 22 Ch. D., 604; *Re Clarke* [1898] 1 Ch., 339. In case of personality, giving of security may be condition precedent, *Ridout v. Fowler* [1904] 1 Ch., 658, 662, *affd.* 2 Ch., 93.

³ *Defries v. Creed* [1865] 34 L. J., Ch., 607.

⁴ *Edwards v. Edwards* [1875] 2 Ch. D., 291, 296. *Of. Srinivas v. Kesho* [1911] 14 C. L. J., 489. In America it has been held that upon filing of the security bond, the receiver's title relates back to the date of the appointment, *High, Rec.*, s. 121A.

⁵ *Md. Zohuruddeen v. Md. Noorooddeen* [1893] 21 Cal., 85, 91 (effect of s. 272, C. P. C., considered, and

difference between property under attachment and in custody of receiver indicated).

⁶ *Ganga Das v. Yakub Ali*, [1899] 27 Cal., 670, 673; *Ashton v. Madhabmoni* [1910] 11 C. L. J., 489.

⁷ *Jogendro v. Debendro* [1898] 26 Cal., 127, 129; *Kahn v. Ali Mohamed* [1892] 16 Bom., 577; *Hem Chander v. Pran Kristo* [1876] 1 Cal., 403.

⁸ *Dunne v. Chaudra Kissore* [1902] 30 Cal., 593.

⁹ 1 Pomeroy, *Eq. R.*, s. 155; *Alderson, Rec.*, s. 313. Property in receiver's hands can be sold in execution of a mortgage decree, but not a money decree, *Jogendro v. Debendro*, *supra*. The court has power, in exceptional circumstances, to create even prior liens, *Kneeland v. American Loan Co.* [1889] 136 U. S., 89.

¹⁰ *Re Ind. Coope & Co.* [1911] 2 Ch.

rights previously acquired by third persons.¹ If at the time of the appointment, therefore, a party claiming a right in the same subject-matter under a title paramount to that under which the appointment is made, is in possession of the right which he claims, his possession and exercise of this right cannot be disturbed by the receiver;² but if the claimant is out of possession, he must apply to the court before he institutes any legal proceedings affecting the possession which the receiver has acquired,³ even though the receiver has been appointed without prejudice to the rights of persons having prior charges.⁴ Where such a prior charge-holder or encumbrancer has, however, already taken possession, he may enforce such rights as he has without being guilty of contempt.⁵

Suits
against
receivers.

To preclude the possibility of contempt, and yet not to prevent the agitation of all just causes of action in respect of the property in its custody, a court, while generally requiring all those who desire to sue the receiver it has appointed to obtain first its leave for the purpose,⁶ will not, as a rule, refuse liberty in any case to try the right claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim.⁷ If an action is instituted without such leave, the proceedings therein may be restrained by injunction, or stayed, or even set aside on motion.⁸ A receiver cannot, be made a party to any suit or proceeding, it has been said, without the leave of the court appointing him.⁹ But the absence of leave to sue does not appear to be a jurisdictional

223, 226. *Kerr, Rec.*, 161. *Wilson v. Wilson*, 1 Barb. Ch., 592. Distinguish *Jotindra v. Sarfaraz* [1910] 14 C. W. N., 653.

¹ *Mahomad v. Panchapakesa* [1912] 35 Mad., 578.

² *Evelyn v. Lewis* [1844] 3 Hare, 472; *Bryant v. Bull* [1879] 10 Ch. D., 155.

³ *Evelyn v. Lewis*, supra, 475.

⁴ *Bryan v. Cormick* [1788] 1 Cox., 422.

⁵ *Underhay v. Read* [1888] 20 Q. B. D., 209.

⁶ *Miller v. Ram Ranjan Chakravarti* [1884] 10 Cal., 1014. This was questioned in *Hari Das Kundu v. Macgregor* [1891] 18 Cal., 477, 481, and the extreme view taken in *Pramatha Nath v. Khetra Nath* [1904] 32 Cal., 270 has been rejected in later cases, *Banku v. Harendra* [1910] 15 C. W. N., 54; *Maha-*

raja of Burdwan v. Apurva [1911], *ibid*, 872; *Sarat v. Apurva*, *ibid*, 925; *Satyakripal v. Satya Bhupal* [1914] 18 C. W. N., 546. *Rodger v. Ashutosh* [1902] 6 C. W. N., 829.

⁷ *Randfield v. Randfield* [1861] 3 De G. F. & J., 766.

⁸ *Pramatha Nath v. Khetra Nath* supra. *Jotindra v. Sarfaraz* [1910] 14 C. W. N., 653. Cf. *Baliharaz v. Burma E. & T. Co.* [1913] 17 I. C., 916 (decree obtained against receiver sued, without leave, set aside.) But contempt should be brought to court's notice immediately, *Satya Kripal v. Satya Bhupal*, supra. Cf. *Re Maidstone Palace of Varieties*, [1909] 2 Ch., 283.

⁹ *Fink v. Chundra Kissore* [1903] 30 Cal., 721, *Dunne v. Chundra*, supra.

fact,¹ and if a special case be made out, the court will allow a party to continue an action, which has been commenced without leave.² "The question always is," says Brewer, J., "not one of jurisdiction, but of contempt; that the ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver; that while the court making the appointment may draw to itself all controversies to which the receiver is a party, it does so by acting directly upon the parties, and not by challenging the jurisdiction of the other tribunals; that while it may so draw to itself all such controversies, it is not compelled to do so, and that not doing so in any particular case, the mere fact of the appointment constitutes no plea to the jurisdiction."³ Nor will a court shield its receiver against actions which arise out of his wrong-doing, *e.g.*, a trespass over property which the court's order did not authorise him to occupy,⁴ or prosecutions for a breach of the ordinary criminal law of the country, *e.g.*, defamation.⁵ Such leave does not seem to be necessary where the suit is founded upon a promissory note or an equitable mortgage, for the property in the receiver's hands may not be affected by the decree;⁶ nor where alluviated land is claimed as reformation on its original site by persons who were not parties to the proceedings in which a receiver was appointed of such land.⁷ As Sale, J., explained in a later case:⁸ "If there is any question between the parties entitled to property in the hands of a receiver, a decree in a suit between the parties can always be carried out against such property or any share therein, without making the receiver a party to the suit." The

¹ High, *Rec.*, s. 254A; 1 Pomeroy, *Eq., R.*, s. 172; *Kuppuswamy v. Suppan* [1907] 30 Mad., 505 (question arose under Madras Act VIII of 1865, s. 85.)

² *Gower v. Bennitt* [1864] 9 L. T., 310; *Aston v. Herson* [1884] 2 M. & K., 390, 397; *Banku v. Harendra*, *supra*; *Sarat v. Apurva*, *supra*. Cf. *Jotindra v. Sarfaraz* [1910] 14 C. W. N., 653; *Satya Kripal v. Satya Bhupal*, *supra* (suit by one receiver against another.)

³ *St. Joseph R. R. Co. v. Smith*, 19 Kan., 225, 231. See also *per Miller, J.*, *Barton v. Barbour*, 104 U. S., 126.

⁴ *In re Young*, 7 Fed., 855. High, §

257, 34 Cyc., 418.

⁵ *Nagendra v. Jogendra* [1912] 15 I. C., 491.

⁶ *Woodroffe, Rec.*, 89, *Secus* where a decree for sale is made, when leave to take possession may subsequently be applied for. *Chartered Bank v. Hurish Neogy* [1900] 5 C. W. N., xv.

⁷ *Suttia Sanker Ghosal v. Golapmoni* [1897] 5 C. W. N., 27. *Rodger v. Ashutosh*, *supra*.

⁸ *Sarala Dassi v. Bhuvan Neogi* [1897] unreported, cited, *Woodroffe, Rec.*, 90-1.

receiver, in fact, is a proper and necessary party, only where property in his hands is intended to be affected by the result of the litigation.¹ But even then it has been doubted whether it is necessary or desirable always to allow the receiver to be sued as receiver. Wallis, J., rules that, where any right is established by a decree in the suit to the property in the hands of the receiver, then the person in whose favour the right is declared, may apply to the court, when it will make such order as is proper and direct the receiver to satisfy the decree.²

Suit by receivers.

Nor can a receiver sue or defend an action without the authority of the court which has appointed him.³ In the order of appointment power may be given in express terms, authorising the receiver to bring suits. But such power will be strictly construed,⁴ and the receiver will be restrained from indulging in wide-spread litigation at the expense of others. A receiver has no vested interest in his appointment and is not entitled to litigate for the profit of the receivership.⁵ Where a receiver was appointed in a partition suit by an order which, *inter alia*, empowered him to let and set the immoveable property or any part thereof, as he should think fit, and to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the rents, issues and profits of the said immoveable property and of the outstanding debts and claims by action, suit or otherwise, as should be expedient, and the receiver, without special leave of the court, served a notice to quit on tenants, who claimed to be permanent lessees, and sued to eject them afterwards, the suit was held unauthorised and was dismissed.⁶ The receiver has to follow the same procedure which ordinary suitors have, and if he fails to show an appointment duly made by a competent court and

¹ *Jotindra v. Sarfaraz* [1910] 14 C. W. N., 653; *Banku v. Harendra* [1910] 15 C. W. N., 54.

² *Admr.-Genl. v. Dasai*, [1911] 9 M. L. T., 300. *Re Dunn, Brinklow v. Singleton* [1904] 1 Ch. 648.

³ *Mahomed v. Panchapakesa*, [1912] 35 Mad., 578.

⁴ *Benode Mookerjee v. Raj Narain Mittra* [1903] 30 Cal., 699 (correction of error of date in order of appoint-

ment cannot operate retrospectively and authorise suit previously brought).

⁵ *Kerr, Rec.*, 237; *Ex parte Cooper* [1877] 6 Ch. D., 255.

⁶ *Drobomoyi Gupta v. Davis* [1887] 14 Cal., 323, 340-1. Distinguish *Hari Lass Kundu v. Macgregor* [1891] 18 Cal. 477 (monthly tenancy determinable by notice to quit, which had been duly served).

authority from that court to prosecute the action,¹ an unauthorised suit as an abuse of power will be restrained, upon the application of the defendant.² As a general rule, all rights of action which belong to the party whose property is made over to a receiver are transferred to the latter by virtue of his appointment,³ but no greater rights or advantages.⁴ And, unless an independent cause of action has accrued to the receiver, he must (according to the older precedents) sue not in his own name, but in that of the parties whose estate he holds.⁵ But this rule does not seem to be rigidly enforced now in England⁶ and America,⁷ and there is an old Calcutta case in which the use of the receiver's name was held to be an error of form only.⁸ It is such a convenience to suitors for the receiver to sue in his own name, and may often save so much time, trouble and expense, that the court will authorise him generally to do so.⁹ It may also happen that matters arise out of the receiver's possession which are such as to render it necessary for him to sue personally in regard to them, that is, such as it would be wrong for any of the parties themselves to sue, *e.g.*, where tenants have attorned to him, or he has let property in his own name, and in such cases the receiver will, of course, bring the suit personally as the

¹ *Dinnonauth v. Hogg* [1863] 2 Hay, 395, 399, seems to recognise a presumption in favour of a receiver-plaintiff's authority, which is not easy to justify. Cf. *Woodroffe, Rec.* 241, *n.* In *Jagat Tarni v. Naba Gopal* [1907] 34 Cal., 305, a suit instituted by receiver temporarily appointed by Subordinate Judge before sanction by District Judge, was held good.

² *Beach, Rec.*, ss. 665, 693.

³ *Ashton v. Madhabmoni* [1910] 14 C. W. N., 560 (order absolute on decree nisi for foreclosure). *Bhubaneshwari v. Ajodhya* [1911] 11 I. C., 102, (decree for rent obtained by owner, set aside on review by receiver).

⁴ The receiver cannot maintain an action upon a note or obligation running to the original party which he himself could not have maintained. *Williams v. Babcock*, 25 Barb., 109; *Bell v. Shibley*, 33 Barb., 610. Defence of set-off allowed, *Subramanian v. Muthuswami* [1907] 17 M. L. J. R., 481.

⁵ *Wilkinson v. Gungadur* [1871] 6 B. L. R., 486, 490.

⁶ *Paterson v. Gas Light Co.* [1896] 2 Ch., 476.

⁷ A receiver, by virtue of his appointment, is a quasi assignee invested with title to such an extent at least as will enable him to sue in his official character, *Beach, Rec.*, s. 689; *Alderson, Rec.*, ss. 558, 562.

⁸ *Juggannath Pershad v. Hogg* [1869] 12 W. R., 117. See also *Fink v. Buldeo Doss* [1898] 26 Cal. 715. Cf. *Jagat Tarni v. Naba Gopal* [1907] 34 Cal., 305.

⁹ *Fink v. Maharaj Bahadur* [1898] 25 Cal., 642. A receiver, when empowered to sue, is clothed distinctly with an interest in regard to the subject of the litigation, and, if pending civil proceedings instituted by him, he is replaced by another, the latter should be made a party. *Akula Paradesi v. Dhelli Jagannadha Row* [1904] 28 Mad., 157.

plaintiff.¹ In regard to applications in respect of the estate, too, the practice at one time was that the receiver should not make them himself, but get them made by the persons beneficially entitled.² But this practice also seems now to have become relaxed.³ When an action is brought against a receiver, it is for the court which appointed him to decide if he should enter a defence, though where the receiver acts in the interest of the estate, and is successful, he is generally entitled to charge the expenses in his accounts.⁴ Some discretion may be allowed to him in emergent cases,⁵ and even where the receiver fails in a suit instituted by him, if he appears to have acted *bond fide* in the best interests of the estate, the costs decreed against him may, as between himself and the estate, be allowed out of funds which are or likely to be, in his hands.⁶

Powers and
rights.

Direction of
court.

The authority of a receiver, as you have seen, flows from the court; he ought, therefore, in all cases to act under a special order obtained from the court.⁷ His discretion is limited, and he must exercise it, subject to the control and approval of the court whose minister he is.⁸ Not only is he entitled to apply for instructions to the court, but in all important matters, in all cases of doubt and of conflicting interests and claims, he is bound to apply for and obtain the direction of the judge who appoints him.⁹ A receiver may employ agents to assist him,¹⁰ but he cannot delegate or entrust to another the duties which lie directly on him to perform, and if he does so, and there is loss to the estate, he must make it good.¹¹ The position of a

¹ *Wilkinson v. Gangadhar*, supra, 491

² *Ibid*, 488.

³ *Kerr, Rec.*, 219-20; Woodroffe, *ib.*, 249. Receiver may move for contempt, *Grey v. Woogra Mohun* [1901] 28 Cal., 790.

⁴ *Anon.* [1801] 6 Ves., 287. *Bristowe v. Needham* [1847] 2 Ph., 190, 191; *Re Dunn* [1904] 1 Ch., 648

⁵ Suits for injunction to restrain waste have been allowed to be instituted without previous leave, *Nangle v. Pingal*, 1 Hog., 142; *Dorman v. Dorman*, 3 Ir. Eq. R., 385; and prompt action for getting in personal assets may be necessary in partnership and other cases. As to a receiver's right

of appeal, see *Bosworth v. Terminal R. Assn.*, 174 U. S., 182; 1 Pomeroy, Eq. R., s. 178.

⁶ *Seton, Judgments*, 442; *King v. Charu Mittra* (unreported), Woodroffe, *Rec.*, 239-40.

⁷ *Kerr, Rec.*, 210.

⁸ Such approval may be counted upon where the receiver acts *bond fide* for the benefit of the parties in interest, *Beach, Rec.*, s. 256.

⁹ *Bala'i Narayan v. Ramchandra Govind* [1894] 19 Bom., 660, 662. *Of. Re Tirathdas* [1913] 19 I. C., 920 (case under Act III of 1907).

¹⁰ — *v. Lindsey* [1808] 15 Ves., 91.

¹¹ *Bala'i v. Ramchandra*, supra.

receiver is one of confidence,¹ and he has no right to mix up with his delegated authority another person who is a total stranger to the court.²

The court appointing a receiver may, by order, if need be, remove the person in whose possession or custody the property may be from the possession or custody thereof, (unless he is a stranger to the suit, with rights dating prior to the appointment of the receiver³), and commit the same to the custody or management of such receiver.⁴ The appointing of a receiver is not, in every case, a turning of the party out of possession⁵; much will depend upon the nature of the property in question. If it is in possession of tenants, *e.g.*, they will not, as a rule, be disturbed. A receiver of land, it has been said, never takes actual possession, he only receives the rent; and he receives rents and profits not by virtue of an estate or title vested in him, but he collects them merely as an officer of the court, upon the title of some persons who are parties to the action.⁶ So, in cases of disputes relating to public institutions or corporations and private partnerships, a receiver will seldom have anything to do with the actual management, and the existing office-bearers will be retained.⁷ Partnership books and papers need not be delivered, so long as the receiver has free access to them and their removal is likely to cause inconvenience to the business.⁸ In a suit between joint farmers of ferries in India, a receiver of tolls might be appointed, without interfering with the possession or management of the ferries.⁹ Where a receiver is appointed of foreign property, he is not put in possession by the mere order of the court. Something else has to be done,

Taking of
possession
by
receivers.

¹ The purchase, therefore, by a receiver in insolvency of property belonging to the insolvent's estate is irregular and may not be sanctioned by court, *Ram Komal v. Bank of Bengal* [1900] 5 C. W. N., 91. *Nugent v. Nugent*, [1907] 76 L. J., Ch., 614.

² *Salway v. Salway* [1831] 2 R. & M., 215, 219; *Woodroffe, Rec.*, 210.

³ C. P. C., Sch. i, Or. 40, r. 1. *Ram Lochan Sircar v. Hogg* [1868] 10 W. R., 430.

⁴ *Mahomad v. Panchapakesa* [1912] 35 Mad., 578.

⁵ *Sharp v. Carter* [1735] 3 P. Wms., 375, 379.

⁶ *Ex parte Evans* [1880] 13 Ch. D., 255; *Vine v. Raleigh* [1883] 24 Ch. D., 243. *Cf. Harendra v. Abinash* [1910] 7 I. C., 761 (s. 16, Act VIII of 1885, B. C.)

⁷ *De Winton v. Brecon* [1859] 26 Beav., 533; *Const v. Harris* [1824] T. & R., 496, 517. But see *Reid v. Explosives Co.* [1887] 19 Q. B. D., 264.

⁸ *Dacie v. John* [1824] McClel., 206.

⁹ Collett, 5th. ed. 328.

and until that has been done in accordance with the foreign law, no person, not a party to the suit, who takes proceedings in the foreign country, is guilty of a contempt, either on the ground of interfering with the receiver's possession or otherwise.¹ But it is both the receiver's power and duty to take possession of the property, whether moveable² or immoveable, over which he is appointed,³ and he will be entitled to any accretion thereto also.⁴ The Court shall not, however, remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.⁵ This proviso is apparently intended to protect a person other than the parties to the suit,⁶ e.g., a tenant holding for a term; his possession cannot be disturbed.⁷

Powers of
receiver to
be defined
by court.

The court may, next, by order, grant to its receiver all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the court thinks fit.⁸ Here the court has a salutary discretion to exercise, for very large indeed are the powers which by law may be conferred upon a receiver, and if suitable restrictions be not imposed with reference to the nature of the property and the specified or expected term of the appointment in each individual case, much harm may be done. For the receiver himself and the persons dealing with him will look only at the order of appointment, and if it simply copies out clause (d) rule 1 (1), Order 40, Code of Civil Procedure, the true owner, when he eventually gets possession after a judicial determination of his right and title, may find his estate to be in a condition totally different

¹ *Maudslay v. Maudslay Sons & Field* [1900] 1 Ch., 602.

² No succession certificate is required, *Harihar v. Havendru* [1910] 12 C. L. J., 252.

³ *Woodroffe, Rec.*, 211.

⁴ *Madhu v. Sabar* [1910] 14 C. W. N., 681.

⁵ C. P. C., Sch. i, or. 40, r. 1 (2).

⁶ *Satya Narayan v. Keshabati* [1914] 18 C. W. N., 537.

⁷ *Collett*, 5th. ed. 329.

⁸ C. P. C., s. 503 (d), Act V of 1908, Sch. i, Or. 40, r. 1 (1) (d). The parties themselves have no power to dictate the taking or defending the proceedings *Viola v. Anglo-American Co.*, [1912] 2 ch. 305.

from what it was, and he wished it to be in, and subject to a number of contractual burdens which he thoroughly dislikes, but which he cannot get rid of, as the results of *bona fide* transactions which the receiver thought fit and proper to enter into.¹ Our courts therefore generally exercise a wise discretion by specifying and limiting the powers which they think fit to grant to a receiver in any particular case, and in this matter English precedents, are likely to be found suggestive. A court, no doubt, if it can appoint a receiver, has ample power to provide for the management of the property; it can deal with it when under its control, just as completely as the owner of the property himself can deal with it.² But it is desirable that when the court appoints a receiver, it should delegate to him only such powers as are necessary and see that even these are exercised under its supervision and control. If a receiver, *e.g.*, is to be authorised to let land or houses, it should be only for a short term; if he is to be authorised to make improvements or repairs, the amount of the outlay permissible should not be large; and no transgression of authority should be, as a rule, permitted, even on pretence of benefit to the estate.³ In the Calcutta High Court ordinarily a receiver is appointed, with power to get in and collect the outstanding debts and claims, and with all powers provided for in Order 40, rule 1 (1), clause (d) of the Code, except that he must not, without the leave of the court, (i) grant leases for a term exceeding three years, (ii) bring suits in a District Judge's Court, except suits for rent,

Calcutta
High Court
practice.

The parties themselves have no power to dictate the taking or defending the proceedings, *Viola v. Anglo-Amer. Co.* [1912] 2 Ch., 305.

¹ "For example, a receiver may consider that it is desirable for the improvement of an estate—as indeed it very well may be—to grant building or mining leases for 99 years or any other long term; or he may fancy that it will be proper to apply and dispose of all the rents and profits in some ornamental improvements, some *impense voluptuosæ*, as L.C. Campbell once called them; and then, when the true owner at last comes into his right, he may find his estate built over, or mined under, in a manner that utterly mars all his enjoyment

of it; or he may be burdened with an elaborate house and gardens quite unfitted to his wants, wishes or means; as the old phrase goes, he may find himself 'improved out of his estate.'" Collett, 5th. ed. 29.

² *Poresh Nath v. Omerto Nauth* [1890] 17 Cal., 614, 615. Where there was a claim to cabs, horses, etc., of a cabman taken in execution pending an interpleader suit, a receiver was appointed instead of a sale being ordered, as otherwise the business as a going concern would have been ruined, *Howell v. Dowson* [1884] 13 Q. B. D., 67.

³ *Gonesh Chunder v. Troyluckonath* [1887] unreported, Woodroffe, *Rec.*, 219.

(iii) institute an appeal in any court (except from a decree in a rent suit), when the value of the appeal is over Rs. 1,000, or (iv) expend in the repairs of any property, in any period of two years, more than half of the nett annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would let when in a fair state of repairs.¹

Lease.

A receiver must let to the best advantage and obtain the best terms.² But he cannot raise the rents on slight grounds or turn out tenants, without the leave of the court;³ nor issue notice of enchancement against tenants;⁴ nor can he abate the rents or forgive the tenants their arrears, without the consent of the parties beneficially interested.⁵ His power to give notices to quit is applicable to tenancies, the period of which may expire during his incumbency.⁶ A tenant directed to pay rent to the receiver must attorn to him,⁷ and thus a tenancy by estoppel between the tenant and the receiver may be created.⁸ If a party to the suit is left in possession of the premises or any part thereof, an occupation rent should be fixed for him.⁹ A receiver's power to grant leases is created simply by his order of appointment, which binds and operates upon the estates of those who are parties to that order, and against whom it is made, but does not affect those persons who are not before the court, though they may be purchasers *pendente lite*. The receiver should not, therefore, of his own authority be allowed, while the result of the suit is yet uncertain, to take upon himself to grant a lease to operate out of the purchased estate, and in effect, defeat it.¹⁰

In England, in the absence of express authority, receivers

¹ Woodroffe, *Rec.*, 205.

² *Wynne v. Lord Newborough* [1790] 1 Ves., 164. An executed lease, if obtained by collusion, can be set aside only by suit. *Krista Chundra v. Krista Sakha* [1808] 12 C. W. N., 1023.

³ *Wynne v. Newborough*, *supra*

⁴ *Khetter Mohun v. Wells* [1882] 8 Cal., 719.

⁵ *Evans v. Taylor, Sau. & Sc.*, 681.

⁶ *Kerr, Rec.*, 209; *Huri Dass Kundu v. Macgregor* [1891] 18 Cal., 477. Distinguish *Drobomoyi v. Davis* [1887]

14 Cal., 323.

⁷ *Brandon v. Brandon* [1821] 5 Madd., 473.

⁸ But this will not apparently enure to the benefit of the true owner, if he subsequently seeks to distrain for rent. *Evans v. Mathias* [1857] 26 L. J., Q. B., 309.

⁹ *Griffith v. Griffith* [1751] 2 Ves., Sr., 401.

¹⁰ *Nilmadhub v. Gillander* [1863] 2 Sev., 955, 957.

have been allowed to spend but very small sums over improvements and repairs.¹ But a receiver of an infant's estate has been permitted, at his discretion, to repair the family mansion and continue the family charities and accustomed bounty to the poor.²

Improvements, repairs.

A receiver may sell³ or pledge the estate with the leave of the court and borrow money, whenever it may become necessary to do so, either to save the estate⁴ or to manage it properly.⁵ Such loans may be secured upon the estate,⁶ and even where a receiver has pledged his personal credit, he is entitled to look to the estate assets for indemnity.⁷ Where, under the order of the court, a receiver had "power to get in and realise" the estate of a deceased person, the Bombay Court held that he had authority to sell also.⁸ A sale by the receiver, however, will not operate in derogation of the rights of third parties and take away, *e.g.*, the right of pre-emption that such parties may have in the event of a private sale under ordinary circumstances by the owner of the property which has been made the subject of receivership.⁹

Sale, mortgage, loans.

A contract entered into by a receiver, when duly authorised by the court, is a contract with the court, and is constituted when the offer of the party desiring to contract is approved by the court.¹⁰ The court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be, and this even after

Contracts.

¹ *Waters v. Taylor* [1708] 15 Ves., 10, 26. He has wider powers in Ireland, *Jackson v. Jackson* [1831] 2 Hog. 238.

² *In re Reddington*, 1 Moll., 256 (no compulsory provision for the poor).

³ A sale by a receiver, under the directions of the court, is to be treated as a sale by the court, *Minatoonnessa v. Khatoonnessa* [1894] 21 Cal., 481, and may be set aside by application, under C. P. C., Sch. I, Or. 21, r. 20 *Fatmabai v. Abdool* [1904] 6 Bom. L. R., 1140; *Gora Chand v. Makhan Lal* [1907] 11 C. W. N., 489, *Cf.* 1 Pomeroy, *Eq. R.*, s. 210. *Golam v. Fatima* [1911] 16 C. W. N., 394.

⁴ *Poreshnath v. Omerto Nauth* [1890] 17 Cal., 614, 619.

⁵ *Mohari Bibi v. Shyama Bibi* [1903] 7 C. W. N., cclxviii, 30 Cal., 937.

⁶ *Greenwood v. Algesiras Ry. Co.*

[1894] 2 Ch., 205.

⁷ *Burt v. Bull* [1895] 1 Q. B., 276 (receiver signed orders as 'receiver and manager'). American courts hold that where a receiver in the course of his duty has entered into a covenant or executed an instrument, remedy thereupon must be sought against the estate of which he is receiver, *High, Rec.* s. 272.

⁸ *Fatmabai v. Abdool* [1904] 6 Bom. L. R., 1140.

⁹ *Kanhai Lal v. Kalka Prasad* [1905] 27 All., 670.

¹⁰ *Crane v. Braucker* [1869] 17 W. R. (Eng.) 342, 837. Contracts made by parties are not annulled by receiver's appointment, and if adopted by the latter, may be enforced against him personally. *Re Newdigate Colliery Co. Ltd.* [1912] 1 Ch., 468, 474, 477 (C. A.)

it has ceased to manage the estate, by reason, *e.g.*, of the suit having been dismissed before the contract is carried out.¹ So, where a charge is claimed by a stranger to the suit upon the plaintiff's share, the court has undoubted jurisdiction to order its receiver to make a payment in satisfaction of the charge out of that share, though, as a rule, such order will not be made, unless there is some pressing reason for it, and the court can see that the parties are clearly entitled.² A receiver may also be directed by the court to advance money to one of the parties to the suit for his defence, provisions being ultimately made for such advance in the decree.³ Where a receiver is authorised to pay debts, he may pay an instalment of a debt and thus stop limitation from running;⁴ and where he can be treated as the agent of the debtor an acknowledgment of a subsisting liability by him may give a fresh start of limitation to the creditor.⁵

Limitation.

Receiver's costs.

A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties,⁶ or in extraordinary services which have been sanctioned by the court.⁷ He may claim to be indemnified for such costs, charges and expenses out of the estate, and his claim will have priority over all other charges,⁸ including the costs of the action.⁹ The court may, by the order of appointment, grant to a receiver such fee or commission on the rents and profits of the property by way of remuneration, as it thinks fit,¹⁰ in respect of which he may

Remuneration.

¹ *Surendro v. Doorgasoondery* [1888] 15 Cal., 253.

² *Motivahu v. Premvahu* [1892] 16 Bom., 511.

³ *Kuppusami v. Rathnavelu* [1901] 24 Mad., 511.

⁴ *Lelley v. Ford* [1899] 2 Ch., 107; *Chinnery v. Evans* [1864] 11 H. L. C., 115 (interest paid by receiver, held 'agent' of mortgagor within 3 & 4 Will. IV., cap. 27, s. 40). *Contra*, when payment unauthorised, *Whitley v. Lowe* [1858] 25 Beav., 421, *affd.* 2 De G. and J., 704. *Periasami v. Seetharama* [1903] 27 Mad., 243, 255.

⁵ *Toft v. Stephenson* (1851) 1 De G. M. & G., 28, 40; *Mitra, Lim.*, 362. Payment outside court by receiver held not to stop limitation running against execution of decree, *Appasami v. Jotha* [1899] 22 Mad., 448.

⁶ *Baluji v. Ramchandra*, [1894] 19 Bom., 660, 662. *Graham v. Noakes* [1895] 1 Ch., 66.

⁷ *Kerr, Rec.*, 232, *sqq.*

⁸ *Strapp v. Bull* [1895] 2 Ch., 1 (claim of creditor who advanced money under order making repayment of same first charge on assets).

⁹ *Latten v. Wedgwood Coal Co.* [1885] 28 Ch. D., 317. Where receiver advances money without previous authority, indemnity contained to assets, *ex parte Izard*, [1883] 23 Ch. D., 80.

¹⁰ C. P. C., s. 503 (d); Act V of 1908, Sch. i, Or. 40, r. 2. *Prokash v. Adlum* [1903] 30 Cal., 696. The commission generally allowed is 5 per cent., but it may be less in the case of very large estates, *Woodroffe, Rec.*, 251; *Day v. Croft* [1840] 2 Beav., 488; *Kerr, Rec.*, 230.

claim a lien, and ask for payment next after the costs of realising the estate. Sir John Romilly, M. R., said, "Where a receiver or manager is appointed by the court, in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it, for the balance, whatever it may be, that shall be found to be due to him on taking his account."¹ A receiver may, however, agree not to take any salary, and if he is a trustee or a party interested, he will generally have to act without remuneration.²

A receiver, as an officer of the court, will be protected by the court. The court, therefore, will take action when a libel is published which interferes with the receiver,³ and it will see that he is paid and re-imbursed.⁴ The court will also give effect to obligations imposed upon the estate by a receiver acting under its directions, though similar obligations created by a trustee or executor under ordinary circumstances may not bind the estate.⁵

Protection
by court.

Coming to the duties and liabilities of a receiver appointed by a court, the first thing to notice is that he shall give such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property.⁶ The court, as a rule, never appoints a receiver without security, unless the parties so apply, which they may do when allowed, of their own authority, to nominate some person as a receiver.⁷ The usual practice is to require the receiver selected to give his own bond and find two sureties in a certain amount.⁸ But money or stock may be deposited, and there may be cases where the court

Duties and
liabilities.

¹ *Bertrand v. Davies* [1862] 31 Beav., 429, 436; *Moran v. Miltu Bibee* [1876] 2 Cal., 70; *Prem Lall Mullick v. Sumbhoo Nath Roy* [1895] 22 Cal., 960. As between a tenant for life and a remainderman, the expenses of a receiver will be paid out of the life-estate, *Shore v. Shore* [1859] 4 Dr., 501.

² *Kerr, Rec.*, 229, 235, but see *Re Bignell* [1892] 1 Ch., 59.

³ *Helmore v. Smith* [1887] 35 Ch., D., 449.

⁴ *Prem Lall v. Sumbhoo*, *supra*

(receiver, though discharged, not compelled to make over property till his lien was satisfied or provided for by sufficient indemnity). *Of. Chandra v. Hari* [1911] 15 C. L. J. (accommodation loan).

⁵ *Mohari Bibi v. Shyama Bibi* [1903] 30 Cal., 937.

⁶ C. P. C., s. 503 (e); Act V of 1908, Sch. i, Or. 40, r. 3(a).

⁷ *Manners v. Furze* [1847] 11 Beav., 30.

⁸ C. P. C., Sch. iv, form 169; Act V of 1908, App. F., No. 7.

deems the security of the receiver alone sufficient, or accepts a larger number of sureties for a reduced amount each.¹

Accounts.

The receiver shall also pass his accounts at such periods and in such form as the court directs,² and pay the balance due from him thereon, too, as the court directs.³ It is of great importance that a receiver should file his accounts with regularity and promptitude,⁴ and irregularity in this matter is sometimes visited in England by an attachment of the person of the receiver, whereby he is deprived of his salary and, his accounts being taken with rests, he has to pay interest on the balance due.⁵ It is his duty to keep his accounts, and vouchers in such condition that they will be ready for examination at any time, and courts are disposed to hold receivers to great strictness in the matter of rendering accounts and scrutinise them in the presence of all interested parties.⁶ The receiver is responsible for all properties which come into his custody or management, and he is responsible not only for actual sums received by him, but for those which might have been received by him but for his wilful neglect and default.⁷ The receiver should take the necessary steps to make productive, for the benefit of the estate any sums received by him which are large enough to be laid out,⁸ and though the time fixed for passing accounts has not arrived, yet he may at any time apply to the court to pay in moneys in his hands.⁹ He is not entitled to credit the salaries of persons appointed by him in excess of the sanction allowed by the court. If he improperly retains any balance, he may be charged interest thereon at the next passing of his accounts.¹⁰ A receiver has been held to occupy the

¹ *Carlisle v. Berkley*, AmbL., 599. The sureties are liable for the same principal and interest as the receiver, not only for sums lost by the latter's misconduct or negligence, but also for costs necessarily caused thereby, *Mounsell v. Egan*, 3 J. & Lat., 251; *In re British Power Traction and Lighting Co.*, *Halifax Joint Stock Banking Co. v. British Power Traction and Lighting Co.*, [1910] 2 Ch. 470.

² C. P. C. Sch. i, Or., 40, r. 3(b). Woodroffe, *Rec.*, 259-60. For accounts in mortgage suits, see *Shamuldhun v. Lakhmani* [1910] 13 C.L.J., 459.

³ C. P. C., Sch. 4, Or. 40, r. 3(c).

⁴ *Per Trevelyan, J., Gonesh Doss v. Troyluckonath* [1887], unreported, Woodroffe, *Rec.*, 260.

⁵ *Davies v. Cracraft* [180] 14 Ves., 143.

⁶ *Mohini v. Ram Narain* [1911] 14 C. L. J., 445 (in which the whole question is thoroughly examined).

⁷ *Per Sale, J., Satty Sankar Ghosal v. Golapmonnee* [1900] 5 C. W. N., 223.

⁸ *Shaw v. Rhodes* [1826] 2 Russ., 539.

⁹ *Kerr, Rec.*, 244.

¹⁰ *White v. Lincoln* [1803] 8 Ves., 363 371. *Baroda v. Rashmani* [1915] 20 C. L. J., 113.

position of a trustee, and if he has received, but through mistake or fraud, not accounted for any moneys, he cannot plead limitation as against the parties interested claiming such moneys, though his final accounts have been passed and the recognisances vacated.¹

Every receiver appointed by a court shall lastly be responsible for any loss occasioned by his wilful default or gross negligence.² He is bound to discharge properly the trust confided in him, and cannot make out of it any emolument which is not authorised. He should invest sums in his hands and not keep them at his disposal and appropriate the interest to his personal use;³ and if he is put in possession of lease-holds, he should apply the sub-rents primarily to the discharge of the head-rent and thus protect the property.⁴ A receiver cannot become a tenant of any part of the property he holds as such, unless the parties consent to such tenancy and it is for the benefit of the estate.⁵ Ordinarily, a receiver will not be given leave to bid at a sale by the court of the property subject to the receivership, nor, without the special leave of the court, will he be permitted to purchase, either directly or indirectly, in the name of a trustee, for himself, any such property or interest in the same.⁶

Default or
negligence.

It is the duty of the receiver to preserve and protect the property in his possession to the best of his ability. He should therefore take as much care of it as a prudent owner would of his own property. He should not mix up the trust funds with his own moneys,⁷ and if there is a loss through his failure to exercise ordinary diligence, he must make it good to the estate.⁸ Where he deposits moneys for safe custody with a banker in good credit to be placed to his account in the character of

Responsibility for loss.

¹ *Seagram v. Tuck* [1881] 18 Ch. D., 296.

² C. P. C., s. 503 (h); Act. V of 1908, Sch. i, Or. 40, r. 3 (d), *Kerr, Rec.*, 222.

³ *Hicks v. Hicks* [1744] 3 Atk., 274; *Shaw v. Rhodes*, [1826] 2 Russ., 539.

⁴ *Balfe v. Blake*, 1 Ir. Ch. R. 365.

⁵ *Stannus v. French*, 13 Ir. Eq. R., 161.

⁶ *Alven v. Bond*, 1 Fl. & Kelly, 196; *De Winton v. Mayor of Brecon* [1860]

28 Beav., 200; *Anderson v. Anderson*, 9 Ir. Eq. R., 23. But as to leave to bid, see *Woodroffe, Rec.*, addenda, ix-xi.

⁷ *Wren v. Kirton* [1805] 11 Ves., 377.

⁸ *Re Skirreles*, 2 Hog., 192. But failure to realise money by former receiver does not justify suit against him by present receiver; latter should sue debtor, *Dutt v. Shamal Dhone* [1914] 41 Cal., 92.

receiver, the subsequent failure of the banker will not affect him ; but if he places the same in hands which he knows or should know to be improper, he will have to answer the loss out of his own pocket.¹ Even in the case of an innocent mistake, the responsibility for loss rests upon the receiver and his sureties,² and ordinarily he has no business to make any payments to, say, the solicitor of the plaintiff,³ the latter not being in any way liable for the wrongful or negligent acts of a servant of the court, unless fraud or participation in such acts be established on his part.⁴ The receiver should maintain unfettered his own control over the property in his charge,⁵ and as moneys in his hands properly belong to the court, he should dispose of them in accordance with the orders of that court, and, in the event of misapplication, any party interested may at once apply to the court for relief, without waiting for the passing of the receiver's accounts. Where a receiver was ordered to pay in the first instance to a corporation certain tolls, as received, but under proceedings taken against him, he submitted to paying this money to the opposite party in the cause, such party was made to refund the money and, along with the receiver, had to pay the costs.⁶ But where the receiver has acted with due caution, and the loss is not attributable to any fault on his part, he will not be held liable. If, *e.g.*, he has selected an attorney with proper and reasonable care, but through the fraud or misconduct of this attorney a loss occurs, the receiver cannot be charged with the loss.⁷

Accountability to court appointing receiver.

It is only to the court which appoints him that a receiver is accountable and amenable for his acts.⁸ In all applications for

¹ *Knight v. Lord Plymouth* [1747] 3 Atk., 480.

² *M'Can v. O'Ferrall* [1841] West, H. L., 593, 616, *per* Lord Cottenham: "If one even innocently pays money to other persons whom he supposes to be entitled in right of the parties in a cause, but who prove not to be so entitled, he will be responsible to such parties, inasmuch as in making such payments he departs from the strict line of his duty, and is therefore liable for any error he may commit."

³ *Delafosse v. Crawshaw* [1885] 4 L.

J., Ch., N.S., 32; *Ind. Coope & Co. v. Kidd* [1894] 63 L. J., Q. B., 726.

⁴ *Beach, Rec.* s. 303.

⁵ *White v. Blaggh* [1835] 9 Bli., N. S., 181 (money so deposited in Bank as not to be withdrawable by receiver without concurrence of surety, on bank failing receiver held liable for loss).

⁶ *De Winton v. Mayor of Brecon* [1860] 28 Beav., 200.

⁷ *Powers v. Longbridge*, 38 N. J., Eq., 396.

⁸ *Buddinath Paul v. Bycauntath* [1851] 27 Tayl. & Bell, 192, 193. This

payment of money, the receiver should appear and give information to the court about funds in his hands and about attachments or claims, if any, on the same.¹ So long as the receiver acts under the orders of this court, no liability attaches to him, even though such orders are subsequently reversed on appeal.² It has accordingly been held in America that a receiver, who has complied with an order to distribute the funds of an estate among the creditors, who proved their claims, will be protected against the actions of other creditors for their claims or demands.³ Where a receiver fails to submit his accounts at such periods and in such form as the court directs, or to pay the amount due from him, or occasions loss to property by his wilful default or gross negligence, the court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.⁴

A receiver should act with the absolute impartiality of an indifferent person, and not raise any controverted question between the parties when he receives rents or collects moneys.⁵ It is not for him to prefer one set of interest to another, and he should abstain from interfering in any litigation between the parties and avoid collusion with either of them.

Impartiality.

It is always within the court's power, even after the dismissal of a suit and the discharge of the receiver appointed therein, to make orders upon him. To quote the Judicial Committee : " Although a receiver has been appointed, who now holds and administers the estate of the testator, he is merely the officer of the court, and the estate must, for all legal purposes, be regarded as being *in manibus curiæ*. It appears to their lordships to be extravagant to suggest that the court has not ample jurisdiction, without the aid of a pending process, to require accounts from their own officer, to permit parties interested

Jurisdiction of court after discharge of receiver.

is the reason why all persons desiring to enforce claims against him, have first to obtain the leave of the court, Woodroffe, *Rec.*, 254.

¹ *Chaitan Mullick v. Gocool Mullick* [1897] 1 C. W. N., 303.

² Woodroffe, *Rec.*, 255.

³ *Holcombe v. Johnson*, 27 Minn., 353; *Keene v. Gaehle*, 56 Indiana, 343.

⁴ Act V of 1908, Sch. i, Or. 40, r. 4. An order under this rule is appealable, Or. 43, r. 1 (s).

⁵ *Comyn v. Smith*, 1 Hog., 81.

to intervene in the examination of these accounts, to make just allowances to their officer for his administration, and to deal with all questions of costs connected with the investigation of his accounts as between him and any parties interested, who may be allowed to appear and take part in it."¹

Discharge
of receiver.

The liability of a receiver does not cease till his discharge. This may follow from the accomplishment of the objects with which the appointment was made, so that the retention of the receiver ceases to be necessary. This may happen while the suit is pending,² or when it is dismissed.³ Where, *e.g.*, pending a suit for the determination of the rights of various claimants to a decedent's estate, a receiver was appointed of such estate, he was discharged upon the subsequent appointment of an administrator *pendente lite*.⁴ Where the plaintiff's claim has been satisfied, even the defendant may move for the discharge of the receiver, though the cause yet remains on the board.⁵ But the court will not discharge a receiver, unless satisfied that the object of his appointment has been fully accomplished or the exigency calling for it is past.⁶ Where, accordingly, a receiver was appointed pending an administration suit, the court refused to discharge him before the completion of the administration decree.⁷ There is no doubt that, where a receiver is appointed under the authority of the court, he is appointed for the benefit of all parties interested in the litigation; and therefore he will not be discharged merely upon the application of the party at whose instance he was appointed, after his demand against the defendant is satisfied, when the rights of other parties are involved, which may be prejudiced by the discharge, and to which they do not consent.⁸ Where the *lis* terminates in favour

¹ *Administrator-General of Bengal v. Prem Lall Mullick* [1895] 22 Cal., 1011, P. C. Cf. *Grey v. Woogru Mohun* [1901] 28 Cal., 790; *Rabeholme v. Smith* [1907] 34 Cal., 336.

² *Bainbrigge v. Blair* [1841] 3 Beav., 421, 423 (new trustees appointed); *Branham v. Strathmore* [1844] 8 Jur., 567 (plaintiff-annuitant paid); *Tewart v. Lawson* [1874] 18 Eq., 490.

³ Cf. *Davis v. Duke of Marlborough* [1819] 2 Sw., 108, 167, 168. *Prem Lall Mullick v. Sumbhoonath Roy* [1895]

22 Cal., 960, 973.

⁴ *i.e. Colvin*, 3 Md. Ch., 297.

⁵ *Grenfell v. Dean & Co. of Windsor* [1840] 2 Beav., 544.

⁶ *Smith v. Lyster* [1841] 4 Beav., 227 (receiver not discharged upon one of two infant tenants-in-common coming of age).

⁷ *Bhugwan Das v. Heera Lall* [1901] 5 C. W. N., 417.

⁸ *Bainbrigge v. Blair* [1841] 3 Beav., 421; *High, Rec.*, s. 837.

of the plaintiff, the receiver may have to carry out the decree of the court, especially in a partnership case. The decree may continue the receiver,¹ and if it directs a permanent appointment, the discharge of the receiver will be a matter of discretion with the court.² Even if the appointment be for a fixed period, the court has a discretion to discharge the receiver when it thinks necessary.³ But, where an appointment is shown to have been improperly made, the court will not hesitate to rectify its error.⁴ A case in point is *Lavender v. Lavender*,⁵ where a receiver was appointed of property which belonged to a party stranger to the action. And, if at any stage of a litigation, it appears that the interests of all parties concerned will be better subserved, protected and secured by the discharge of the receiver, the court will entertain a motion to that effect.⁶ In *Ferry v. Bank of Central New York*,⁷ the court discharged a receiver of the property of a bank appointed with the consent of the management, on the ground of insolvency, when the bank subsequently became solvent and was able to pay the claims of the creditors immediately.

Removal of
receiver.

No court of equity will sanction or continue a receivership which has been created collusively or fraudulently,⁸ but, unless for a substantial cause, no receiver will be arbitrarily removed, merely because some of the parties in interest desire it. The court has a discretion to exercise, and may remove one receiver and appoint another when satisfied that the interests of the parties concerned require the change. It may act upon a *bond fide* joint application of the parties, when there is no attempt to traffic in the receivership,⁹ and it may also act where bias and improper conduct in the receiver are shown.¹⁰ The courts, however, are averse to change, because change means expense and delay;¹¹ and the fact that the sureties join in the petition

¹ *Motivahu v. Premvahu* [1892] 16 Bom., 511, 512.

² *Ex parte Rani Mathusri Jijai Amba* [1890] 13 Mad., 390.

³ *Mathusri Umamba v. Mathusri Deepamba* [1895] 23 I. A., 28, 19 Mad., 120.

⁴ *Furlong v. Edwards*, 3 Indiana, 251, 99.

⁵ 9 Ir. Eq., 593.

⁶ *Beach, Rec.*, s. 796.

⁷ 15 How. Pr., 445.

⁸ *Beach, Rec.*, s. 784.

⁹ *Ibid*, s. 789.

¹⁰ *Ibid*, s. 786.

¹¹ *Smith v. Vaughan* [1744] Ridg.,

for removal, does not vary the case.¹ There is no specific provision made in the Code of Civil Procedure for the discharge or removal of a receiver, but the court which appointed him has inherent jurisdiction in the matter; and even the appellate court has got all the powers of the original court.² The petition for removal has to be presented to the court which appointed the receiver,³ and, if made by that officer himself, must show some good cause arising subsequently to his acceptance of office.⁴ Physical incapacity, *e.g.*, blindness, may be such cause,⁵ but the pressure of private business apparently will not be.⁶ When the parties apply for removal, they may prove mismanagement or incompetence on the part of the receiver.⁷ Gross dereliction of duty or negligence will justify the removal of a receiver,⁸ and the court may also allow the motion where a receiver is shown to have been improperly appointed,⁹ or he has been irregular in carrying in and passing his accounts,¹⁰ or has so conducted himself as to impede the impartial course of justice.¹¹

Sureties.

When a surety is discharged, which ordinarily will be only upon proving benefit to the estate or the existence of special circumstances,¹² the receiver has generally to enter into a fresh recognisance with new sureties. "As the receiver is an officer of the court, and the surety is so in a sense, if there is anything due on account between them, justice requires," said Lord Eldon, "that, upon the application of the surety, he shall be indemni-

¹ *Per* Lord Hardwicke: "If people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognisance, and not discharged at their request to have new sureties appointed; for then there would be no end of it." *Griffith v. Griffith* [1751] 2 Ves. Sr., 400. A surety may be discharged only under special circumstances, and with consent of the receiver and the other surety, without prejudice to their liability as to past and future acts of the receiver, *O'Keefe v. Armstrong* 2 Ir. Ch. R., 115.

² *Subramonia v. Muthulakshmi-amal* [1912] 17 I. C., 583.

³ *Dinnonath v. Hogg* [1863] 2 Hay, 395, 396; *Woodroffe, Rec.*, 271; *Kerr, Rec.*, 263.

⁴ *Smith v. Vaughan* [1744] Ridg. temp. Hardw., 251.

⁵ *Richardson v. Ward* [1822] 6 Madd., 266.

⁶ *Beers v. Chelsea Bank* 4 Edw. Ch., 277.

⁷ *Gonesh Doss v. Troylucko Biswas* [1887] unreported, *Woodroffe, Rec.*, 276.

⁸ *Re St. George's Estate*, 19 L. R. Ir. 566; *Kerr, Rec.*, 253.

⁹ *Re Wells* [1890] 45 Ch. D., 569.

¹⁰ *Bertie v. Lord Abingdom* [1845] 8 Beav., 53.

¹¹ *Mitchell v. Condry* [1873] W. N. 282.

¹² *E.g.*, underhand practice with which person secured was connected, *Hamilton v. Brewster*, 2 Moll., 407, or violation of partnership articles, *Swain v. Smith, Seton*, ed. 6, 809.

fied for what he has paid for the receiver out of the balance due to him."¹

Such, in brief, are the general features of the law relating to receivers. For further details, I must refer you to Mr. Justice Woodroffe's excellent treatise, and to one remark there I may direct your special attention: "An excessive citation of case-law even where it is not, as is sometimes the case, of doubtful authority or inapplicable to present circumstances, too often serves no other purpose than to confuse and to obscure the plain provisions of modern Statutes and Codes."² It remains for me to notice a few points of procedure of practical moment.

Case-law
and sta-
tutes.

In India, under the Code of Civil Procedure, 1882, High Courts and District Courts alone are empowered to appoint receivers.³ But whenever the judge of a court subordinate to a district court considers it expedient that a receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, submit such person's name, with the grounds for the nomination, to the district court, and the district court shall authorise such Judge to appoint the person so nominated, or pass such other order as it thinks fit.⁴ The application for the appointment of a receiver must always be presented to the court which is seized of the case in connection with which the appointment is applied for.⁵ Such application should not contain vague allegations or mere general averments of the applicant's belief that the property will be wasted or destroyed, but the grounds upon which such belief is founded should be set forth,⁶ and it must be shown that a receiver is necessary for the realisation, preservation, better custody or management of the property, as mentioned in the Code.⁷ It should also specify the nature and value of the

Practice
under Act
XIV of 1882.

¹ *Glossup v. Harrison* [1814] 3 V. & B., 134. As to a surety's right against his co-surety, see *Re Swan's Estate*, Ir. R., 5 Eq., 209.

² *Rec.* 96.

³ Not a court of small causes. *Nursing v. Tulsiram* [1878] 2 Bom., 558.

⁴ C. P. C., s. 505. *Birajan v. Ram Churn* [1881] 7 Cal., 719.

⁵ *Dhundiram v. Chanda Nabai*

[1865] 2 Bom., H. C. R., 103; *Latafut Hossain v. Anunt Chowdhry* [1896] 23 Cal., 517.

⁶ *Kerr, Rec.*, 140.

⁷ *Latafut v. Anunt*, supra. *Muneshar v. Jagun Nath* [1907] 10 O. C., 268. In a suit under the Religious Endowments Act, a dispute as to the right of succession must be shown. *Gyanada v. Kristo* [1901] 8 C. W. N., 404.

property likely to be affected by the appointment. The application should, in all ordinary cases, be supported by an affidavit, which, however, should contain the facts, and not merely repeat the words of the Code.¹ If the application is made to a district court or to a High Court in its original jurisdiction, it may either reject it or, after hearing the opposite party,² grant it. But where it is made to a subordinate court, that court will hold a judicial enquiry to satisfy itself, upon evidence adduced by both parties, if necessary, that it is expedient that a receiver should be appointed in the suit before it. If not satisfied of the expediency, it will refuse the application; but if so satisfied, it will proceed to nominate some person whom it considers fit for appointment as a receiver, and it will then submit the name of this person, together with the grounds for the nomination, to the district court. This latter court is invested with full control over the matter, and the district judge can consider the necessity for the appointment of a receiver at all,³ and, if satisfied on this score, he may either accept or reject or modify the nomination made by the subordinate judge.⁴ But the district judge cannot himself appoint a receiver not nominated by the subordinate judge.⁵ When the subordinate court is authorised by the district court to make the appointment, it may appoint its nominee as the receiver, or it may even then, upon fuller consideration, refuse to make any appointment.⁶ The jurisdiction to appoint a receiver may be exercised either by a court of first instance, or, where it refuses, by a court of appeal.⁷ There is an appeal from an order of

¹ *Per Peel, C. J.*: "A party cannot swear in the words of an Act of Parliament merely, but must state the facts, without stating what the construction of the Act is." *In the goods of Okilmoney Dossee* [1824] Fulton, 90.

² An *ex parte* order will not be made except in case of pressing necessity, *e.g.*, where insolvency of trustee of trust-estate in question is imminent. *H. v. H.* [1876] 1 Ch. D., 276, or property in suit has been advertised for sale by sole executor, who is about to leave the country, *Colebourne v. Colebourne* [1876] 1 Ch.

D., 690; and will, in the first instance, be only a temporary order for *interim* receiver, *Truman v. Redgrave* [1881] 18 Ch. D., 547.

³ *Biraan Kooer v. Ram Churn Lall*, [1881] 7 Cal., 719, 721.

⁴ *Chunilal v. Sonibai* [1859] 21 Bom., 328.

⁵ *Amar Nath v. Raj Nath* [1896] 18 All., 453.

⁶ S. 505, C. P. C., is not imperative, *Dulmir Puri v. Hetnarain* [1880] 6 C. L. R., 467, 469.

⁷ *Jaikissondas v. Zenabai* [1890] 14 Bom., 431.

the former court whereby it appoints or refuses to appoint a receiver,¹ but there is none against the nomination made by a subordinate court or the authorisation to appoint made by the district court.² An appellate court will not interfere with the selection of a receiver by an inferior tribunal, unless there is some "overwhelming objection in point of propriety of choice or some objection fatal in principle" to the person nominated.³

It is gratifying to find that the whole of the complicated procedure above set forth has been repealed by the new Code of Civil Procedure (Act V of 1908.) Under Order XL, Schedule I, "where it appears to the court to be just and convenient, the court may by order appoint a receiver of any property, whether before or after decree." Appeals are provided for by Order XLIII, Rule 1(s).

An application for the appointment of a receiver may be made at any stage in a suit;⁴ and if it is decreed, the appointment may be made by the decree,⁵ or even after the decree.⁶ In a suit for an account of a dissolved partnership, the decree should direct the appointment of a receiver of outstanding debts and effects,⁷ and in a suit to wind up a partnership by the widow of a deceased partner, upon the application of the plaintiff, a similar receiver was appointed after decree.⁸

Act V of
1908.

Appoint-
ment when
made.

¹ C. P. C., s. 588, cl. 24; *Dulmir Puri v. Hetnarain*, supra, 468; *Venkatasami v. Stridavamma*, [1886] 10 Mad., 179; *Boidya Nath v. Mahan Lal* [1890] 17 Cal., 680; *Sangappa v. Shivbasawa* [1899] 24 Bom., 38, 41. No appeal to Privy Council, *Chundi Dutt v. Pudmanund* [1895] 22 Cal., 928. Appeal against order refusing to remove receiver, *Mithibai v. Lim i* [1880] 5 Bom., 45. See also *Khagendro v. Sashadhar* [1904] 31 Cal. 495; *Bai Moni v. Khimchand* [1908] 10 Bom. L. R., 1037.

² *Sangappa v. Shivbasawa*, supra. *Hiranu v. Ram Churn* [1881] 7 Cal., 719. There may be a review, *Chuni v. Sanibai* [1895] 21 Bom., 328. No appeal against order directing receiver to advance money to guardian ad litem, *Kuppusami v. Rathnavalu*, [1901] 24 Mad., 511.

³ *Per Knight Bruce, L. J., Cooke v.*

Cooke [1865] 2 De.G. J. & S., 526, 528; *Perry v. Oriental Hotels Co.* [1870] 5 Ch. Ap., 420.

⁴ A suit ends by dismissal, *Moheeddeen v. Ahmed Hossein* [1890] 14 W. R., 384, 385; and then the court becomes *functus officio*, *Yamin-ud-doulah v. Ahmed Ali* [1894] 21 Cal., 561, 563-5.

⁵ *Ex parte Fijai Amba* [1890] 13 Mad., 390; *Motivohu v. Premvahu* [1892] 16 Bom., 511, 512; *Mathusri Umamba v. Mathusri Dipamba* [1895] 19 Mad., 120.

⁶ *Shunmugam v. Moidin* [1884] 8 Mad., 223, 233, Act V of 1908, Sch. i, Or. 40, r. 1. Appointment after leave to appeal to Privy Council, C. P. C., Or. 45, r. 12 (d). *Mishew v. Mimi* [1912] 12 I. C. 198.

⁷ *Thirukumaresan v. Subaraya* [1897] 20 Mad., 313.

⁸ *Shunmugam v. Moidin*, supra.

Application
by defend-
ant.

The application for appointment of a receiver is generally made by the plaintiff, but in exceptional cases, *e. g.*, in a partition suit,¹ or an action for dissolution of a partnership and accounts,² it may be made even by the defendant,³ provided his claim to relief arises out of the plaintiff's cause of action or is incidental to it.⁴

Person se-
lected for
receiver-
ship.

As we have seen, an indifferent and disinterested person should, as a rule, be selected as a receiver,⁵ and if the property is land paying revenue to Government, or land on which the revenue has been assigned or redeemed, and the court considers that the interests of those concerned will be promoted by the management of the Collector, the court may, with the consent of the Collector, appoint him to be receiver of such property.⁶ In exceptional cases, however, persons interested or even parties to the suit may be appointed receivers, where their interest does not conflict with due management of the subject-matter of the receivership.⁷ A case in point is *Hyde v. Warden*,⁸ which was a suit for specific performance of the lease of a farm by the lessor,—the lessee had entered but repudiated the agreement, and the farm was getting into a bad condition,—the plaintiff was appointed receiver and manager without security. So in partnership cases, especially where the nature of the business depends upon personal qualities, the party, who had advanced the major portion of the capital, may be appointed receiver of the assets of the firm.⁹

Order of ap-
pointment.

When an order for the appointment of a receiver is made, a party to the suit who has actual notice of it, will be bound

¹ *Porter v. Lopes* [1878] 7 Ch. D., 358.

² *Sergeant v. Read* [1876] 1 Ch. D., 600.

³ *Cf. Judicature Act, 1873*, s. 50 (2), (6).

⁴ *Carter v. Fly* [1894] 2 Ch., 541; *Kerr, Rec.*, 140.

⁵ *Ante*, pp. 544, 560.

⁶ *C. P. C.*, s. 504; *Act V of 1908*, Sch. i, Or. 40, r. 5.

⁷ *Meaden v. Sealey* [1849] 6 Hare, 620; *Faggle v. Bland* [1883] 11 Q. B. D., 711. A party to suit the will generally have to act without salary and will

not be appointed where the other party objects, *Allen v. Lloyd* [1879] 12 Ch. D., 447; *Powys v. Blagrove* [1854] 18 Jur., 462. *Cf. Narayanan v. Ramasami* [1910] 19 M. L. J., 669—(rest-house belonging to a community, no receiver appointed pending appointment of proper trustee by community, but plaintiffs put in possession); *Shamaldhan v. Lakhimani*, [1911] 13 C. L. J., 459.

⁸ [1876] 1 Ex. D., 309.

⁹ *Hoffman v. Duncan* [1853] 18 Jur., 69; *Boyle v. Betties L. C. Co.* [1876] 2 Ch. D., 726.

by it, even though it has not been formally served upon him.¹ When a person is appointed receiver, subject to his giving security, the order is not effective until security is so given.² In the exceptional case where no security is demanded from a receiver, it should be expressly so stated in the order of appointment; and in this case the receiver's right will be established as soon as he takes possession under the order.³ But, in any case, his liability to account for moneys received and expended by him will arise immediately, even before completion of the security.⁴ The duration of the receivership may be expressly limited by the order of appointment, otherwise it will ordinarily be determined by the pendency of the *lis*,⁵ and may, at the discretion of a court, be even made permanent.⁶ But, as long as the order appointing a receiver remains unreversed, and the suit remains a *lis pendens*, the functions of the receiver continue, until he is discharged by order of the court.⁷

An order appointing a receiver cannot be collaterally attacked, except upon the ground of fraud⁸ or absence of jurisdiction;⁹ and while it subsists, it must be obeyed. But it should clearly state over what property the receiver is appointed.¹⁰ A third person cannot apply for an order on the receiver, except through a party to the suit;¹¹ and even where a receiver has exceeded his powers, the proper procedure for the party aggrieved, though a stranger, is not to bring a separate suit, but to apply, in the action in which the receiver was appointed, for an order restraining him.¹² "It is clear," said Pigot, J., "that whatever is the least expensive course, consistent with a satisfactory enquiry, ought to be adopted, in order that the court shall not,

Collateral
attack.

¹ *Skip v. Harwood* [1747] 3 Atk., 564; *Hollier v. Hedges*, 2 Ir. Ch. R., 370.

² *Re Roundwood Colliery Co.* [1897] 1 Ch., 373. Cf. *Ridout v. Fowler* [1904] 1 Ch., 658, 662, 2 Ch., 93; *Srinivas v. Kesho* [1911] 14 C. L. J., 489.

³ *Morrison v. Skerne Iron Works Co.* [1889] 60 L. T., 588. As to the rule in other cases, see *ante*, 560.

⁴ *Smart v. Flood* [1884] 49 L. T., 467.

⁵ *Kerr Rec.*, 155; *Woodroffe, ib.*, 59.

⁶ *Mathusri Umamba v. Mathusri Dipamba* [1895] 19 Mad., 120.

⁷ *Dinonath Sreemoni v. Hogg* [1863]

2 Hay, 395, 396.

⁸ *Woodroffe, Rec.*, 244.

⁹ *Poreshnath v. Omerto Nauth* [1890] 17 Cal., 614, 618. 1 *Pomeroy, Eq. R.*, s. 182.

¹⁰ *Crow v. Wood* [1850] 13 Beav., 271.

¹¹ *Brocklebank v. E. L. Ry. Co.* [1879] 12 Ch. D., 839.

¹² *Searle v. Choat* [1884] 25 Ch. D., 723. Separate proceedings against receiver can only be by leave of court, *Kamatchi v. Sundaram* [1902] 26 Mad., 492, which must be obtained before institution, *Promotha v. Khetra*, [1904] 32 Cal., 270. But cf. *ante*, 562.

by its own dominant power, hold property on which the parties to the suit have no claim, and hold it in despite of the real owners."¹ The court, therefore, which has appointed the receiver, will generally hear and determine all rights of action and demands against him by petition in the cause,² it will grant possession by summary process to a purchaser at the receiver's sale of immoveable property,³ and it will aid a judgment-creditor, who desires and is entitled to levy execution against property in the hands of the receiver, by directing the latter to pay him up and avoid the sale.⁴ If the receiver fails to do so, the court may order the creditor to proceed against the property; and this order may even have the effect of discharging the receiver.⁵ A sale by a receiver made under the order of court cannot, in the absence of fraud, be attacked collaterally by persons who were parties to the proceedings or by their representatives; and if these seek to challenge the propriety or validity of the order of sale, they must take their chance before the court which made it, and cannot maintain a new or independent action to set aside the order and the sale made by virtue thereof.⁶

Retirement
pendente
lite.

If a receiver, appointed for the management of an estate, ceases his connection with the estate after he has filed an appeal on its behalf, the litigation commenced by him does not abate, though it cannot proceed without the officer succeeding him being impleaded properly to represent the interest concerned.⁷ A receiver is only the official representative of an estate; consequently, if, while the true owner is being ascertained, he brings an action in ejectment for the benefit of the

¹ *Mahomed Mehdi v. Zoharra Begam* [1889] 17 Cal., 285, 287; *Neate v. Pink* [1846] 15 Sim., 450.

² *Woodroffe, Rec.*, 81.

³ *Minatooneesa v. Khatoonessa*, [1894] 21 Cal., 479.

⁴ *Kerr, Rec.*, 179-80.

⁵ *Raghunath v. Gopinath* [1905] 25 A. W. N., 110. Of course, if the creditor does not seek to proceed against any property in the receiver's hands, he need not apply to the court which appointed him.

⁶ *Gora Chand v. Makhan Lal* [1907] 6 C. L. J., 404, 408; *Alderson, Rec.*, s. 604.

⁷ *Akula Paradesi v. Dhelli Jaganadha* [1905] 28 Mad., 157. Cf. 1 *Pomeroy, Eq. R.*, 350: "An action may be brought against a receiver on a liability incurred by his predecessor in the receivership, since the receivership is continuous and uninterrupted, until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes; the position of a receiver in this respect being somewhat analogous to that of a corporation sole." See also s. 195. *McNutta v. Lockridge*, 141 U. S., 327, 332.

estate, and subsequently, before the suit ends in a decree, his office comes to an end, the true owner has a right to step into the receiver-plaintiff's place and continue the action.¹

When a receiver retires, an application for the appointment of another receiver in his place should be made in court, and not in chambers.² Two receivers will not be appointed contemporaneously to the same property.³ And where a receiver has been appointed of a particular estate, upon the determination of that estate the custody of the court will cease, and the owner then entitled may take possession without making any application to the court. *E.g.*, if the subject-matter of a receivership is the estate of a tenant for life, upon the demise of the tenant, the remainderman will have a right to come in, without reference to the court which appointed the receiver.⁴

Appoint-
ment of
substitute.

¹ *Macleod v. Kisson* [1904] 6 Bom., L.R., 995.

² *Stalkartt v. Stalkartt* [1900] 28 Cal., 250.

³ *Searle v. Choat* [1884] 25 Ch. D., 724.

⁴ *Kerr, Rec.*, 185; *Re Stack*, 13 Ir. Ch., 213.

LECTURE XII.

INJUNCTIONS.

Injunction. The last form of specific relief I will consider, is that given by preventing a party from doing that which he is under an obligation not to do.¹ Since 'obligation' is defined to include every duty enforceable by law,² this form of specific relief, it would appear, is applicable to all cases where one person can enforce a duty against another, or, to use the correlative term, where one person is vested with a right which empowers him to constrain the other to adopt a particular line of conduct, or to do or abstain from doing a particular act. This right may or may not arise out of a contract, and the remedy of injunction, by which preventive relief is granted by a court,³ may be held to be available throughout the whole range of law. But the jurisdiction is carefully defined in Part III, Specific Relief Act, and to some extent circumscribed. It still remains, however, a vast and expansive jurisdiction, and forcibly illustrates the power of equity, in spite of the fetters of codification, to march with the times, and adjust its beneficial remedies to altered social conditions and the progressive needs of humanity. Fortunately for me the whole subject has been dealt with at large and with conspicuous ability and learning by a previous Tagore Law Professor, the present Mr. Justice Woodroffe of the Calcutta High Court; so I will confine my observations to broad and general considerations and to certain points of practical moment.⁴

**Prohibitory,
mandatory.**

An injunction may be either prohibitory or mandatory. The object of the process issued by the court is governed by the fact, whether the person against whom it is issued has already committed some act or allowed some omission which infringes the

¹ S. R. A., s. 5 (c).

² *Ibid*, s. 3.

³ *Ibid*, s. 52.

⁴ Principal Nelson of the Madras

Law College has also published a comprehensive and very helpful treatise on the subject.

complainant's right, or he has only threatened such commission or omission ; and the process has also regard to the consequences which have followed upon the commission or omission complained of, if actual and past. If, for the establishment and enforcement of the right infringed or about to be infringed, it is enough to forbid the wrong-doer and restrain him from perpetrating or continuing the wrong, a prohibitory or restrictive order is all that is called for. If, on the other hand, the wrong-doer's act or omission has been attended with results which have changed the situation of the parties and altered the *status in quo*, there can be no restoration, unless the wrong-doer is compelled to undo the effects of his act or omission ; and, in such a case, a mandate will be issued requiring the performance of such acts as may be necessary to afford specific relief to the injured party.¹ A trustee may commit a breach of trust,² or a person may cause such unnecessary noise in his compound as to interfere materially and unreasonably with the physical comfort of the occupier of an adjoining house.³ In such cases the party aggrieved may have full redress by an order which enjoins the trustee or the neighbour from repeating or continuing the breach of the obligation existing in the plaintiff's favour.⁴ But a publisher may pirate the copy-right of another publisher,⁵ or your neighbour may run up a wall which obstructs your easements of light and air.⁶ In such cases, the complainant cannot have complete relief, unless there is a restrictive order, forbidding the breach of the obligation in future, and, in addition, a mandatory order, directing the delivery or destruction of the pirated copies⁷ or the demolition of the offending structure. The right protected may be contractual. If there is a lease for the purpose of erecting and working mills, the lessor covenanting to supply water from canals and reservoirs on his estate, he may, on committing a breach of the covenant, be enjoined from continuing to keep the said canals, or the banks, gates, locks,

¹ S. R. A., s. 55.

² Cf. *ibid.* s. 54, ill. (b).

³ *Ibid.* ill. (s); *Benjamin v. Storr* [1874] 9 C. P., 400; *Fritz v. Hobson* [1880] 14 Ch. D., 542, 555.

⁴ *Ibid.* s. 54.

⁵ *Ibid.* ill. (v).

⁶ Cf. *ibid.* s. 55, ill. (a).

⁷ *Ibid.* ill. (g).

or works of the same respectively, out of good repair, order or condition.¹

Temporary,
perpetual.

The injunction may be either temporary or perpetual.² An order may, *e. g.*, be made in a pending suit, with the object of keeping things *in statu quo*, till the determination of the rights of the parties in the cause, or it may be made after such determination, with the object of giving effect to and protecting those rights. These two forms of injunctions are treated of in two distinct chapters³ of the Specific Relief Act. The provisions in limitation of the right to perpetual injunctions are therefore not strictly applicable to the case of temporary injunctions;⁴ and I will deal with these latter first.

Temporary
or interlocu-
tory.

A temporary or interlocutory injunction is such as is to continue until a specified time, or until the further order of the court, and may be granted at any period of a suit.⁵ The provisions of the Code of Civil Procedure regulate this species of specific relief.⁶ It may be granted to enjoin waste *pendente lite*⁷ or the breach of a contract or other wrong independent of contract, *i.e.*, a tort.⁸ The ultimate object of the suit may be a perpetual injunction or the determination of some right to property, or otherwise. But, where the defendant has committed or is threatening what the plaintiff alleges to be a breach of an obligation, or, more briefly, a wrong, the plaintiff may ask the court to direct the object-matter of the dispute to be maintained *in statu quo*, till the issue between the parties has been determined. If, specially the plaintiff's suit is to recover property *in specie*, the defendant ought not to be allowed to decide the suit in his own favour by making

¹ *Lane v. Newdigate* [1804] 10 Ves., 192, 1 Ames, 74 (Eldon, C.).

² S. R. A., s. 52.

³ Chapters IX and X.

⁴ *Amir Duhin v. Administrator-General of Bengal* [1895] 23 Cal., 351.

⁵ S. R. A., s. 53.

⁶ Secs. 492 to 497; Act V of 1908. Sch. i, Or. 39.

⁷ C. P. C., s. 492; Act V of 1908, Sch. i, Or. 39, r. 1 *Raja Ram v. Dharan Das* [1905] 2 A. L. J. R., 601.

⁸ C. P. C., s. 493; Act V of 1908, Sch. i, Or. 39, r. 2. *Darab Kuar v. Gonti Kuar* [1900] 22 All., 449, cannot be supported. *Anantnath v. Mackintosh* [1871] 6

B.L.R., 571. This will not apply where the defendant is in possession of the property in dispute and the plaintiff is out of possession, *Subramanya v. Vengu* [1905] 18 M. L. J. R., 302. The general equity jurisdiction of the High Court to grant temporary injunctions is not restricted by the Civil Procedure Code, *Mungle Chand v. Gopal Ram* [1906] 34 Cal., 101; *Rash Behary v. Bhowani*, *ibid*, 97; *Uderam v. Hyderally* [1908] 10 Bom., L. R. 1141. *Contra*, *Jairamdas v. Zamonlal* [1903] 27 Bom., 357; *Jumna v. Harcharan* [1911] 38 Cal. 405.

away with the property in question.¹ Where the sole object of a suit is protection by means of an injunction, to withhold a temporary injunction may practically decide the cause in favour of the defendants, without giving the plaintiff an opportunity to establish the truth of the case made by his plaint.² Section 492 of the Code,³ accordingly, provides that "if in any suit it be proved by affidavit or otherwise (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors," the court may grant a temporary injunction or give such other order as it thinks fit, to prevent the anticipated injury. This section is not comprehensive enough, but in practice is liberally construed. Not only will all vexatious alienations pending a suit be restrained,⁴ but a court will also interfere by injunction to prevent serious damage or waste tending to change the nature and value of the property, such as the destruction of works of irrigation, the removal of principal buildings, the cutting down of timber unfit for use or adapted only for ornament, or anything else which amounts to mischievous or malicious waste.⁵ Where the defendant, a railway company, agreed to buy the plaintiff's land and made their line upon it, but neglected to pay the price, in a suit to enforce the unpaid vendor's lien, the defaulting company was enjoined from running their trains, until they had paid the money.⁶ In another railway case, Lord Cottenham lucidly explained the principle upon which courts act: "It is certain that the court will in many cases interfere and preserve property *in statu quo* during the pendency of a suit, in which the rights

C. P. C., s.
492.

Transfer
pendente
lite.

¹ *Robinson v. Pickering* [1881] 16 Ch. D., 636.

² *Salomon v. Hertz* [1885] 40 N. J. Eq., 400, 1 Ames, 128 (suit to restrain defendants from making public secret peculiar methods and processes alleged to have been learnt while in plaintiff's service; apprehension of disclosure *pendente lite* which would make plaintiff's success at the conclusion of the suit, "but a barren and worthless victory," per Runyon, C.).

³ Act V of 1908, Sch. i, Or. 39, r. 1.

⁴ *Daly v. Kelly* [1816] 4 Dow, 417, 440; *Echliiff v. Baldwin* [1809] 16 Ves., 267.

⁵ *Lowndes v. Bettie* [1864] 10 Jur., N. S., 226, 1 Keener, 604; *Erhardt v. Boaro* [1885] 113 U. S., 537, 1 Ames, 507.

⁶ *Allgood v. M. Q. D. Ry. Co.* [1886] 33 Ch. D., 571. Cf. *ante*, 555. Distinguish *Taylor v. Florida E. O. R. Co.*, [1907] 16 L. R. A., N. S., 307.

to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title ; but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction.It is true that the court will not so interfere, if it thinks that there is no real question between the parties ; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail.”¹ The rule, opines Mookerjee, J., is that, if there is a clear valid contract for transfer, the court will not permit the transferor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*.²

Moveable
property.

No distinction is made between moveable and immoveable property, and immediate and prompt protection may be very necessary where the chattel in dispute is of peculiar value, say, an heirloom or ancient family picture.³ In *Hood v. Aston*,⁴ the defendants were bankers who held a bill of exchange for which they had given value, but had notice that it had been improperly accepted, in the partnership name, by a partner of the plaintiffs, Lord Eldon, C., granted an interlocutory injunction restraining the defendants from negotiating the bill, and said : “ This bill of exchange, if it passed by negotiation into the hands of a third person, who had no notice of the circumstances under which it came into the possession of the

¹ *G. W. Ry. Co. v. B. & O. Ry. Co.* [1848] 2 Ph., 597, 602-3 (two railway companies having agreed to amalgamate and make their lines in union, injunction granted to restrain one of them from making and disposing of its line otherwise.)

² *Pramatha v. Jagannath* [1913] 16 I. C., 359.

³ *Arundell v. Phipps* [1804] 10 Ves.,

139. In *North v. G. N. Ry. Co.* [1860] 2 Giff., 64, the sale *pendente lite* of railway waggons was enjoined ; so in *Goodall v. Goodall* [1852] 16 Jur., 316, the transfer of papers and deeds belonging to a testator's estate. In America, slaves have been similarly protected, *Henderson v. Vaulx*, 10 Yerg., 80.

⁴ [1826] 1 Russ., 412, 415-6.

bankers, would be as good a bill of exchange as any person could desire to have, and from that danger, and the mischief attending it, the plaintiffs have a right to be protected. It is true that even if the court were not to act, they could still have the security of *lis pendens*. But it is quite a new doctrine to me, that a security like that, which is far from being the best that a prudent man would wish to have, is to deprive the suitor of the more effectual protection of an injunction, or that the court, because it acts on the doctrine of *lis pendens*, will not prevent (if possible) the necessity of proceeding on such a principle." In another case, where the bill had been "taken under circumstances which were calculated to raise suspicion and ought to have occasioned inquiry," the court said that "there was no necessity for proving such a case, and much less for showing that the defendants knew of the illegal consideration, in order to sustain the injunction."¹ So, where a steward was suspected of having embezzled a large sum of money received by him for rents, and invested the same in stock in his own name, Lord Eldon enjoined him from transferring any stock whatever in his name, though the plaintiff did not claim the whole of the stock as his money in a transmuted form.²

Lis pendens.

An interlocutory injunction will be issued not only to restrain free and voluntary acts of the parties, but also acts *in invitum*. A sale in execution of a decree of court may be enjoined if wrongful, and the very language of the Code shows that the legislature distinctly contemplates and recognises that even a sale, ordered by a court of competent jurisdiction, may under certain circumstances be "wrongful." It is easy to conceive that a stranger to a decree may have rights in the property, which the decree purports to affect, superior to and paramount over

Wrongful
sale in
execution
of decree.

¹ *Lord Portarlington v. Soulby*, [1834] 3 My. & K., 104 (bill given by plaintiff for money lost at play). *Of. Maitland v. Backhouse* [1847] 16 Sim., 58 (note endorsed by rich niece under undue influence of insolvent uncle, accepted without inquiry by bankers who were acquainted with the circumstances of each); *Esdaile v. La*

Nauze [1836] 1 Y. & C. Ex., 394 (bill fraudulently endorsed by agent); *Smith v. Aykwell* [1747] 3 Atk., 566 (promissory note given under a marriage brokerage agreement.)

² *Chedworth v. Edwards* [1802] 8 Ves., 46. But see *Cox v. Paxtons*, 1 Mad. Ch. Pr., 215n.

any that the decree-holder may claim. A trustee may have in breach of the trust, mortgaged trust property, a *shebait* or *mut-walli* may have wrongfully dealt with endowed lands, a Hindu co-parcener may have alienated a joint ancestral house in derogation of the vested rights of other co-owners. Such transfers do not pass a perfect title ; and if the transferee seeks to enforce any by obtaining a judgment and decree against the actual transferor, the parties ultimately injured may sue to have their rights declared in the property in question and, pending the determination of such rights, may have even a contemplated court-sale stayed for the time. The case is still stronger when, in execution of a simple money-decree against *A*, the property of *B* is attached and advertised for sale. *B* may or may not file a claim under section 278, Civil Procedure Code.¹ If the claim is determined summarily in his favour, the decree-holder may institute a regular suit for a declaration of the right which he claims ; if otherwise, the claimant will have to institute a regular suit.² In the former case, the decree-holder may obtain a decree, and then resume the execution proceedings temporarily interrupted ; and if the claimant appeals against the decree, it may be necessary for him to have protected from sale the property which he claims pending the litigation. In the latter case, the claimant-plaintiff may even in the court of first instance find it necessary to invoke the aid of the court for this purpose. And not dissimilar will be his position when he elects to file at once a regular suit for the establishment of his title to the property in danger, without taking his chance of a prior summary investigation. When a claim is made under section 278 of the Code, the court may stay further proceedings in execution, relating to the property in dispute.³ When a suit with the same object is filed on the regular side, there is apparently no substantial reason why the court should refuse to exercise its discretion in favour of the party who puts forward a *bonâ fide* claim and is bound to be seriously embarrassed, if the subject-matter of the claim is in the mean-

¹ Act V of 1908, Sch. i, Or. 21., r. 58 ;
ante, 527.

² C. P. C., s. 283 ; Act V of 1908, Sch.
i, Or. 21, r. 68.

³ C. P. C., s. 278 ; Act V of 1908, Sch.

i. Or. 21, r. 58(2). Upon a decree being
appealed from, execution of that de-
cree may be stayed, C. P. C., s. 545 ;
Act V of 1908, Sch. i, Or. 41, r. 5. *Cf.*
Polini v. Gray [1879] 12 Ch. D., 438.

time sold by public auction. Any other course can lead but to circuity and multiplicity of action. The applicant for the court's protection may be the plaintiff in a suit or the appellant in an appeal. But the accident whether he was arrayed as the plaintiff or the defendant in the court of first instance, cannot make and difference in principle,¹ and even a void act, under colour of judicial process, may be subject to injunction.² At the stage when an interlocutory injunction is applied for, there is no occasion for a final adjudication of the rights in issue in the suit; but if the court is satisfied by affidavits or otherwise that there is a reasonable apprehension of injury to a *primâ facie* right, it will be failing in the discharge of its duty, if it deliberately omits to afford protection against what, so far as it is then in a position to judge, appears to be a wrong.³

I have laboured to put this matter clearly before you, because it is one that arises frequently in practice, and because at one time there were some decisions of the Allahabad High Court which were calculated to throw doubt upon well-settled principles.⁴ These decisions, however, have now been overruled.⁵

Doubtful
ruling of
Allahabad
High Court.

The granting of an injunction rests in the judicial discretion of the court,⁶ a discretion which, as I have

Discretion.

¹ Cf. C. P. C., s. 582; Act V of 1908, Sch. i, Or. 22, r. 11. Burkitt, J., seems to have thought otherwise in an unreported case (*Haidari v. Hayat Begam*, F. A. No. 1 of 1901, disposed of on June 3, 1901).

² "No reason in law or in morals can be found," said the Indiana Court, "that will justly support the position of one who resists an injunction where he concedes he is acting under colour of authority, but in fact has none, and is using that authority to seize and sell without right or the semblance of justification the land of another. No one, we suppose, doubts that a property owner may quit his title against an apparent claim, though it be never so empty, and if he may do this, surely he may by injunction prevent that apparent claim from clouding his title, without delaying until it has assumed that shape:" *Bishop v. Moorman*, 49 Am. R., 731.

³ Cf. *Parker v. Dhanji Boy* [1907] P. L. R., No. 53.

⁴ *Re Chando Bibi* [1903] 26 All., 311; *Megh Raj v. Lala Mal* [1907] 4 A. L. J., 342.

⁵ *Abdullah Khan v. Banke Lal* [1910] 33 All., 79, F. B. See also *Kirpa Dayal v. Rani Kishori* [1885] 10 All. 803; 4 A. L. J., 342. *Brajendra v. Rup Lal* [1886] 12 Cal. 515; *Amir Dulhin v. Admr.-Gen. Bengal* [1895] 23 Cal., 351; *Nelson, Inj.*, 540-4; *Woodroffe, Inj.*, 193-7; 1 A. L. J., 61-2 Cf. *Purshottam v. Purshottam* [1884] 8 Bom., 532; *Ram Lochan v. Beni* [1909] 36 Cal., 252; *Jit Lal v. Kamaleswari* [1912] 16 C. L. J., 555.

⁶ S. R. A., s. 52; 2 Story, *Eq.*, s. 863. A distinction has been drawn in America between cases where the injunction is sought in aid of private right and where it is asked in some matter *publici juris*; in the latter case, it has been said, an absolute duty devolves upon the court to exercise its jurisdiction to accomplish the public object. *Spelling, Inj.*, s. 22, p. 34.

pointed out before, is sound and reasonable,¹ not arbitrary or capricious,² and it has to be reasonably exercised, with reference to all the circumstances of the particular case.³ It is capable of correction by a court of appeal,⁴ even when exercising the limited jurisdiction conferred by section 584, Civil Procedure Code;⁵ but the *onus* is upon the appellant to show that the court below has erred in the exercise of its discretion.⁶ "I have no hesitation," remarked Jessel, M. R., "in saying that there is no limit to the practice of the court with regard to interlocutory applications, so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause."⁷ A man who comes to the court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.⁸ There may be a doubt as to the plaintiff's right, but this will not justify a refusal of the injunction, unless it is a serious doubt which remains after the faithful application of the judge's faculties to its solution.⁹ The court must be guided by a discretion, according to the exigencies and the nature of each particular controversy.¹⁰ The court will, consequently, take into consideration the balance of convenience, and determine whether an *interim* interference is

Balance of
convenience.

¹ S. R. A., s. 22; *Aynsley v. Glover* [1874] 18 Eq., 544, 545.

² 2 Story, Eq., s. 742.

³ *Greenwood v. Hornesey* [1886] 33 Ch. D., 471; *Martin v. Price* [1894] 1 Ch. 276, 280; *Taylor v. Florida E. C. R. Co.* [1907] 15 L. R. A. N. S., 307 (specific performance of contract).

⁴ S. R. A., s. 22; *Davy v. Garrett* [1878] 7 Ch. D., 473.

⁵ *Ram Bahadur v. Ram Shankar* [1905] 27 All., 688, F. B. Act V of 1908, s. 100.

⁶ *Shadi v. Anup Singh*, [1889] 12 All., 436, F. B.; *In re Martin* [1882] 20 Ch. D., 365, 369.

⁷ *Smith v. Peters* [1875] 20 Eq., 511, 513. In *Simonds v. Hallet* [1883] 24 Ch. D., 346, pending a wife's suit for

judicial separation, the husband was enjoined from going into her house to annoy the plaintiff. In *Williams v. Williams* [1818] 2 Sw., 253, 2 Keener, 199, deft. was enjoined from running coaches in competition with plff.

⁸ Kerr, *Inf.*, 5th. ed., 16; *Powell v. Lloyd* [1826] 1 Y. & J., 427, 31 R. R., 662; *Hudson v. Bertram* [1818] 3 Madd., 440 (ground for supposing relief may be given enough). But see *Reddaway v. Schroder Smidt* [1903] 8 C. W. N., 151.

⁹ *Little v. Gould*, 2 Blatchf., 165. Cf. *Nage, dra v. Probal* [1913] 17 C. W. N., 964.

¹⁰ *Ollendorff v. Black* [1850] 4 DeG & Sm., 209 (Knight Bruce, V.C.).

expedient. If the property in question is likely to be destroyed or seriously damaged,¹ or if a refusal to enjoin the defendant is likely to result in the creation of new rights which can be got over only by further litigation,² a court will be disposed to interfere in favour of the plaintiff. Where, in violation of the covenants in a lease, the leasehold property was used as a disorderly house, the court of appeal in England issued an interlocutory injunction against the occupier, without determining the nature of his interest in the premises.³ But where the apprehended injury is not of a serious nature, the court may listen to suggestions made by the defendant that his rights will suffer by premature interference.⁴ The plaintiff's conduct, *e.g.*, undue delay in making his application, or apparent acquiescence in the wrong complained of, may disentitle him to this summary relief, and where the effect of granting such relief is likely to injure the defendant much more than the plaintiff, the balance of convenience will be against the issue of a temporary injunction.⁵ A vexatious interruption to the enjoyment of property is not favoured. Thus, where the plaintiffs sought to enjoin the defendants from working certain coal mines, and the defendants set up a claim under a prior unexpired lease, Knight Bruce, V. C., said: "The defendants, who claim a right to do what they are doing, are, it is true, by working the coal taking away the very substance of the property, which may in a sense be perhaps called in this case, and might in others certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made

Plaintiff's
conduct.

Vexatious
interruption
to enjoyment
of property.

¹ *Wilson v Wilson* [1848] 1 H.L.C., 538. *Cf. Gangabai v. Purshotum* [1907] 32 Bom., 146.

² *Echliif v. Baldwin* [1809] 16 Ves., 287; *Curtis v. Marquis of Buckingham* [1814] 3 V. & B., 168. In *Turner v. Wight* [1841] 4 Beav., 40, Langdale, M. R., thought doctrine of *lis pendens* might afford sufficient protection to plaintiff. But see *per Turner L. J.*, *Hadley v. London Bank of Scotland* [1865] 3 DeG. J. & S., 63, 70.

³ *Mander v Falcke* [1891] 2 Ch., 554, 2 Keener, 609.

⁴ *Shrewsbury Ry. Co. v. S. & B. Ry. Co.* [1851] 20 L. J., Ch., 574. *Cruttwell v. Lye* [1810] 17 Ves., 335 (sale of good-

will). But the courts are not inclined to apply the maxim *de minimis non curat lex* to cases where there has been an actual invasion of property rights, *Spelling*, 30.

⁵ *Singaran Coal Syndicate v. Indra Nath Chatterjee* [1905] 10 C. W. N., 173. In the case of mines, though the property may be gravely affected by working *pendente lite*, yet inconceivable mischief may ensue by the value of the opportunity of working the mine being lost, and an *interim* stay order should be made with extra caution. *Grey v. Northumberland* [1809] 17 Ves., 281.

available, and may, therefore, in a sense, perhaps be deemed not more than taking the ordinary usufruct of the thing in dispute, nor is unskilful or unminer-like working established against the defendants to my satisfaction, nor are they said to be insolvent." An interlocutory injunction was refused.¹ Where the title to land is disputed, before the determination of this issue, a defendant in possession will not be restrained from the ordinary and natural use of the premises and the enjoyment of all benefits which flow from possession. If, *e.g.*, the premises be a farm, he should be permitted to use it in any ordinary way, as such a farm is used, with the single limitation that he commit no waste, and make no substantial and injurious change in its condition.²

Interlocutory mandatory injunction.

The court must be satisfied that the matter is emergent and its immediate assistance is required before it will issue a temporary injunction,³ for there is a possibility of irremediable injury being caused to the defendant,⁴ especially if the injunction

¹ *Haigh v. Jaggard* [1845] 2 Coll. Ch., - 231, 1 Ames, 495.

² *Per* Brewer, J., *Snyder v. Hopkins* [1884] 31 Kan., 557, 1 Ames, 509.

³ In the case of an alleged nuisance produced by the working of an enormous steam hammer on premises adjoining the plaintiff's house, Page Wood, V. C., said, "If I found any real apprehension of serious and immediate injury to health or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the meantime, but in this case I see nothing except annoyance apprehended by the plaintiff: and I certainly think that on the question of balance of convenience I ought to refuse the injunction." *Baden v. Pirth* [1863] 1 H. & M., 573, 1 Ames, 564. "A strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction as a precautionary and preventive remedy." *Railroad Co. v. Prudden*, 5 C. E., Green, 530. "As a preliminary injunction is in its operation, somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity to avoid injurious consequences which cannot be repaired under any standard of compensation." *Mammoth Vein Coal Co.'s Appeal*, 54 Pa. St., 183.

Spelling, 32. A previous notice of action is required in the case of some municipal and other authorities, but this is not meant to license them to do any mischief they please whilst the notice is running, and English courts may issue interlocutory injunctions meanwhile to prevent immediate and irreparable injury by, *e.g.*, a nuisance. *Flower v. Local Board of Low Leyton* [1877] 5 Ch. D., 352.

⁴ *Of. Stevens v. Keating* [1847] 2 Phil., 333, 1 Ames, 628 (patent case); *Tilghman's Co. v. Societe Anon* [1883] 25, Ch. D., 1. Where plaintiff complains of an infringement of patent right, if there is a serious question to be tried at the hearing, *Plympton v. Malcolmson* [1875] 20 Eq., 37, 1 Ames, 632, and neither the patentee's right nor the infringement is beyond reasonable doubt, *Standard Elevator Co. v. Crane Elevator Co.* [1893] 56 Fed., 718, 1 Ames, 633, an interlocutory injunction has been refused in England and America. But previous adjudication, even as against other alleged infringers, *Edwin v. Beacon Co.* [1893] 54 Fed., 678, 1 Ames, 630; *Bovile v. Goodier* [1866] 2 Eq., 195; or long and uninterrupted possession may be taken as *prima facie* evidence of title, *Stevens v. Keating*, *supra*; *Davenport v. Jepson*, [1862] 4 DeG. F. & J., 440, 477. Where defendant is likely to go on selling the invention to many

Patent rights.

asked for is of a mandatory character. In a comparatively old case, Lord Hardwicke is reported to have said that he never knew an order to pull down anything on motion.¹ The court is slow to grant an interlocutory mandatory injunction.² But where the injury is immediate and pressing and irreparable and clearly established by the proofs, and not acquiesced in by the plaintiff, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced.³ Where the plaintiffs, cotton manufacturers, complained that the defendant, who had large pieces of water in his park, supplied by the stream which flowed to the mill, had since April 4, 1785, at one time stopped the water, and at another time, let in the water in such quantities as to endanger the mill, with the object, it was alleged, of obtaining money from the plaintiffs, Lord Thurlow said, "The court will not restrain what has been enjoyed for twenty years past; but if what has been so enjoyed is used in a different way, so as to do mischief, the court may interpose," and the Chancellor issued an injunction, restraining the defendant "from using dams, weirs, shuttles, floodgates, and other erections, so as to prevent the water flowing to the mill in regular quantities as it had ordinarily done before the 4th of April."⁴ Where the defendant obstructed the passage of smoke from flues used for many years by the plaintiffs, by placing tiles upon the chimney-pots, Wood, V. C., felt no hesitation in granting a mandatory injunction, though the issue as to the plaintiff's right to such passage for the smoke had yet to be tried. The plaintiff's house lay in imminent risk of

others, to prevent a multiplicity of suits, the court may issue an *interim* injunction, but it will not as a rule stop an old established business. *Plimton v. Spiller* [1877] 4 Ch. D., 286; *Fernie v. Young* [1886] 1 H. L., 63, 78. *Terrell, Patents*, 313 sqq.

¹ *Ryder v. Bentham* [1750] 1 Ves. Sr., 543, 1 Ames, 564.

² *Gale v. Abbot* [1862] 8 Jur., N. S. 987; *Munia v. Linge* [1910] 15 M. C. C. R., 139. Cf. *Rasul v. Pirubhai* [1914] 6 Bom. L. R., 283 (hearing may be expedited or interlocutory order treated as decree).

³ 4 Pomeroy, *Eq., J.*, s. 1359. See authorities collected in 2 Pomeroy, *Eq., R.*, ch. xxx.

⁴ *Robinson v. Lord Byron* [1785] 1 Bro. C. C., 588, 1 Ames, 566. Cf. *Lane v. Newdigate* [1804] 10 Ves., 192, 1 Ames, 75. The former practice in England was to issue a mandatory injunction in the negative form. But now the court says in plain terms what it means, and in direct words orders constructions to be pulled down and removed. *Jackson v. Normandy Co.* [1899] 1 Ch., 438.

becoming uninhabitable in the meantime.¹ And especially where, after the motion for a temporary injunction, the defendant has evaded service of notice, or upon such service has hurried on with the constructions objected to, there is a race against law,² and the court will not allow itself to be circumvented or imposed upon by a proceeding of that kind.³ "If builders will take the chance of running up a building in that way," said Lindley, L. J., "they must take the risk of pulling it down."⁴

Leading
principle.

But where no very special circumstances occur, the leading principle, in Lord Cottenham's opinion, which ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, is that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay further injury, to keep things as they are for the present.⁵

Conditional
injunction.

The court, in the exercise of its discretion, may grant an injunction upon terms.⁶ It may require from the plaintiff, applying for an interlocutory order, an undertaking to compensate the defendant for such loss as may be caused to him by the injunction.⁷ It may only partially restrain the defendant⁸ or, instead of granting an injunction, may direct the defendant to keep an account or give security, or do some other act which the court thinks fit.⁹ An injunction, though

¹ *Hervey v. Smith* [1855] 1 K. & J., 389. In the later case of *London & Ry. Co. v. Lancashire & Ry. Co.* [1867] 4 Eq., 174, the learned V. C. explained: "It was one of those simple and summary acts which can be so immediately done that it is not possible to prevent it while the right is being tried, and I decided that the court would interfere to prevent such damage."

² *Cooke v. Boynton* 135 Pa. St., 102.

³ *Smith v. Day* [1880] 13 Ch. D., 651; *Van, Joel v. Hornsey* [1895] 2 Ch., 774, 1 Ames, 546.

⁴ *Van Joel v. Hornsey*, supra. Cf. *Daniel v. Ferguson*, [1891] 2 Ch., 27. See also *Israil v. Samser* [1913] 18 C. W. N., 176 (construction by co-owner since institution of suit and with full knowledge of proceedings).

⁵ *Blakemore v. Glamorganshire Canal Nav.* [1892] 1 My. & K., 154, 183 (case of diversion of watercourse

temporary mandatory injunction refused, as large and valuable works had been constructed many years ago, and, if their restoration to original condition proved impracticable, defendants might be compelled to suspend their navigation altogether).

⁶ Cf. *Shaw v. Jersey* [1879] 4 C. P. D., 359.

⁷ *Shadi Ram v. Abdul*, [1904] 1 A. L. J. R., 527; *Chandra v. Sree Gobind* [1900] 6 C. W. N., 308. Cf. C. P. C., s. 545; Act V. of 1908, Sch. 1, Or. 41, r. 5 (3); *Howard v. Press Printers Ltd.* [1904] 73 L. J. Ch. 100. *Chappel v. Davidson* [1856] 8 DeG. M. & G., 1 Keer, *Inj.*, 5th. ed., 29.

⁸ Cf. *Beufus v. Bullock* [1869] 7 Eq., 393.

⁹ C. P. C., ss. 492, 493; Act V. of 1908, Sch. 1, Or. 39, r. 1, 2. In patent cases, defendant's undertaking to keep account of sales is frequently accepted, *Bacon v. Jones* [1839] 4 My.

irregularly obtained or erroneously granted, must be obeyed, so long as it is not discharged;¹ but even before the trial of the cause, the court may discharge, vary or set it aside upon motion.² A temporary injunction cannot generally be granted without notice to the opposite party.³ Where a plaintiff, upon an *ex parte* motion for an *interim* injunction, has suppressed material facts, the injunction will be dissolved upon that ground alone, and he will not be allowed to maintain it upon the merits subsequently disclosed.⁴ Where an injunction has been obtained upon insufficient grounds, the court may award compensation to the defendant,⁵ presumably for the immediate natural consequences of the injunction under the circumstances which were within the knowledge of the party obtaining the injunction.⁶ An order granting or refusing a temporary injunction is open to appeal.⁷ It is discharged as a matter of course upon the dismissal of the suit.⁸

I now come to perpetual injunctions. These may be granted at the hearing and upon the merits of the suit,⁹ to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication;¹⁰ and their effect is to restrain the defendant permanently from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.¹¹ I have endeavoured to show to you before¹² that the right to an injunction is primary. Owing to the peculiar constitution of the English Courts of Chancery and the commercial spirit so characteristic of

Perpetual
injunction.

& Cr., 433, 1 Ames, 635; *Bridson v. Mc Alpine* [1845] 3 Beav., 229, 330; *Plympton v. Malcolmson*, supra; *Kerr, Inf.*, 5th. ed. 346.

¹ *Partington v. Booth* [1817] 3 Mer., 148.

² C. P. C., s. 496; Act V of 1908, Sch. i, Or. 39, r. 4.

³ C. P. C., s. 494; Act V. of 1908, Sch. i, Or. 39, r. 2; *Sanwal v. Narpal* [1908] 11 O. C., 151.

⁴ *Hilton v. Granville* [1841] 4 Beav., 130; *Freeman v. McArthur* [1851] 2 Tay. & B., 10; *Sohochurry v. Hurree* [1859] 2 Boul., 62; *Kerr*, 5th. ed. *Inf.*, 676.

⁵ C. P. C., s. 497; Act V of 1908, s. 95.

⁶ *Smith v. Day*, [1882] 21 Ch. D.,

421. See also *Griffith v. Blake*, [1884] 27 Ch. D., 474.

⁷ C. P. C., s. 558 (24); Act V of 1908, Sch. i, Or. 43, r. 1 (r); the appellate order is final. But an appellate court will not lightly interfere, unless there has been palpable error or abuse of discretion, *Richards v. Dower* [1883] 64 Calif., 62, 1 Ames, 519, and will prefer to allow matters to remain in *statu quo*, *Chandra v. Sree Gobind*, supra.

⁸ *Neel Gomul v. Bipro Dass* [1901] 28 Cal., 597, 607.

⁹ S. R. A., s. 53.

¹⁰ *Ibid*, s. 54.

¹¹ *Ibid*, s. 53. A perpetual injunction concludes a right, *Kerr, Inf.*, 5th. ed. 2.

¹² Lect. I, ante, 25.

modern times, for long was it contended that no injunction could be issued where the ordinary courts of law might decree adequate compensation in money. For years did learned judges in England refuse to enjoin trespass unaccompanied by waste,¹ and they would not issue mandatory injunctions at all.² It has been repeatedly asserted that in equity a decree is never of right, as a judgment at law is, but of grace,³ that a court of equity has a certain latitude in the exercise of its great power,⁴ and grants an injunction at discretion. But it has been truly observed that "the rights to equitable relief, where that is the only adequate remedy, are as absolute as to legal relief, the one remedy is no more sacred than the other, and no more capable of lawful denial."⁵ And in later English decisions, a right as of course to an injunction in a proper case has been amply acknowledged.⁶ "I am most unwilling," said Mellish, L. J., "to make a difference between law and equity when I do not find it exist."⁷ In *Martin v. Price*,⁸ the Court of Appeal⁹ said: "The plaintiff's legal right and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right; but we can discover none in this case." And in the later case of *Shelfer v. London Electric Lighting Co.*,¹⁰ the same principle was re-affirmed, and a protest entered against the notion that a court ought to allow a wrong to continue, simply because the

Right of
course to
injunction
in proper
case.

¹ See authorities reviewed in *Haigh v. Jaggard* [1845] 2 Coll. Ch., 231; *Davenport v. Davenport* [1849] 7 Hare, 217, 1 Ames, 496; and *Lowndes v. Bettie* [1864] 33 L. J., Ch., 451, 1 Ames, 499.

² See *Smith v. Smith* [1875] 20 Eq., 500, 1 Ames, 543.

³ Per Thompson, C. J., *Richards's Appeal* [1868] 57 Pa., 105, 1 Ames, 575.

⁴ Per Gray, J., *O'Reilly v. N. Y. Elev. R. Co.*, 148 N. Y., 347.

⁵ Per Campbell, C. J., *Edwards v. Allouez Mining Co.* [1878] 38 Mich., 46, 1 Ames, 610.

⁶ In *Imperial Gas, &c., Co. v.*

Broadbent [1859] 7 H. L. C., 600, 610, a nuisance having continued and been aggravated, Lord Campbell, C., said: "Under these circumstances, unless there is something peculiar in this case, it would be a matter of course to grant an injunction."

⁷ *Leech v. Schweder* [1874] 9 Ch., 463, 476.

⁸ [1893] 1 Ch., 276.

⁹ Lindley, A. L. Smith, and Davey, L. JJ.

¹⁰ [1895] 1 Ch., 287, judgment of Kekewich, J., was reversed by Lord Halsbury, C., Lindley and A. L. Smith, L. JJ.

wrongdoer was able and willing to pay for the injury he might inflict. "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances," said Lindley, L. J., "such jurisdiction ought not to be exercised in such cases, except under very exceptional circumstances."¹ So in America the right to an injunction in a proper case has been said to be fixed and certain. "The writ can be rightfully demanded," said Earl, J., "to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate jurisdiction. It is a matter of grace in no sense except that it rests in the sound discretion of the court."² And as to discretion another learned judge has explained: "If by 'discretion,' is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less...But if the word 'discretion' in this connection is used in its secondary sense, and by it is meant that the Chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing these rights, then I deny such power."³ The result of the recent cases, truly observes Mr. Nelson, is to make Injunction the rule and Damages the exception.⁴ The Specific Relief Act, however, was framed at a time when a more restricted view of the equitable jurisdiction seems to have prevailed, and it has even been suggested at Bombay, that in cases before courts subject to this Act, the later English decisions have no application.⁵ But this suggestion has been

¹ Cf. *Jordeson v. Sutton, &c., Gas Co.* [1899] 2 Ch., 217.

² *Campbell v. Seaman* [1876] 63, N. Y., 568, 1 Keener, 751; *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St., 116.

³ Per Pitney, V. C., *Hennessy v. Carmony* [1892] 50 N. J. Eq., 616, 1 Ames, 582. The Vice-Chancellor added, "It seems to me that the true scope of the exercise of this

latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right." Cf. per Jessel, M. R., *Smith v. Smith*, supra.

⁴ Nelson, S. R. A., 296; *Inj.*, 60; *Muthukrishna v. Somalinga* [1911] 21 M. L. J. R., 742.

⁵ *Newaz Jung v. Rustamji Nanabhoy* [1896] 20 Bom., 704.

repudiated at Allahabad ;¹ and it is hard to see why, in interpreting and applying the provisions of an enactment admittedly based upon the principles of English equity jurisprudence, the latest and most approved authoritative expositions of those principles should not be resorted to.² Where the Indian legislature lays down that "an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding,"³ the stress is upon "equally efficacious" and upon "certainly," and where a decree for damages cannot even in effect restore the parties to the *status quo ante* and prevent a recurrence of the injury, monetary compensation, however bountiful, is manifestly inefficacious.⁴ So there is not much difficulty in fitting the more liberal principles of advancing judicial conscience into the iron bed of the codified discretion prepared for our courts by the legislature, and relief should be administered to suitors in this country according to the spirit of a beneficent legislation. Indeed sections 54 and 55, Specific Relief Act, did not introduce any new principles of law into India, but only attempted to express in general terms the rules acted upon by courts of equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience.⁵

Legislative
bars.

I will first consider what have been called legislative bars to injunction in British India.⁶ As in section 21, so in section 56, the legislature has taken a number of the principal rules by which courts of equity in England and elsewhere have been guided in the exercise of their judicial discretion, and these have been formally enacted as so many exceptional cases where Indian courts cannot administer specific relief. This is in more than one way unfortunate, though the section of the statute no doubt furnishes a convenient summary of the leading principles

¹ *Yaro v. Sanaullah* [1897] 19 All., 257. *Nelson, Inj.*, 63-4.

² *Ramanjulu v. Apparanji* [1911] 21 M. L. J. R., 319, 319.

³ S. R. A., s. 56(i).

⁴ *Of. Bal Samrat v. Sardarsang* [1911] 13 Bom. L. R., 905.

⁵ *Per Wilson, J., Shamnugger Jute Factory v. Ram Narain* [1886] 14 Cal., 189, 199.

⁶ *Nelson, S. R. A.*, 296 ; *Inj.*, 27, 61. *McCabe v. Atchison Ry. Co.* [1914] 235 U. S.

for judges not learned in the law. Let us now consider these principles.

It is an elementary principle of law that no plaintiff can maintain a suit to obtain a relief for which he cannot show in himself a *locus standi*. The plaintiff cannot succeed because some one else may be hurt, though of the same race or occupation. This principle is embodied in clause (k), section 56. The applicant for an injunction must prove a *personal interest* in the matter.¹ His suit should not be an imposition upon the court.² But the *quantum* of the interest, if he has some, is not material,³ nor, as a general rule, will a court enquire into the motives with which a suit has been instituted, provided the plaintiff has a real and legal interest to protect.⁴ In the case of public funds, for instance, a person interested in the smallest degree may sue, if there is malversation, and pray for an injunction.⁵

Plaintiff's
interest.

Another ground personal to the plaintiff which will bar injunctive relief, is such conduct on his or his agent's part as disentitles him to the assistance of the court.⁶ For, where the discretionary and equitable jurisdiction of a court is invoked, the applicant must come with clean hands, and show that his own actions, which are relevant to the controversy, have been fair and equitable.⁷ It is a principle of that court, *e.g.*, with respect to partnership concerns, that a partner, who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself to do his duty towards them.⁸ Where, therefore, the plaintiff, who seeks to restrain his partner (defendant) from receiving the partnership-debts and effects, has improperly possessed himself of the books of the firm and denied the defendant access to them, the court will refuse the injunction.⁹ Nor will the court support a false or fraudulent claim. This question has often arisen with regard

Plaintiff's
unfair conduct.

¹ *Forrest v. Manchester S. & L. Ry. Co.*, [1861] 30 Beav., 40 (nominal plaintiff).

² *Hare v. London & N. W. Ry. Co.* [1861] 7 Jur., N. S., 1145, 2 J. & H., 80.

³ *Ibid*; *Bloxam v. Metropolitan Ry. Co.* [1868] 3 Ch. Ap., 337, 353-4.

⁴ *Hare v. London, &c., Ry. Co.*, *supra*.

⁵ *Vaman v. Municipality of Sholapur* [1897] 22 Bom., 646, 652-3 (tax-

payer sued to restrain improper use of municipal funds).

⁶ S. R. A., s. 56 (j).

⁷ *Seeni Chettiar v. Santhanathan* [1896] 20 Mad., 58.

⁸ *Const v. Harris* [1824] T. & R., 496 523.

⁹ S. R. A., s. 56, ill. (a); *Littlewood v. Caldwell* [1822] 11 Price, 97.

to articles described as patented or of special virtue. If a trade-mark, *e.g.*, represents an article as protected by a patent, when in fact it is not so protected, there is a misrepresentation of a material fact, which would preclude the owner of the trade-mark from obtaining an injunction against a rival dealer who pirates it;¹ and it does not matter whether the protection by patent never existed or has at the time ceased to exist.² So, if an article vended as "Mexican Balm," and said to be compounded of divers rare essences and possessing sovereign medicinal qualities, is really nothing but scented hog's lard, the vendor's description is dishonest, and he cannot restrain another dealer from selling a similar article so named and described as to lead people into the belief that they are buying the former's so called "Mexican Balm."³ An exclusive privilege for deceiving the public, it has been well said, is assuredly not one that a court of equity can be required to aid or sanction.⁴

Delay,
acquies-
cence.

Acquiescence in the wrong complained of and delay in seeking the protection of the court, may also disentitle a plaintiff to equitable relief. But if either circumstance is relied upon, it must be shown that the legitimate inference or the legal

¹ *Morgan v. McAdam* [1867] 36 L. J., Ch., 228; S. R. A., s. 56, ill. (b).

² *Leather Cloth Co. v. American Leather Cloth Co.*, [1865] 11 H. L. C., 523, 543. But if the word 'patent' is not so used as to indicate an existing protection, but merely as part of the designation of an article known by that name in the market, or as a pure term of art, as in 'patent leather' or 'patent thread,' there is no misrepresentation. *Marshall v. Ross* [1869] 8 Eq., 651.

³ *Perry v. Truefitt* [1842] 6 Beav., 66; S. R. A., s. 56, ill. (c); *Pidding v. How* [1837] 8 Sim., 477 (tea falsely sold as "Howqua's mixture"); *Fetridge v. Wells*, 13 How. Pr., 385 (liquid named "Balm of a Thousand Flowers," though not an extract or distillation of flowers); *Bile Bean Mfg. Co. v. Davidson*, [1907], 8 F., 1181; *Connell v. Read*, 128 Mass., 477 (medicine falsely described as from "East Indies"); *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 187 U. S., 516 ("fig syrup" of which figs constituted very small, if any, part). In this last case, Shiras,

J., stated the law thus: "It is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

⁴ 2 Pomeroy, *Eq. R.*, s. 582, p. 999. An injunction to protect a quack patent medicine has been refused, *Heath v. Wright*, 3 Wall. Jr., 141. But see *Holloway v. Holloway* [1850] 13 Beav., 209, where the court proceeded on the ground of fraud. Puffing advertisements will not bar a right to injunction, *Curtis v. Bryan*, 2 Daly, 312.

result of the plaintiff's conduct is that he has abandoned his rights or is estopped from asserting them. Delay short of the statutory period of limitation is not of much consequence,¹ unless in the meantime the situation of the parties has been so altered as to prejudice the defendant.² The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice,³ and the inference to be drawn from the plaintiff's delay may be negated by a consideration of his conduct during the time which has elapsed.⁴ Mere delay may be a material consideration where an interlocutory injunction is applied for, but "it cannot have any bearing," said Romilly, M. R., "at the hearing of the cause," for then the plaintiff is entitled to have his property protected for the future.⁵ The court will not act upon light grounds against the legal right of the parties; consequently lapse of time alone, without fraud or such acquiescence as in the view of the court would make it a fraud in the plaintiff afterwards to insist upon his legal right,⁶ will not be a bar to the granting of an injunction at the trial, unless it would be a bar to the legal right itself, in aid of which the injunction is sought.⁷

An injunction, having been originally granted as a

Other equally efficacious relief.

¹ *Kanakasabai v. Muttu*, [1890] 13 Mad., 445, 446; *Lindsay Petroleum Co. v. Hurd* [1874] 5 P. C., 221, 240. *Per* Ringer, C. J.: "Where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defence to such an action." *Galway v. Metrop. Elev. Ry. Co.* [1891] 128 N. Y., 138, 1 Ames, 605. *Bigelow, Estoppel*, 476 sqq. *Ante*, 377-9.

² *Jamnadas v. Atmaram* [1877] 2 Bom., 133, 138.

³ *Per* Sanborn, Ct. J. *Ide v. Thorlicht*, [1902] 115 Fed., 137, 1 Ames, 643. This was a patent case, and the learned judge further observed: "Unreasonable delay and the deceitful acts or silence of a patentee which induce an infringer to incur expenses or to become liable to losses and damages which he would not otherwise have suffered, may sometimes justly induce a court of equity to stay his suit for

an infringement or for an accounting before the time fixed by the analogous statute of limitations has expired. But delay, unaccompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action."

⁴ *Land Mortgage Bank of India v. Ahmedbhoy* [1882-3] 8 Bom., 35.

⁵ *Turner v. Mirfield* [1865] 34 Beav., 390, 1 Ames, 558 (case of nuisance, bill not filed till 6 months after nuisance was perceived).

⁶ *Willmott v. Barber* [1880] 15 Ch. D., 96, 105; *Russell v. Watts* [1884] 25 Ch. D., 559, 585; *Proctor v. Bennis* [1887] 36 Ch. D., 740, 758; *Baswantapa v. Baru* [1884] 9 Bom., 86, Lightwood, *Time Limit*, 253.

⁷ *Fullwood v. Fullwood* [1878] 9 Ch. D., 176; *Rowland v. Mitchell* [1896] 75 L. T., 65; *Rochdale Canal Co. v. King* [1851] 2 Sim., N. S., 78, 88, 89 (Cranworth, C.). *Kerr, Inj.*, 5th, ed. 25, 37.

supplemental remedy, is also not issued in cases where the plaintiff may be certain of obtaining equally efficacious relief by any other usual mode of proceeding.¹ Thus, where the defendant is a person in possession, and the suit is in substance brought to turn him out of possession, and to give possession to the plaintiff, the latter should seek the direct remedy of ejectment and not the indirect one of injunction,² even though the plaintiff happens to be a trustee.³ And if the injury complained of is a crime, it will not be restrained by an injunction.⁴ The party aggrieved should move the criminal courts and ordinarily he cannot be enjoined from doing so.⁵ But if the crime is also a tort, *e.g.*, a nuisance,⁶ and affects the enjoyment of property, a civil court may interfere,⁷ and it will readily do so where a corporation abuses its powers.⁸ Injury to property is a civil cause of action.⁹ Where a decree has been obtained in an administration suit, it operates in favour of all creditors, who may claim payment according to their respective rights and priorities. Any individual creditor, therefore, who was not a party to the suit and seeks to proceed

¹ S. R. A., s. 56 (i).

² *Deere v. Guest* [1836] 1 My. & Cr. 516, 1 Ames, 492, expld. in *Goodson v. Richardson* [1874] 9 Ch. Ap., 221, 1 Ames, 503; *Kanakasabai v. Muttu*, supra. Distinguish *Surendra v. Hari Misser* [1903] 31 Cal., 174, 177-8.

³ *Rathuasabapatty v. Ramasami* [1910] 33 Mad., 452.

⁴ *Attorney-General v. Sheffield Gas Co.* [1853] 3 DeG. M. & G., 304, 320.

⁵ *Cf.* S. R. A., s. 56 (e); *Kerr v. Corporation of Preston*, [1877] 6 Ch. D., 466. *Paulk v. Sycamore* [1898] 41 L. R. A., 772.

⁶ *Carleton v. Rugg*, 149 Mass., 550; *Attorney-General v. Fitzsimmons*, [1896] 35 Am. L. Reg., 100, 1 Ames, 622 (bill to restrain prize fight. Martin, C., said: "While conceding that courts of equity have no power to enforce the criminal statutes of the state, and no jurisdiction to enjoin the commission of crimes ordinarily yet where the crime arises from, or is a constituent part of, a public nuisance, they should not fail to exercise their extraordinary powers to abate the nuisance; and in doing

this, they may, by proper orders, prevent the commission of the crime").

⁷ *Macaulay v. Schakell* [1827] 1 Bligh., N. S., 96, 127; *Attorney-General v. G.N. Ry. Co* [1850] 4 DeG. & S., 75. *Spelling, Inj.*, 23.

⁸ *E.g.*, in *Columbian Athletic Co. v. State*, [1895] 28 L. R. A., 727, 731, a prize fight was enjoined, with the remark: "It comes with an ill grace from a corporation to aver that, because the abuse of its corporate privileges consists in committing crime, civil remedies are unavailing. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding, by asserting its own infamy and insisting that redress can only be had under the laws punishing crimes."

⁹ "The subject-matter of equity jurisdiction is the protection of civil rights and private property, and not the punishment or prevention of crime or immoral acts when not in connection with violations of private rights," *Spelling, Inj.*, 37.

against the debtor's assets for his debt, may be enjoined from doing so, at the instance of the person who has obtained the decree.¹

Damages adequate.

In some cases, again, damages may really be an adequate remedy, *e.g.*, where a plaintiff has shown that he only wants money,² or has so conducted himself as to render it unjust to give him more than pecuniary relief; or the cases are vexatious and oppressive,³ of trivial, and occasional⁴ nuisances *e.g.*, or of purely technical trespass,⁵ or the acts complained of are already finished.⁶ But if the absence of a plain and adequate remedy at law affords, as has been sometimes said, the only test of equity jurisdiction, the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings.⁷ It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient for the ends of justice, and its prompt administration, as the remedy in equity.⁸ The injury complained of may be irreparable,⁹ *e.g.*, where it threatens to destroy the plaintiff's property,¹⁰ or where its extent cannot be ascertained,¹¹ or where its recurrence can be compensated for, if at all, by repeated suits.¹² Where the wrong complained of is a continued unlawful occupation, any remedy, which does not or may not end it,

Irreparable injury.

¹ S. R. A., s. 54, ill (q).

² *Edwards v. Allouez Mining Co.* [1878] 38 Mich., 46, 1 Ames, 608.

³ *Hunter v. Carroll* [1888] 64 N. H., 572, 1 Ames, 529.

⁴ *Swaine v. Great Northern Ry. Co.* [1864] 4 De G. J. & S., 211, 1 Ames, 570.

⁵ *Gates v. Lumber Co.* [1899] 172, Mass., 495, 1 Ames, 520; *Cooper v. Crabtree* [1882] 20 Ch. D., 589, 1 Ames, 504.

⁶ *Shelfer v. London Electric L. Co.*, supra, 1 Ames, 593 (Lindley, L. J.).

⁷ *Watson v. Sutherland* [1866] 5 Wallace, 74, 1 Ames, 532.

⁸ *Boyce's Executors v. Grundy*, 3 Peters, 210.

⁹ English and American lawyers frequently speak of "irreparable injury;" but this does not mean that there is no physical possibility of repairing the injury; all that is meant is that the injury is a serious, or at least a material one, and not adequately re-

parable by damages. And this may be so, because damages cannot be accurately ascertained, or they may not be such a compensation as will in effect, though not *in specie*, place the parties in the position in which they formerly stood, or owing to the delay incident to the prosecution of a suit to final judgment and execution, a decree for damages may prove fruitless of beneficial results." 1 Joyce, *Inv.*, 75; Spelling, *Inv.*, 19; Kerr, *Inv.*, 5th. ed. 18-9. *Ainsworth v. Munoskong Club* [1908] 17 L. R. A., N. S., 1236.

¹⁰ *Hilton v. Earl Granville*, [1841] Cr., & Ph., 283, 292; *Aynsley v. Glover* [1874] 18 Eq., 544, 552.

¹¹ *Pennington v. Brinks of Hall Coal Co.* [1877] 5 Ch. D., 769.

¹² *Cf.* S. R. A., s. 54(e). *Hacke's Appeal*, 101 Pa. St., 245 (disturbance of easement); *Williams v. New York C. R. Co.* [1857] 16 N. Y., 97, 1 Ames, 522 (trespass).

is manifestly not adequate to redress the injury or restore the injured party to his rights.¹ So, if the stock-in-trade of a shop-keeper is wrongfully attached in execution of a decree against a stranger, besides the injury to the property taken, collateral, or consequential damages in the shape of loss of trade, destruction of credit, and failure of business prospects are also likely to follow. Pecuniary compensation for such commercial ruin cannot but be uncertain in amount and speculative in character. The ends of justice clearly require an injunction, and nothing short of it, in such a case.² So also in a case where the wrongdoer belongs to the poorer classes or is insolvent.³ Damages against a pauper cannot be an effectual protection to the plaintiff in the enjoyment of a legal right. As against persons in such position "such a form of redress," remarked Stuart, V. C., "would be the merest mockery of justice."⁴ A plaintiff may agree that the remedy for the injury in question shall be by damages, and thus be estopped from alleging that the said injury is irreparable.⁵ But an offer to treat or to accept money as the price of abstaining from taking legal proceedings, will not preclude a plaintiff from showing that damages will not afford him either certain or adequate relief.⁶ And if the injury complained of is a breach of trust, no question of damages arises. The damage may be small and pecuniary compensation may afford full satisfaction, but the plaintiff has a right to insist on specific relief.⁷ To this question of damages as an alternative remedy for an injunction, I shall have to recur when I come to discuss particular breaches of obligation, and so I will now pass on to other legislative bars to this form of equitable relief.

Act of state. The nature of the relief asked for may, again, stand in the plaintiff's way of getting an injunction. There can be no injunction, *e. g.*, to interfere with the public duties of any

¹ *Wheelock v. Noonan* [1888] 108 N. Y., 179, 1 Ames, 527.

² *Watson v. Sutherland*, *supra*.

³ *Smallman v. Onions* [1792] 3 Bro. C. C., 621; *Lyons v. Williams* [1896] 1 Ch., 811, [1899] 1 Ch. 245; *Charnock v. Court* [1899] 2 Ch., 85.

⁴ *Hodgson v. Duce* [1856] 2 Jur., N.

S., 1014, 1 Ames, 524.

⁵ *Muncherji v. Noor Muhomedbhoy* [1898] 17 Bom., 711.

⁶ *Ainsworth v. Bentley* [1866] 14 W. R. (Eng.), 630; *Dent v. Auction Mart Co.* [1866] 2 Eq., 238, 246.

⁷ S. R. A., s. 54 (a), ill. (f).

department of the Government of India or the Local Governments, or with the sovereign acts of a Foreign Government.¹ No municipal court can question an act of state,² nor has it jurisdiction over persons domiciled elsewhere or places outside its territorial limits.³ But the action of the department of Government which is protected is a *bona fide* action; if it can legally do an act and has done it, it is not for a court of law to say that it has exercised an improper discretion in discharging its duty.⁴ If, however, a servant of Government perpetrates a wrong, he cannot escape merely by pleading that it was committed under the orders of the department.⁵

Nor will a court grant an injunction to restrain persons from applying to any legislative body,⁶ whether inland or foreign.⁷ In England, the jurisdiction to enjoin a person from petitioning Parliament has been often affirmed,⁸ but does not seem to have been ever exercised.⁹ The abrogation of existing rights and the creation of new ones will not apparently justify an injunction, for that would be in restraint of Parliamentary interference,¹⁰ nor will a contract not to apply to Parliament entered into for the protection of private rights be specifically enforced, as the applicant may urge his petition upon grounds of public policy which it is for the Parliament to judge.¹¹ As in the case of all applications to the legislature, grounds of a public nature may be urged, in India the jurisdiction has been taken away by statute.

Application to legislature.

¹ S. R. A., s. 56(d); *Gladstone v. Ottoman Bank* [1863] 1 H. & M., 505.

² Authorities are collected in 8 Bom. L. R. 66-76; 2 A. L. J., 189-196. See also Moore, *Act of state, passim*.

³ *Vavasour v. Krupp* [1878] 9 Ch. D., 351 (public property of Mikado of Japan, manufactured in Germany, not stopped in England, though infringement of English patent).

⁴ *Hawley v. Steele* [1877] 6 Ch. D., 528.

⁵ *Raleigh v. Goschen* [1898] 1 Ch., 73.

⁶ S. R. A., s. 56 (c).

⁷ *Bill v. Sierra Nevada Co.* [1859] 1 DeG. F. & J., 177. But a fit case for an injunction cannot be resisted on the ground that the defendant intends to apply to a legislative body in the matter, *Telford v. Metropolitan Board*

of Works [1872] 13 Eq., 574, 594.

⁸ *Steele v. North Metropolitan Tramway Co.* [1867] 2 Ch., 238n. Fry, s. 1606, p. 672.

⁹ Except perhaps indirectly where at the instance of a dissenting shareholder the application of the funds of an incorporated company to defray the expenses of obtaining an Act of Parliament for altering the constitution of the company has been restrained, but even in these cases the other shareholders have been left at liberty to pay the expenses out of their own pockets. *Hawkes v. E. O. Ry. Co.* [1852] 1 DeG. M. & G., 737.

¹⁰ *Heathcote v. North Staffordshire Ry. Co.* [1850] 2 M. & G., 100.

¹¹ *Lancaster & C. Ry. Co. v. North Western Ry. Co.* [1856] 2 K. & J., 293.

Stay of
proceedings.

And as courts in India are courts both of law and of equity, there is scarcely room for the jurisdiction, so often asserted in England¹ and America,² of staying proceedings at law. This jurisdiction was entertained in respect of actions pending in foreign courts too, and was said to be grounded not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom the order was made being within the power of the court.³ The English Judicature Act⁴ has effected an amalgamation and left but two courses open to a party who may previously have obtained an injunction from the Court of Chancery in restraint of legal proceedings. He may either plead the matter (that might have justified an injunction) as a defence to the action, or make it the ground of application to the court seized of the action to stay the proceedings therein.⁵ The Indian statute follows this later English practice,⁶ and inhibits an injunction to stay

Civil Courts.

(i) proceedings in a court not subordinate to that from which the injunction is sought;⁷

(ii) a judicial proceeding pending at the institution of the suit in which the injunction is sought, provided, in the latter case, that the restraint is not necessary to prevent a multiplicity of proceedings.⁸

Proceedings therefore in a court of superior or co-ordinate jurisdiction cannot be stayed, nor in the court whose assistance is invoked, for it cannot be said to be subordinate to itself.⁹ Pending proceedings even in a subordinate court can be stayed

¹ See 1 Ames, 5, *Earl of Oxford's Case* [1616] 13 Jac., 1; 1 Wh. & T., 8th. ed. 773.

² 2 Pomeroy, *Eq. R.*, ch. xxxi

³ *Per* Lord Brougham, *Lord Portington v. Souby* [1834] 3 My. & K., 104, 1 Ames 25. In *Hunt v. Hunt* [1862] 4 DeG. F. & J., 221, 1 Ames, 131, where an injunction was granted to restrain proceedings for restitution of conjugal rights instituted by the husband in violation of a covenant in a separation-deed, Lord Westbury said, "An injunction is directed against the individual, and is not a prohibition addressed to the court; it admits the jurisdiction of the court." (*Cf.* *Raja Ram v. Dharam Das* [1905]

2 A. L. J. R., 601, a ruling under s. 492, C. P. C.)

⁴ 36 & 37 Vict. c., 68, s. 24, subs. 5; *Re Artistic Colour Printing Co.* [1880] 14 Ch. D., 502, 505.

⁵ *Garbut v. Fawcus* [1876] 1 Ch. D., 155; Fry, s. 1164, p. 501.

⁶ *Venkatesa v. Ramasami* [1895] 18 Mad., 338, 341.

⁷ S. R. A., s. 56 (b).

⁸ *Ibid.*, (a). *Cf.* with this C. P. C., s. 10.

⁹ *Venkatesa v. Ramasami*, *supra*, 342; *Setthurayar v. Shanmugam*, [1897] 21 Mad., 353. *Of. Deno Nundy v. Hari Mati* [1903] 31 Cal., 480, 486 (Hill, J.).

only upon the ground of the necessity to prevent a multiplicity of suits, but there is nothing to preclude the enjoining of the institution of proceedings there.¹ In England, specific performance has been decreed of an agreement, one term of which provided for the dismissal of an action which, at the time of the agreement, was pending in the Probate and Divorce Division.² And in India, the execution of a decree has been held to be capable of restraint, where the evidence showed it to have been improperly³ or corruptly⁴ obtained. But it is worth while to point out that even in England "the court never did by injunction restrain a proceeding. What it did," said Jessel, M.R., "was to restrain a party to a cause from going on. Therefore when the (Judicature) Act says no cause or proceeding shall be restrained by injunction, it means that no party shall be restrained from going on with his action."⁵ In granting injunctions, the court operates *in personam*,⁶ and there is no reason for thinking that the Indian legislature, when it spoke of staying proceedings by injunction, intended any departure from well-settled practice. What is prohibited, therefore, is the issue of an injunction, not merely to a court, but also to the parties concerned.⁷

Proceedings in a criminal matter will also receive the same respect.⁸ It is not for civil courts to invade the domain of criminal courts or of the executive and administrative departments of the government.⁹ And a plaintiff, who has sustained loss by reason, say, of fraud or conspiracy, may maintain a civil action for damages and at the same time criminal proceedings to punish the wrong-doer.¹⁰ If the proceedings in the two courts are identical, it has been suggested in England that the court may order that the same

Criminal
courts.

¹ *Uf, Besant v. Wood* [1879] 12 Ch. D., 605, 630.

² *Hart v. Hart* [1881] 18 Ch. D., 670, 680.

³ *Moran v. River Steam Nav. Co.* [1875] 14 B. L. R., 352; *Dhuronidhur Sen v. Agra Bank* [1879] 5 Cal., 86, 95-6.

⁴ *Kunhamed v. Kutti* [1891] 14 Mad., 167; *Appu v. Raman*, *ibid*, 425, 430; *Shib v. Krishna* [1911] 9 I. C., 576 (fraud). But see article 5 M. L. J., 162.

⁵ *Re Artistic Colour Printing Co.* [1880] 14 Ch. D., 502. *Snell, Eq.*, 17th, ed. 5-51 *Kerr, Inj.*, 5th, ed.

⁶ *Kerr, Inj.*, 608-51, *Residence with-5th, ed.* in jurisdiction therefore necessary, situation of property not enough, *Jumna v. Harcharan* [1911] 38 Cal., 405.

⁷ See 5 M. L. J., 159-165 (art).

⁸ S. R. A., s. 56(c).

⁹ *Ex parte Sawyer*, 124 U. S., 200.

¹⁰ *Saull v. Browne* [1875] 10 Ch. Ap., 64.

person shall not at the same time pursue one remedy in the civil court and another in the criminal.¹ But such a contingency can only arise where the proceedings in the latter court are not purely criminal.² The section speaks of staying proceedings in a criminal matter; I apprehend, therefore, there is no bar to enjoining contemplated prosecutions, where proceedings are only threatened and are not yet pending.³

Operation of
injunction.

An injunction by its very definition cannot act retroactively, it can only affect the status of things *in præsentis* and *in futuro*.⁴ But, so far as it can operate, it may be characterised as a "most efficient, humane, and flexible remedy."⁵ It may be granted, as we have seen, to prevent or forbid a breach of contract or a tort.⁶ Where the obligation which the court seeks thus to enforce arises from contract, the principles upon which it grants specific performance must be borne in mind. For an injunction is a form of specific relief, it forbids a party to do what he has contracted not to do, and it compels a party to do what he has contracted to do. "A prohibition, preventing the commission of an act, may as effectually perform an agreement," said Lord St. Leonards, "as an order for the performance of the act agreed to be done."⁷ Therefore, whatever is a good defence to a suit for an actual affirmative execution of a contract, must be a good defence to a suit for what I may call its negative execution.⁸

Agreements.

¹ *Saull v. Browne*, supra, 66.

² *Cf. Re Briton Life Assn.*, [1886] 32 Ch. D., 503; *Kerr, Inj.*, 7. *Qy.* if exceptions recognised in England will be held good under S. R. A., s. 56(e), 5 M. L. J., 165 (art.)

³ It has been intimated in America that when prosecutions "are threatened under colour of an invalid statute, for the purpose of compelling the relinquishment of a property right, the remedy in Chancery is available." *Central Trust Co. v. Citizens' St. R. Co.*, 80 Fed., 218, and in many cases the enforcement, by criminal prosecutions, of void municipal ordinances, the execution of which directly affected property rights, has been enjoined, 1 *Pomeroy, Eq. R.* s. 354. But see *ante*, 608.

⁴ *Spelling, Inj.*, 12.

⁵ *Martin, C., Attorney-Genl. v. Fitzsimmons*, supra, who continued: "Under this form, the court can

prevent that from being done which, if done, would cause a nuisance; it can command an observance of peace before it is broken; it can save suffering, and sometimes disgrace to those who are in no way responsible; and in some instances, ... it can secure an obedience to the laws of the country that a court of law, pursuing the other remedy, could not do."

⁶ *Ante*, 28. Sir E. Fry points out that injunction is connected with specific performance of executory contracts in three ways, viz., as (i) the instrument of performance or (ii) merely ancillary to performance or (iii) for enforcement of rights resulting from non-performance; s. 1149, p. 494.

⁷ *Lumley v. Wagner* [1852] 1 DeG. M. & G., 604, 1 Ames, 94.

⁸ S. R. A., s. 54, para 2. "In all cases where specific performance can be decreed, the jurisdiction by injunction will attach as a matter of course, but

The defences to an action of the former kind I have already discussed. Here I will only point out that although, in all contracts, which are in substance affirmative, the parties contemplate the performance and not the breach, yet an injunction cannot be granted to prevent the breach, if the contract is not such that its specific performance would be enforced.¹ "Every agreement to do a particular thing in one sense," said Lindley, L. J., "involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum*; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it."² But there are contracts, which, though expressed in a positive form, are negative in substance.³ *E.g.*, a party may agree to a covenant not to exercise a trade or profession within certain limits, and if such a covenant is valid,⁴ as it may be in the case of a sale of the good-will of a business or of certain agreements among partners,⁵ not only a direct breach, but an evasion of it may also be restrained.⁶ Or a quarry-owner may agree not to make a tender for the supply of stone as invited by a corporation, in consideration of another quarry-owner, who was going to make another tender, purchasing his stone. If he does make

Negative
covenants.

it is not confined to such cases, but will be exercised in all cases where it can operate to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreement," Kerr, *Inf.*, 5th. ed. 429. Where period of agreement expires before decree, injunction ceases to be appropriate remedy, *Fraser v. Bomlay Ice Mfg. Co.* [1905] 29 Bom. 107, 119.

¹ S. R. A., s. 56 (f). *Mair v. Himalayan Tea Co.* [1866] 1 Eq., 411; *Fothergill v. Rowland* [1873] 17 Eq. 132. 1 Ames, 111; *Nusserwanji v. Gordon* [1881] 6 Bom., 266; *Re Ganpat Narain Singh* [1875] 1 Cal., 74. Injunction may be granted against an improper dismissal of a teacher by breach of contract; *Smith v. Macnally* [1912] 1 Ch., 816.

² *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch., 416, 1 Ames, 119.

³ *Catt v. Tourle* [1869] 4 Ch. A., 654 (agreement on contract of sale of land that vendor shall have exclusive right of selling beer to any public house erected on the land, really negative). But see as to this case, *Zetland v. Hislop* [1882] 7 A. C., 447. *Langdell, Eq. J.*, 72.

⁴ *Pragji v. Pranjivan* [1903] 5 Bom. L. R., 878. Distinguish *Leng v Andrews* [1908] 78 L. J., Ch., 80 (minor).

⁵ I. C. A., s. 27.

⁶ *Williams v. Williams* [1818] 2 Sw., 253, 2 Keener, 199; *Jones v. Heavens* [1877] 4 Ch. D., 636 (trade carried on ostensibly as manager of near relation); *Wilkinson v. Colley* [1894] 164 Pa. St., 35, 2 Keener, 300.

a tender in violation of the agreement, he may be enjoined from supplying stone to the inviter of the tender.¹ So there may be a covenant not to communicate special news to third persons,² not to give any but the plaintiff a certain business privilege,³ or even not to ring a bell in the morning.⁴ The specific enforcement of such covenants can be only effected by an injunction. The negative covenant may not and need not be the whole of the contract. Such a covenant, *e.g.*, may be entered into with the object of restricting either party in the user of property on the sale or demise of land; and this restrictive covenant, even where it does not run with the land, may bind transferees with notice.⁵ And the jurisdiction of the court to grant specific relief (not technically 'specific performance') in such a case will not be affected by the fact that the contract, of which the covenant forms a part, is executed; but the breach of an obligation arising out of this executed contract will be restrained by an injunction,⁶ even if there are other covenants to be performed by the plaintiff, which may be possibly broken hereafter, but which, if so broken, the court will not specifically enforce.⁷ Such questions may frequently arise between landlords and tenants.⁸ *E.g.*, where certain land was let to a tenant, who covenanted not to dig sand or gravel thereout, upon the penalty of paying £100 for every acre of land so broken up, the lessor obtained an injunction restraining digging, in violation of the covenant.⁹ So another tenant was restrained from breaking up meadow land with the object of

¹ *Jones v. North*, [1875] 19 Eq., 426, 2 Keener 278.

² *Exchange Co. v. Central News* [1897] 2 Ch., 48.

³ *Holmes v. Eastern Ry. Co.* [1857] 3 K. & J., 675; *Raphael v. Thames Co.* [1867] 2 Ch. A., 147; *Altman v. Royal Co.* [1876] 3 Ch. D., 228.

⁴ *Martin v. Nutkin* [1724] 2 P. Wms., 266, Finch, 776.

⁵ *Ante*, 386-91. In *Amerman v. Deane* [1892] 132 N. Y., 355, 2 Keener, 1050, injunction was refused, character and condition of adjoining lands, with reference to that conveyed, having so changed as to render the restriction in the conveyance inapplicable, according to its true intent and

spirit; relief sought was disproportioned to nature and extent of injury sustained or likely to be sustained. Damages were given. *High, Ind.*, ss. 22, 1158.

⁶ *Wolverhampton Ry. Co. v. London & N. W. Ry. Co.* [1873] 16 Eq., 439.

⁷ *Rigby v. G. W. Ry. Co.* [1846] 15 L. J. Ch., 271 (Wigram, V. C.)

⁸ *Fielden v. Slater* [1869] 7 Eq., 523.

⁹ *City of London v. Pugh* [1727] 4 Bro. P. C., 395 (it was shown that the tenant might raise £1000 worth of gravel for every £100 of penalty and, at the end of his term, leave the landlord the bottom of the gravel pit for his estate). *Cf. S. R. A.*, s. 54, ill. (a).

building thereupon.¹ Injunctions will similarly be granted to enforce covenants not to build,² or mow a park,³ or cut down trees,⁴ or kill game,⁵ or carry on certain trades,⁶ or even affix any outward mark of business.⁷ So lessees or transferees of building ground may covenant not to build beyond a fixed line of frontage⁸ or build anything but residential flats.⁹ And in issuing injunctions in support of negative covenants, English judges act upon the general rule that where parties have, for valuable consideration agreed, that a certain thing shall not be done, it is not for the court to criticise the agreement or say that the breach may not be injurious, or that it may even be beneficial.¹⁰ "If it be a contract duly entered into between the parties," said Romilly, M. R., "it is no answer to a violation of it to say that it will not inflict any injury upon one of the contracting parties."¹¹ The parties have the right to determine for themselves in what way and for what purposes their lands should be occupied, irrespective of pecuniary gain or loss, or the effect on the market-value of the lots of such condition.¹² It is not absolutely necessary that the negative covenant should be express: it may be implied from the circumstances.¹³

A lessee cannot be allowed to injure the leased premises.¹⁴ Lease.
A tenant therefore may be enjoined from sowing the land with

¹ *DeWilton v. Saxon* [1801] 6 Ves., 106.

² *Rankin v. Huskisson* [1830] 4 Sim., 13, 2 Keener, 306.

³ *Blagrove v. Blagrove* [1847] 1 De G. & S., 252.

⁴ *Nicholson v. Rose* [1859] 4 De G. & J., 10.

⁵ *Frogley v. Lovelace* [1879] Johns, 333.

⁶ *Kemp v. Sober* [1851] 1 Sim. N. S., 517; *Bramwell v. Lacy* [1879] 10 Ch. D., 691; *Steward v. Winters* [1847] 4 Sandf. Ch., 628, 2 Keener, 309. In the last case Sanford, V. C., said, "The owner of land, selling or leasing it, may insist upon just such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by

the definition." Cf. *Brigg v. Thornton* [1900] 73 L. J., Ch., 301.

⁷ *Evans v. Davis* [1879] 10 Ch. D., 747.

⁸ *Lord Mannors v. Johnson* [1875] 1 Ch. D., 673, 1 Ames, 130; *Pope v. Bell*, 35 N. J., 1. Cf. *Atty.-Genl. v. Algonquin Club* [1891] 153 Mass., 447, 2 Keener, 319. *Elliston v. Reacher* [1908] 2 Ch., 665.

⁹ *Hudson v. Cripps* [1896] 1 Ch., 265.

¹⁰ *Doherty v. Allman*, [1878] 3 A. C., 709 (Cairns, L. C.); *Tipping v. Eckersley* [1855] 2 K. & J., 264, 270 (Wood, V. C.).

¹¹ *Dickenson v. Grand Junction Canal Co.* [1852] 15 Beav., 260, 2 Keener, 318.

¹² *Trustees Columbia College v. Lynch* [1877] 70 N. Y., 440, 2 Keener, 580.

¹³ *Kimpton v. Eve* [1813] 2 V. & B., 349.

¹⁴ Cf. *Ward v. Duke of Buckingham* [1813] 10 Ves., 161 (cited).

more than two grain crops during four years,¹ or from sowing therein pernicious seed, like mustard, which damages the land and requires many years to eradicate.² Where arable lands are let for purposes of husbandry, though there may be no express contract as to the mode of cultivation, yet there is an implied contract to use them in a husband-like manner.³ The tenant of a dwelling-house may be restrained from fitting it for the business of a coach-builder⁴ or from using it as a charitable home for poor girls.⁵ The tenant may, on the other hand, claim an implied contract on the part of his landlord to keep property *in statu quo* and secure to him a continuous comfortable enjoyment thereof. Where, therefore, the owner of two adjoining houses let them to different tenants, he was enjoined from making such alterations in one of them (with the concurrence or assistance of the tenant thereof) as to prevent the comfortable enjoyment of the other by its tenants.⁶

Partnership.

In partnership engagements a covenant, that the partners shall not carry on for their private benefit that particular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course.⁷ Partners, therefore, even in the absence of express covenants, may be restrained from engaging in another concern of such a character as will necessarily give rise to a conflict of interests.⁸ And even in the case of a partnership determinable at will, one partner may be enjoined, at the instance of the others, from committing an act which tends to destruction of the partnership property, and this though no dissolution of the partnership is sought.⁹ Otherwise a dishonest partner may, at

¹ *Fleming v. Snook* [1842] 5 Beav., 250.

² *Pratt v. Brett* [1817] 2 Madd., 62.

³ S. R. A., s. 54, ill.(k). Tenant enjoined from building indigo factory on agricultural land, *Surendra v. Hari Misser* [1903] 31 Cal., 174.

⁴ *Bonnett v. Sadler* [1808] 14 Ves., 526.

⁵ *Rolls v. Miller* [1884] 25 Ch. D., 206.

⁶ *Palmer v. Paul* [1833] 2 L. J., Ch., 154; S. R. A., s. 54, ill. (j).

⁷ *Per Eldon, L. C., Morris v. Colman,*

[1812] 18 Ves., 437, 1 Ames, 89. A right of pre-emption may be specifically enforced, *Hornfray v. Fothergill* [1866] 1 Eq., 567.

⁸ *Glassington v. Thwaites* [1823] 1 S. & S., 124; *Mumtaz v. Kasim* [1913] 11 A. L. J. R., 423.

⁹ S. R. A., s. 54, ill.(l); *Miles v. Thomas* [1839] 9 Sim., 606, 609. As to when a court may direct a partnership to be wound up, see 1. C. A., s. 265; *Re Bristol Joint Stock Bank* [1890] 44 Ch., 703.

his will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by continued violation of the partnership contract.¹ But a court will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances between the partners, which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights, interests and operations of the partnership;² nor will the court undertake the internal management of a going concern.³ An injunction may sometimes even be so framed as to prevent a dissolution. *E.g.*, in the well-known case of *England v. Curling*,⁴ there was a partnership for a term not yet expired; but one partner, who desired a dissolution, joined another rival firm. Lord Langdale, M. R., enjoined him from carrying on business with his new partners, or otherwise than with his old partners, till the expiration of the term; and enjoined the new partners from carrying on business with him in the name of the other firm. He also prohibited the publication of any notice of the dissolution of this firm before the expiry of the term originally fixed upon.

I have stated above the general rule that there can be no injunction to prevent the breach of a contract not specifically enforceable.⁵ Another equally well-established rule, *viz.*, that where an agreement cannot be performed as a whole, the court cannot perform any part of it,⁶ is probably only a different form or an application of this. "If there is such an infirmity in the agreement," said Lord Cottenham, "that it cannot be performed in all parts, the court will not by an injunction compel the defendant to perform his part of it."⁷ The general rule, however, admits of an exception, and I will

General
rule against
partial en-
forcement.

¹ *Fairthorne v. Weston* [1844] 3 Hare, 387, 392.

² *Goodman v. Whitcomb* [1820] 1 J. & W., 589, 592.

³ *Carlen v. Drury* [1812] 1 V. & B., 154 (*Per Eldon, C.*, "This court is not to be required on every occasion to take the management of every play-house and brew-house in the kingdom: but if the case justifies the interference of the court, it may appoint a

manager in the interim for the purpose of winding up, and putting an end to, the concern").

⁴ [1844] 8 Beav., 129.

⁵ S. R. A., s. 56. (f)

⁶ S. R. A., s. 17. *Of Kimberley v. Jennings* [1836] 6 Sim., 340, 2 Keener, 204, *Gervais v. Edwards* [1842] 2 Dr. & War., 80, Finch 773.

⁷ *Dietrichsen v. Cabburn*, [1846] 2 Ph., 52, 1 Ames, 109.

S. R. A., s.
57.

state this in the authoritative words of the Indian Legislature. Section 57, Specific Relief Act, runs thus:

"Notwithstanding section 56 clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract, so far as it is binding on him."¹

An old case which proceeded upon this doctrine is that of *Martin v. Nutkin*.² The plaintiffs there resided quite close to the church of Hammersmith, and so were subject to a great annoyance in the daily ringing of a bell at 5 in the morning. In consideration therefore of an undertaking to stop the source of this annoyance, they covenanted with the parson, church-wardens, and some other parishioners to erect a new cupola, clock and bell to the church. The plaintiffs fulfilled their covenant, and when the bell began to be rung again after about two years, they obtained an injunction. Another interesting case is that of *Burfield v. Nicholson*,³ where a person, who, in selling a work, had covenanted not to do anything to injure the sale of the work, was enjoined from publishing a rival work on the same subject. But the great case which established the exception is that of *Lumley v. Wagner*.⁴ There, the defendant, Johanna Wagner, had agreed with the plaintiff that she should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere during that period, but she subsequently abandoned this contract and agreed with the co-defendant, Gye, to sing at the Royal Italian Theatre.⁵ Parker, V. C.,

*Lumley v.
Wagner.*

¹ Langdell has examined carefully the jurisdiction of equity in the matter of negative covenants, and points out that they will be enforced where the contract is unilateral or they form one independent side of a bilateral contract; if dependent, then the other side should have been performed in whole or in part, or the remaining affirmative covenant should be specifically enforceable. If there has been only a part performance of

the other side of the contract and an injunction is issued, it will have to be dissolved, in the event of a breach in respect of the remainder. *Eq. Jur.*, 68-72. See also art. by Ashley, 6 Columbia L. Rev., 82.

² [1724] 2 F. Wms.; 266, 2 Keener, 196.

³ [1824] 2 Sim. & St., 1. Cf. *Ajalo v. Lawrence* [1904] A. C., 17.

⁴ [1852] 1 De G. M. & G., 604, 1 Ames, 93, 6 R. C., 652.

⁵ Cf. S. R. A., s. 57, ill. (c).

granted an injunction, restraining her from doing so, and the order was upheld, after an elaborate examination of the authorities, by Lord St. Leonards, C. His lordship pointed out that the case did not consist of two correlative acts to be done, one by the plaintiff and the other by the defendants, but of an act to be done by Miss Wagner alone. "The agreement to sing for the plaintiff during three months at his theatre," said the Lord Chancellor, "and during that time not to sing for any body else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. Although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity."

In this case there was an affirmative agreement to do a certain act, *viz.*, to sing at the plaintiff's theatre, and a negative agreement not to do a certain act, *viz.*, to sing at any other theatre; and though the former agreement could not have been specifically enforced,¹ the court had no difficulty in so enforcing

Court grants all relief in its power.

¹ Cf. S. R. A., s. 21 (b).

the latter. It proceeded upon the idea not of inducing Miss Wagner indirectly to do one thing by prohibiting her from doing another,¹ but of leaving nothing unperformed which the court could ever be called upon to perform.² "The court repudiates the idea," said Lord Chelmsford, C., in a later case, "of indirectly compelling performance where it could not directly decree it. It gives all the relief in its power, without looking to the effect which may be ultimately produced by the restraint which it places on the party who is disposed to break his contract."³ Lord St. Leonards drew a distinction between a case where the negative stipulation is merely ancillary to, concurrent and operating together with, a positive stipulation by the same party, and one where the two stipulations consist of two correlative acts. A case of the latter description was *Hills v. Croll*⁴ already discussed. Where both the correlative stipulations are negative, either party may apparently have an injunction against the other⁵.

There is no distinction to be made between cases where the negative contract is but a separable part of a larger contract and where the negative contract is co-extensive with the positive contract.⁶ Nor does it matter that the negative stipulation is not express,⁷ so long as it is fairly inferrible from the circumstances. Affirmative agreements may involve a negative,⁸ and where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves, Malins, V. C., gave it as his deliberate opinion, the necessity of his or her not performing or singing at any other during that time,—“a negative contract” he said, “is as necessarily implied as if it had been plainly

Negative stipulation.
Sale of good-will.

¹ Cf. *per* Lord Eldon, C., *Clarke v. Price* [1819] 2 Wils., 157, 1 Ames, 90.

² *Per* Lord St. Leonards, C., *Lumley v. Wagner*, *supra*.

³ *De Mattos v. Gibson* [1859] 4 De G. & J. 276, 1 Ames, 104.

⁴ *Hills v. Croll* [1845] 2 Ph., 60, 1 Ames, 427; *ante*, 311.

⁵ *Morris v. Colman*, [1812] 18 Ves., 437, 1 Ames, 89 (*Per* Eldon, L. C.: “If Mr. Garrick were now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket theatre, and Mr. Colman with him to write for that

theatre alone? Why should they not thus engage for the talents of each other?”).

⁶ *Donnell v. Bennett* [1883] 22 Ch. D., 835, 1 Ames, 115. In *Stuart v. Diplock* [1887] 47 Ch. D., 343, part of a covenant (not to carry on certain trade in a house) was enforced. *Distinguish Brett v. E. I. Shipping Co.* [1864] 2 Hem. & M., 404, 2 Keener, 238.

⁷ *Donnell v. Bennett*, *supra*.

⁸ *Webster v. Dillon* [1857] 3 Jur., N. S. 432 (Wood, V. C.); *DeMattos v. Gibson*, *supra* (Chelmsford, L. C.)

expressed.”¹ The principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger.²

Where there is an express negative clause, there can be no difficulty. *E.g.*, a person selling the goodwill of a certain business may in so many words agree that he will not carry on that business at a certain place,³ and so may another person in consideration of a payment of money.⁴ But a contract of sale of the goodwill of a business, without any express stipulation forbidding the setting up of a similar business in the neighbourhood, will be taken to imply a covenant that the seller will not solicit his old customers to deal with him, in the event of his starting a similar business.⁵ Such solicitation will be an act wholly and directly inconsistent with the contract of sale, which ordinarily only transfers the possibility that the old customers will continue to resort to the old place of business.⁶ So will be the act of a clerk who, having contracted to serve faithfully one firm for a certain period, transfers his services to a rival house before the expiry of that period.⁷

Sale of goodwill.

The doctrine of *Lumley v. Wagner* has been applied in cases which have arisen between a theatrical company and an actor,⁸ a publisher and an author,⁹ a doctor and his assistant,¹⁰ an

Negative contracts enforced.

¹ *Montague v. Flockton* [1873] 16 Eq., 189, 1 Ames, 108. Lindley, L. J., doubted this decision in *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, Finch, 790, but it is clearly good law under *S. R. A.*, s. 57. *Callian v. Narsi Tricum* [1895] 19 Bom., 764, 767.

² *Wolverhampton and W. Ry. Co. v. London and N. W. Ry. Co.* [1873] 16 Eq., 433, expld. per Lindley, L. J., *Whitwood Chemical Co. v. Hardman*, supra.

³ *S. R. A.*, s. 57, ill.(a): here the goodwill is supposed to be unconnected with any business-premises, and a covenant may be implied that the seller will send his customers to the purchaser. *Of. May v. Thomson* [1882] 20 Ch. D., 705, *Pomeroy v. Scale* [1907] 23 T. L. R. 170.

⁴ *S. R. A.*, s. 57, ill.(e). *Of. Whittaker v. Howe* [1841] 3 Beav., 383, 2

Keener, 209. *Rolfe v. Rolfe* [1846] 15 Sim., 88, 2 Keener, 218.

⁵ *S. R. A.*, s. 57, ill.(b); *Palmer v. Graham*, [1850] 1 Pars., 476, 478, 2 Scott, 18.

⁶ *Crutwell v. Lye* [1810] 17 Ves., 335. As to the rule about soliciting business, see *Labouchere v. Dawson* [1872] 13 Eq., 325; *Trego v. Hunt* [1896] A. C., 7; with which cf. *Walker v. Mottram* [1881] 19 Ch. D., 355; *Curl Bros. v. Webster* [1904] 1 Ch. 688. Distinguish *Green v. Marris* [1914] 1 Ch., 562 (assignment to trustee for benefit of creditors).

⁷ *S. R. A.*, s. 57, ill. (d).

⁸ *Grimston v. Cunningham* [1894] 1 Q. B. 125.

⁹ *Stiff v. Cassell* [1856] 2 Jur., N. S. 348.

¹⁰ *Charlesworth v. MacDonald* [1898] 23 Bom., 103.

employer and his clerk,¹ and a master and his servant.² And where a fish-curer and fish-smoker had contracted with a manure manufacturer to sell to him, and not to anybody else, all parts of fish not used in the curing and smoking business, but subsequently was induced to break his contract by a rival manufacturer, who wanted to obtain the monopoly of all the refuse of fish in the neighbourhood, Fry, J., not without hesitation, granted an injunction.³ This case may be compared with the older case of *Dietrichsen v. Cabburn*,⁴ where Lord Cottenham, C., enforced by an injunction an agreement by a manufacturer of a patent medicine with a vendor of such drugs not to supply it to any other dealer at a larger discount than 25 per cent. upon the current retail price, the plaintiff claiming to have been appointed wholesale agent for twenty-one years.

But in England the doctrine is now considered anomalous, and one which it would be dangerous to extend.⁵ Jessel, M. R., felt a very considerable difficulty in understanding the court, on the one hand, professing to refuse specific performance because it was difficult to enforce it, and yet, on the other hand, attempting to do the same thing by a round-about method,⁶ and Fry, J., like him, found it hard to draw any substantial or tangible distinction between a contract, containing an express negative stipulation and another containing an affirmative stipulation which implied a negative.⁷ Where a person, after having agreed to become manager of one company's works for ten years, and during that period to give the whole of his time to this company's business, subsequently, within the period of ten years, engaged himself to act as director of a rival company, the court of appeal refused to enjoin him from doing so. Looking at the

Later
English
doctrine.

¹ *Robinson & Co. v. Heuer* [1898] 2 Ch., 451.

² *Baines v. Geary* [1887] 35 Ch. D., 154; *Dubowskie v. Goldstein* [1896] 1 Q. B. 478.

³ *Donnell v. Bennett*, [1883] 22 Ch. D. 835, 1 Ames, 114. But cf. *Fothergill v. Rowland* [1874] 17 Eq., 132 (agreement to sell coal to plaintiff and no other person, not enforced by injunction). *National Phonograph Co. v. Edison-Bell C. P. Co.* [1908] 1 Ch., 335.

⁴ [1846] 2 Ph., 52, 1 Ames 108 (plaintiff was to get 40 per cent. discount upon

the retail price). See also *Manchester Canal Co. v. Manchester Race Course Co.* [1901] 2 Ch., 37 (a contract to give the 'first refusal' held to involve a negative contract not to part with the land to any other company or person without giving that first refusal).

⁵ *Whitwood Chemical Co. v. Hardman*, supra; *Wolverhampton Ry. Co. v. London Ry. Co.*, supra; Fry, s., 862, p. 373.

⁶ *Fothergill v. Rowland*, supra.

⁷ *Donnell v. Bennett*, supra.

matter broadly, Lindley, L. J., thought the court would generally do more harm by attempting, either directly or indirectly, to decree specific performance in cases of personal service than by leaving them alone.¹ In a still later case, Romer, J., refused to enforce as unreasonable a stipulation by the defendant to devote the whole of his time for ten years, during the usual working hours, to the plaintiffs' business and not to engage in any other business during the continuance of this contract.² He thought the rule in *Lumley v. Wagner*, was limited to cases where the service sought to be enforced was of a special nature.³ Fry, J., thus sums up the tendency of recent English decisions—"that the court ought to look at what is the nature of the contract between the parties; that, if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then the court ought not to interfere, whether there be or be not the negative stipulation."⁴

American courts, while generally recognising the doctrine in question,⁵ are disposed to limit it to cases where the services or acts contracted for are of an exceptional character.⁶ "Where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely

American
doctrine.

¹ *Whitwood Chemical Co v. Bardman*, *supra*. (The plaintiffs' difficulty was said to be that they could not suggest anything more specific than that the man must either be idle or specifically perform the agreement into which he had entered. *Per* Van Fleet, V. C., "A court of equity, in exercising its prohibitory power, must always proceed with the utmost caution and see to it that its power is not so exercised as to do more harm than good. The power exists to prevent irreparable wrong, and should not, therefore, be used, in any case when its use will produce the very result it was designed to prevent." *Sternberg v. O'Brien* [1891] 48 N. J. Eq., 370, 1 Ames, 126. In an old Pennsylvanian case, it was suggested that a contract for personal services thus enforced would be but

a mitigated form of slavery, *Ford v. Jermon*, 6 Phila., 6. But see this case criticised, *Waterman*, p. 153.

² An injunction, if issued, might here too have compelled the defendant to abstain wholly from business; the restriction was general.

³ *Ehrman v. Bartholomew* [1898] 1 Ch., 671.

⁴ *Donnell v. Bennett*, *supra*.

⁵ *Singer Sewing Machine Co. v. Union Button-hole Co.* [1873] 1 Holmes, 253, 2 Keener, 257.

⁶ 4 Pomeroy, *Eq. J.*, s. 1343; 22 Cyc., 857-9. *Per* Hoffman, J., "The element of mind exhibited in the subject of the contract, as distinguished from what is mechanical and material, may perhaps furnish a rule of distinction and decision," *Fredericks v. Mayer*, 13 How. Pr. 566. *Daly v. Smith* [1874] 38 N. Y. S. C., 158, 2 Keener, 267.

intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages."¹ The jurisdiction has accordingly been refused where the abilities of the defendant were not exceptional, so that his place might be readily supplied and no irreparable damage occasioned to the plaintiff.²

Statutory
jurisdiction
in India.

As the jurisdiction is conferred by statute in India, there is no ground to treat it as exceptional or anomalous. It is not a technical or artificial rule which the Indian statute-book professes to enforce : it looks to the substance and not to the form of the contract.³ An affirmative contract in a negative form⁴ will be no more enforced in India than in England. The contract must also require the performance or the abstention from some definite act, such as the court is in the habit of requiring to be performed or abstained from by way of administering superior justice.⁵ In such a case, if the contract is one, of which the court would direct specific performance, if it could practically compel its observance by the party refusing to perform, through a

¹ *Rogers Manufacturing Co. v. Rogers* [1890] 58 Conn., 356, 2 Keener, 279 (injunction refused in case of a general agent and manager). *Per* Barrett, J., "It may sometimes be difficult to say just what is a special, unique, or extraordinary service, or whether the employee possesses special, unique, or extraordinary qualifications. The solution may generally be reached by an enquiry as to whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract ; in other words, whether the individual service especially contracted for is essential to prevent irreparable injury. The foundation of the jurisdiction is the inability of the law to afford adequate redress." *Strobridge Co. v. Crane*, 35 N. Y. St. R., 473 ; *Johnston Co. v. Hunt*, 142 N. Y., 621.

² *Carter v. Ferguson*, [1890] 58 Hun., 569, 1 Ames, 121 (actor not a 'star' or attraction of the company) ; *Burney v. Ryle* [1895] 91 Ga., 701, 2 Keener, 295 (insurance agent) ; *Jaccard v. O'Brien*, 70 Mo. Ap., 432 (salesman) ; *Strobridge Co. v. Crane*, *supra*, (lithographer and designer) ; *Johnston Co. v. Hunt*, *supra*, (advertising solicitor) ; *Columbus Club v. Reiley*, 25 Ohio L. J. 385 (base-ball player) ; *Cort v. Lassard* [1889] 18 Oreg. 221, H. & W. 619 (acrobat). Distinguish *Philadelphia Club v. Lajoie* [1902] 58 L. R. A., 227.

³ *Cf. Wolverhampton Ry. Co. v. London Ry. Co.* *supra*, 440, *Burn & Co. v. McDonald* [1908] 36 Cal. 354, 363-5.

⁴ *Cf. Davis v. Foreman* [1894] 8 Ch., 654, 658, 2 Keener, 300 (agreement for employment of manager of business, not to be required by his employer to leave, except for misconduct).

⁵ *Cf. Wolverhampton Ry. Co. v. London Ry. Co.*, *supra*, 438.

decree for specific performance,¹ and the substance of the agreement is violated by doing the thing sought to be prevented,² the court will catch hold of the negative promise and by enforcing it, prevent, so far as it can, a breach of faith which it considers unconscionable. It is the affirmative agreement which gives jurisdiction, if an express or implied negative agreement is coupled with it; and if it is such that the court is unable to compel specific performance of it.³ The affirmative agreement here contemplated is apparently one covered by clause (b), section 21, Specific Relief Act, the nature of which is such that the court cannot enforce specific performance of its material terms; those terms are not such as can be carried out by the machinery of a court.⁴ But the court will not interfere if the applicant for an injunction has failed to perform his part of the agreement.⁵ The plaintiff must do all that is requisite on his part. Wood, V. C., remarked, "the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved."⁶ If, therefore, there is a contract between two persons whereby, on consideration of a payment of money to be made by one by a day fixed, the other engages not to set up a certain business in a specified locality, the former, after making default in the payment of the money, cannot ask a court to restrain the latter from carrying on this business in such locality.⁷

Plaintiff's
conduct.

¹ *Cf. Metropolitan Ex. Co. v. Ewing* [1890] 7 L. R. A., 381.

² *Cf. Wolverhampton Ry. Co. v. London Ry. Co.*, supra 440. *Per* Lowell, J.: "If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it," *Singer Co. v. Union Co.* [1873] 1 Holmes, 253, 2 Keener, 259. In this case, the learned judge res-

trained the violation of a contract by injunction, though one party had the sole right to terminate it, but the whole contract was not rendered inequitable by reason of such stipulation. *Waterman*, 138*n*.

³ S. R. A., s. 57.

⁴ *Cf. Metropolitan Ex. Co. v. Ewing*, supra. The Madras court thinks the exception in s. 57, refers to all the clauses of s. 21, *Madras Ry. Co. v. Rust*, [1890] 14 Mad., 18, 22; but this is very doubtful. *Cf. Nelson*, S. R. A., 327.

⁵ *Cf. Telegraph Despatch Co. v. McLean* [1873] 8 Ch. Ap., 658; *Grimston v. Ounningham* [1894] 1 Q. B., 125 130.

⁶ *Stocker v. Wedderburn* [1857] 3 K. & J., 393, 404, 2 Keener, 808.

⁷ S. R. A., s. 57, ill.(e).

So, where a provincial actor, who was engaged to appear on the London boards to perform Shakspeare's characters, but was kept idle by his employer for five months, though paid his salary, broke his engagement, Lord Romilly refused an injunction, because "there was a mutuality in the agreement entered into on both sides; on the one side, that he should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere, unless with the permission of the plaintiff;" and mere payment of the defendant's salary was not sufficient performance on his employer's part.¹ The question before the Indian courts will therefore be one of discretion, not of jurisdiction, though in view of the provisions of clause (i), section 56, it is not unlikely that the results actually reached in India will not much differ from those arrived at in America, and even later English decisions like *Ehrman v. Bartholomew*² may be referred to here as illustrative of the limits of judicial prudence.

Fiduciary
relation.

So much for injunctions to enforce contractual rights and relations strictly so called. But cases are frequent where the relation between the parties, even if contractual at its inception, is fiduciary at the time when a court of law is called upon to deal with it. *E.g.*, a doctor may be called in to treat a patient and may thus learn facts about him which it will be contrary to his professional duty,³ and possibly defamatory to his patient,⁴ to divulge. So a lawyer, in the course of his professional employment, may come in possession of papers belonging to a client, which it will be a breach of trust on his part to make public or to disclose to strangers.⁵ The Specific Relief Act defines 'trust' and 'trustee'⁶ in a very comprehensive sense; an injunction therefore may be available wherever the defendant is shown to hold a fiduciary character, whether expressly or by implication or construction. A court of equity

Breach of
trust.

¹ *Fechter v. Montgomery* [1863] 33 Beav., 22, 26.

² [1898] 1 Ch., 671.

³ S. R. A., s. 54, ill. (i).

⁴ *Ibid.*, s. 55, ill. (f). This and the preceding ill. (e) seem to have been misplaced. They both illustrate s. 54.

⁵ S. R. A., s. 54, ill. (h). *Cf. Davis v. Clough* [1837] 8 Sim., 262; *Lewis v. Smith* [1849] 1 M. & G., 417; *Ewitt v. Price* [1827] 1 Sim., 483. Breach of confidence may also constitute a tort.

⁶ S. R. A., s. 3; *Shrewsbury Ry. Co. v. L & N.-W. Ry. Co.*, 4 DeG. M. & G., 115.

will always entertain jurisdiction wherever there is a trust, and will enjoin a breach of this trust, whether grave or light, without enquiring if the same may not be adequately and effectively compensated for by an award of damages in money.¹ The reason of this is that trusts were within the exclusive jurisdiction of the old Courts of Chancery in England, and no question of an alternative remedy in damages available in the ordinary law courts could arise in respect of suits relating to trusts. If a trustee threatens a breach of trust, an injunction to prevent such breach may be obtained by the beneficiaries,² and should be obtained by co-trustees, if any, to protect themselves against personal responsibility for the injury that may result from the defendant's act.³ The directors of a public company are trustees for the shareholders; consequently their actions may be made the subject of the equitable jurisdiction of injunction. They are bound, *e. g.*, to limit the expenditure to the proper object of the company;⁴ and an attempt to pay a dividend out of capital or borrowed money may be restrained at the instance of any shareholder;⁵ and so may a proposal to alter the special purposes of the partnership be put down.⁶ The directors of a fire and life insurance company, *e. g.*, cannot be allowed to engage in marine insurances, if the shareholders object.⁷ Each partner is entitled to say to the others, "I became a partner in a concern formed for a definite purpose, and upon terms which

¹ *Ibid.*, s. 54, ill.(f); *Anon.* [1821] 6 Madd., 10 (imprudent sale of trust property without proper advertisement restrained). *Attorney-General v. Liverpool Corporation* [1835] 1 My. & Cr. 171, 210.

² *S. R. A.*, s. 54(b); *Balls v. Strutt* [1841] 1 Hare, 146.

³ *S. R. A.*, s. 54, ill.(b). *Re Chertsey Market* [1818] 6 Price 279. If breach has already been committed co-trustee should sue for restoration of the trust fund.

⁴ *Natusch v. Irving* [1824] 2 Coop. t. Cott., 358.

⁵ *S. R. A.*, s. 54, ill. (c); *McDougall v. Jersey Hotel Co.* [1864] 2 H. & M., 528. But see 8 Edw. VII, c. 69, ss. 89, 91; 57 & 58 Vict., c. 12, s. 3. In England, a declaration of an intention to pay such dividend may be restrained, but not the payment where such a

declaration has been actually made, for the declaration is said to create a debt in favour of each shareholder, which may be at once sued upon, *Severn & Wye Co.* [1896] 1 Ch., 559; *Carlisle v. S. E. Ry Co.* [1850] 1 M. & G., 689. But where the proposed payment is a breach of trust, the declaration cannot create a right, *Holmes v. Newcastle & Co.* [1876] 1 Ch. D., 682, and the distinction, it is apprehended, does not exist under the Indian law. Collett, 4th. ed. 394.

⁶ "The right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in." *Natusch v. Irving*, *supra*.

⁷ *S. R. A.*, s. 54, ill. (d).

were agreed upon by all of us ; and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable.¹ Similarly, an executor, who has accepted office, is a trustee for the due administration of the assets in behalf of all interested under the will ; and if he fails in his duty or, through his misconduct or insolvency, endangers the testator's property, he may be restrained and inhibited from getting in the assets.² A municipal board, which appropriates a fund to a purpose not allowed by the law, commits a breach of trust, and any rate-payer may sue for an injunction.³ So does the settler of an executed settlement, though not founded on marriage or other valuable consideration, when he contracts to sell the estate to a third person, and the party interested under the settlement, even if a volunteer, may have the sale enjoined.⁴ Where the right of the members of a club flows out of a right to use and enjoy the club property, the committee thereof may be restrained from improperly excluding such member without enquiry conducted according to the rules of ordinary and common justice.⁵

Right to
property.

A right of property may often have to be protected by means of an injunction. The protection here is against a wrong independent of contract, *i.e.*, a tort. This tort may consist in trespass or disturbance of possession, or in waste which affects the substance, or it may be a nuisance, which detracts from the enjoyment, or the violation, of an easement ; and where the

¹ *Attorney-General v. G. N. Ry. Co.* [1860] 1 Dr. & S., 154.

² S. R. A., 54, ill. (e). The court may appoint a receiver also.

³ *Shephard v. Trustees of Port Bombay*, [1876] 1 Bom., 132 ; *Vaman v. Municipality of Sholapur*, [1897] 22 Bom., 646.

⁴ S. R. A., s. 54, ill. (g) the settlement apparently is one capable of specific enforcement under s. 12 (a), *supra*.

⁵ *Labouchere v. Wharnclyffe* [1880] 13 Ch. D., 346, 4 *Laws of Eng.*, 415 sqq. Otherwise, where member has no

right of property, *Lards v. Wells*, [1890] 44 Ch., D., 661. But a court will not interfere with the internal management of a club or school or other institution, secular or religious, *Hayman v. Rugby School* [1874] 18 Eq., 28 (*cf. Chapsey v. Jethabai* [1907] 9 Bom. L. R., 514), unless corruption, misconduct or *mala fides* on the part of trustees or managers is shown, *Dean v. Bennett* [1871] 6 Ch., 489. *Cf. Thomson v. University of London* [1864] 10 Jur., N.S., 669 (injunction restraining award of more than one gold medal refused).

property is of the special character of a patent or copyright, a trade-name or trade-mark,¹ there may be a fraudulent use of this which requires prevention. I will take these various kinds of injury to right to, or enjoyment of, property *seriatim*; but before I do so, it is necessary to direct your attention once more to the general principles upon which relief is afforded. Specific relief was granted by a court of equity with the object of doing more complete justice as between the parties than could be compassed by a mere decree for money, which was ordinarily all that a court of law could award. But where a party could practically have all that he wanted and deserved from the general forum of law, there was no ground for resorting to the special forum of equity. The direct result of this accident in history is that, even where the rigid and archaic division of courts and remedies into legal and equitable has become obsolete, the judicial tribunals still profess to act upon the theory that the supplemental remedy of injunction is not called for where equally efficacious relief can certainly be obtained by asking for some other usual process,—a theory which has been authoritatively engrafted upon Indian jurisprudence by statute.² The relief which is made available by “any other usual mode of proceeding” is not specific in terms, but it is so in effect, because by putting the plaintiff in possession of the necessary funds, it enables him to place himself in the same position in which he may have found himself, in the event of a direct decree for specific relief in his favour.³ Section 54, Specific Relief Act, therefore repeats that a perpetual injunction to restrain an actual or threatened invasion of a right to or enjoyment of property, whether moveable, or immoveable, may be granted where money damages are impracticable or inadequate, the only exception recognised being in the case of a trust.⁴ Such damages are *impracticable*, where

Historical
accident.

S.R.A., s. 54.

¹ S. R. A., s. 54, expln.

² S. R. A., s. 56 (i) “Whenever a tort will cause an injury which is specific, and which the person injured cannot specifically repair and which cannot be paid for in money, or an injury, the extent of which it is impossible to ascertain or estimate with any accuracy, there is a *prima facie*

case for the interference of equity to prevent the commission of the tort; otherwise, the remedy at law is adequate, so far as regards the nature of the tort,” Langdell, *Eq. Jur.*, 29.

³ Cf. *Wood v. Sutcliffe* [1852] 21 L. J., Ch., 253, 255.

⁴ S. R. A., s. 54 (a)

Damages
impractic-
able,

inadequate.

Irreparable
injury.

there is no possible standard for ascertaining the amount of the damage caused or apprehended,¹ or they are unavailable,² by reason, *e. g.*, of the wrongdoer's insolvency.³ The injury in such cases is clearly *irreparable*,⁴ and an injunction must issue. Such damages are *inadequate*,⁵ where they cannot effect restoration. If, *e. g.*, to award damages would practically amount to compelling the plaintiff to sell his property against his will, the effect of the decree would be the opposite of restoration, and, though the court may consider it reasonable that he should accept damages, yet it will have to issue an injunction.⁶ So, if the plaintiff cannot effectively put down the wrong by a single suit for damages, but has to sue repeatedly, it is clear that pecuniary compensation is not an adequate relief.⁷ A wrong may continue or recur, and not only must the existing mischief be cured, but future mischief must also be prevented. A multiplicity of judicial proceedings can only be averted by a perpetual injunction.⁸ The injury in such case is also *irreparable*, for, though damages can be given, they will not afford a sufficient and real reparation.

¹ *Ibid*, (b); *ibid*, ill. (h), (i); *Ghansham v. Moroba* [1894] 18 Bom., 474, 489; *Fazol Karim v. Maula Baksh* [1891] 18 Cal., 448, P. C.; *Ramanadhan v. Zamindar of Ramnad* [1893] 16 Mad., 407, 409-10. "Where the facts are of such a nature as to render the measure of damages speculative and impossible to ascertain with any degree of certainty, equitable relief is seldom denied," *Keplinger v. Woolsey*, 93 N. W., 1008. Even an approximate estimate of the damage should not be possible, *Corry v. Yarmouth & N. Ry. Co.* [1844] 3 Hare, 593, 603.

² S. R. A., s. 54(d).

³ *Ibid*, ill.(o); cf s. 12, ill.(d), *ante*; *Hodgson v. Ducc* [1856] 2 Jur., N. S., 1014.

⁴ The expression "irreparable injury" is rather loosely employed by English lawyers. *Ante*, 609. "It is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grievous one or at least a material one, and not adequately reparable by damages," Kerr, *Inf.*, 5th. ed. 19. "Irreparable injury means a destructive act to property of such peculiar character or use

that its loss would not be adequately recompensed by the damages a jury's verdict would give," 2 Pomeroy, *Eq. R.*, p. 935.

⁵ S. R. A., s. 54 (c).

⁶ *Govind Venkaji v. Sadashiv Shet* [1892] 17 Bom., 771.

⁷ S. R. A., s. 54, ill. (p). *Apaji v. Apa* [1902] 26 Bom., 735; *Bal Samrat v. Sardarsang* [1911] 13 Bom. L. R., 905. Cf. *Per Morton, J.* "The injury to the plaintiffs is permanent and continuous, and a judgment for damages would not furnish them adequate relief. It is true that in an action of tort for the nuisance, they might also obtain a judgment that the nuisance be abated and removed. But power of a court of law can go no further than to remove the nuisance, while a decree of a court of equity may restrain the continuance or repetition of the nuisance." *Oadigan v. Brown* [1876] 120 Mass., 493, 1 Keener, 189. Cf. *Steward v. Winters* [1847] 4 Sandf. Ch., 628, 2 Keener, 309.

⁸ S. R. A., s. 54(e). Cf. *Manhattan Co. v. New Jersey Co.* [1872] 23 N. J. Eq., 161, 2 Keener, 571.

Torts :
pass.

Such are the general principles ; let us now consider some particular wrongs. Trespass is a large head of civil wrongs, but the courts in England long hesitated to restrain it by an injunction.¹ The jurisdiction was at first entertained with some doubt only where the wrong committed was akin either to waste² or nuisance.³ The result of the cases was thus summarised by Kindersley, V. C., in 1864 : "Where a plaintiff out of possession, not having privity of title with the defendant, sought to restrain the defendant from acts of spoliation, the court would only grant an injunction where the acts were of a flagrant kind causing great damage to the property."⁴ Again, where the plaintiff in possession sought to restrain one who claimed no title, the leaning of the court was to refuse the injunction, and to leave the plaintiff to his remedy at law. But where the plaintiff in possession sought to restrain one who claimed title, the leaning of the court was to grant the injunction when spoliation was irremediable, that is, when there was a destruction of part of the inheritance."⁵ But the practice has gone on widening, and it has been judicially affirmed that Chancery will interfere by injunction where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future, as when a trespasser digs into and works a mine to the injury of the proprietor, or where timber is attempted to be cut down by a trespasser in collusion with

¹ See, e.g., *Davenport v. Davenport* [1849] 7 Hare, 217, 1 Ames, 496, where Wigram, V. C., said : "It has always appeared to me the court was trying to get out of a technical rule, with a view to the better protection of property." Kent, C., said in *Jerome v. Ross*, 7 Johns, Ch., 315, "I do not know a case in which an injunction has been granted to restrain a trespasser, merely because he is a trespasser."

² *Flamang's Case*, 7 Ves., 308 (cited). Per Lord Eldon : "The interference of the court is to prevent your removing that which is his estate," *Thomas v. Oakley* [1811] 18 Ves., 184, 1 Ames, 492.

³ Per Lord Hardwicke, "Every common trespass is not a foundation for an injunction in this court, where

it is only contingent and temporary ; but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person committing it." *Coulson v. White*, [1743] 3 Atk., 21.

⁴ Cf. *Kesho v. Srinivasa* [1911] 13 C. L. J., 394 (Seemle where no apprehension of waste, and plff. really seeks to obtain control over expenditure of income of disputed property by deft. in possession, more appropriate remedy is appointment of receiver).

⁵ *Lowndes v. Bettie* [1864] 33 L. J., Ch., 451, 1 Ames, 501-2. *Stanford v. Hurlstone* [1873] 9 Ch., 116, 119 (trespasser threatening to cut down trees).

the tenant of the land; or where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental trees in the disputed territory.¹ "In short," says Judge Story, "an injunction is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property."² A trespass may be under colour of title,³ *e.g.*, where contiguous lands, with mines underneath, are owned by different persons, and the owner of the one so works his mine as to extend under the other's mine and endanger its support.⁴ Or, it may be a pure trespass, but persistent,⁵ and the trespasser not able to pay damages.⁶ Or, the trespassers may be many, and there may be a multiplicity of judicial proceedings, *e.g.*, an owner of land, who has already obtained a declaration from the court that certain villagers have no right of way over his land, may be persecuted with a number of suits by other villagers asserting a similar right of way and alleging an obstruction of the same.⁷ These are all cases where an injunction may properly be granted. An instructive case is *Goodson v. Richardson*,⁸ where the defendant, a house-owner at Ramsgate, being

¹ *Per* Currier, J., *Echelkamp v. Schrader* [1870] 45 Misso., 505, 1 Ames, 511. In this case, plaintiff had purchased and lived peaceably for 17 years in a frame building, which, upon a careful survey, was found to encroach 3 feet on defendant's ground; defendant thereupon commenced to have 3 ft. sawed off from one end of the plaintiff's tenement, leaving the interior exposed and wholly unprotected. The court issued a perpetual injunction to save the plaintiff's domicile from disturbance and substantial destruction, so far as its usefulness as a place of residence was concerned.

² Story, *Eq.*, ss. 928-9. *Jethalal v. Lalbhai* [1904] 28 Bom., 298 (injunction sole remedy, where building on or overhanging another's land). *Anantnath v. Mackintosh*, [1871] 6 B.L.R., 571.

³ *Of. Allen v. Martin* [1875] 20 *Eq.*, 462.

⁴ S. R. A., s. 54, ill. (r): *Lonsdale v. Curwen* [1799] 3 Bligh., 168; *Fletcher*

v. Walker, *ibid.*, 172. *Cf. Berkeley v. Berwind W. C. M. Co.* [1908] 16 L. R. A., N. S., 851 (removal of underlying coal).

⁵ *Lowndes v. Bettie*, *supra*. *Cf. Dharmadas v. Amulya Dhan* [1906] 33 Cal., 119 (case between Hindu father and son, Dayabhaga law). *Cf. Stevens v. Stevens* [1908] 24 T. L. R., 20.

⁶ S. R. A., s. 54, ill. (o); *Hodgson v. Duce*, *supra*.

⁷ S. R. A., s. 54, ill. (p). *Cf. Lord Tenham v. Herbert* [1742] 2 Atk., 483, 1 Keener, 191 (bill of peace). 1 *Pomeroy. Eq. J.*, s. 248.

⁸ [1874] 9 Ch. Ap., 221, 1 Ames, 502. An American case, where the plaintiff's estate was removed by the excavation of a tunnel underneath, is *Richards v. Dower* [1883] 64 Calif., 62, 1 Ames, 517. "It disturbs the plaintiff's possession," said Sharpstein, J., "and, if permitted to continue, will ripen into an easement. That of itself is sufficient to entitle him to an injunction."

dissatisfied with the water works company, proceeded to construct water works for the supply of his houses and lay the pipes along the adjoining highway, of a half of which the plaintiff was owner in fee. "Now, the ground under highway could be of no use to the adjoining owner, and could not be damaged by the defendant's pipes, but, as the defendant invaded his property, he had a right to restrain him from doing so. It was a valuable property for which he had a right to obtain payment. An injunction was his only remedy, and action at law would have been no remedy to him."¹ The use of an under-ground tramway has accordingly been enjoined,² so also the sale of goods on the plaintiff's land,³ and an interference with the removal by him of an encroaching bridge.⁴ The levelling of private family vaults and the removal of the tombstones cannot be compensated for in money,⁵ nor apparently an obstruction of a right to take a certain share of fees and offerings tendered in a Hindu temple every fourth year,⁶ and injunctions have been issued in restraint.

To throw water on another man's land against his will, especially when it is claimed to do this as of right, amounts to a trespass. The nature of the right to store or use water on a party's own land was carefully defined in *West Cumberland Iron & Steel Co. v. Kenyon*.⁷ *Sic utere tuo ut alienum non lædas*.⁸ Government have the right to distribute the water of Government channels for the benefit of the public, but not to flood a man's land because, in its opinion, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit.

Trespass by
Government
statutory
powers.

¹ *Per* Jessel, M. R., *Cooper v. Crabtree* [1882] 20 Ch. D., 589, 1 Ames, 506. Lord Selborne saw nothing unneighbourly in the action and said: "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction."

² *Bowser v. McLean* [1860] 2 DeG.

F. J., 415.

³ *Smith v. Brown* [1879] 48 L. J., Ch., 694.

⁴ *Campbell Davys v. Lloyd* [1901] 2 Ch., 518.

⁵ *Morland v. Richardson* [1856] 22 Beav., 596, 24 *ibid*, 83.

⁶ *Moro Mahadeo v. Anant Bhimaji* [1896] 21 Bom., 821.

⁷ [1879] 11 Ch. D., 782. *Cf. McCartney v. Londonderry & L. S. Ry Co.* [1994] A. C., 313; *Harington v. Derby Corp.* [1905] 1 Ch., 205, 219.

⁸ *Broom, Leg. Max.*, 281, 1 Beven, *Negligence*, 476, sqq.

Where, therefore, with the object of reducing the flow of water into a tank through a channel and for the protection of the tank, Government constructed a bye-wash in 1882, and no negligence was shown in its construction, but the necessary effect of the bye-wash was to cause the water diverted from the channel to flood the land of a *ryotwari* tenant, and the latter sued for a mandatory injunction in 1900, White, C. J., and S. Ayyar, J., decreed the claim and held that, even if Government had been empowered by statute to construct the bye-wash in question, it would be for Government to show that they could not exercise their statutory powers without injuring the plaintiff's lands.¹

Waste,

The jurisdiction to restrain waste does not seem to have been ever denied, where the case arose between a life-tenant and a remainderman, or a mortgagor and a mortgagee, or a lessor and a lessee, or two co-tenants.² Now, waste may be legal or equitable, *i.e.*, such as may be imputed to fair acts of ownership,³ or extravagant, mischievous and humoursome;⁴ it may be commissive or permissive, that is, active and wilful, or due to neglect; it may be destructive or ameliorating, such as does injury to the inheritance or improves it. But the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage; a court of equity ought not to interfere where the waste is ameliorating or trivial.⁵ "As to repairs," said Verney, M. R., "the court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in case of wilful waste."⁶ A tenant for life cannot so

¹ *Sankaravadivelu v. Secy. of State* [1904] 28 Mad., 72, citing, among others, *Hammersmith Ry. Co. v. Brand* [1869] 4 H. L., 215; *Canadian Pacific Ry. Co. v. Roy* [1902] A. C., 220, 230. Cf. *Munl. Corp. v. Vasudeo* [1904] 6 Bom. L. R., 899.

² Waste is "a tort to the land, committed by a person in possession of the land, and whose possession is rightful, against a person who has neither the possession nor the right to possession. Hence it is not a trespass, the essence of which is always a wrongful entry, and which is always an injury to the possession." Langdell, *Eq. Jur.*, 30-1

³ *Vincent v. Spicer* [1856] 22 Beav., 380.

⁴ *Abrahall v. Bubb* [1680] Freem. C. C., 53, 1 Ames, 475; *Turner v. Wright* [1860] 2 DeG. F. & J., 234, 1 Ames, 476, *per* Campbell, L. C., "equitable waste is that which a prudent man would not do in the management of his own property."

⁵ *Doherty v. Allman* [1878] 3 A. C., 709, 1 Ames, 464; *Mollineux v. Powell* [1730] 3 P. Wms., 268*n*, 1 Ames, 468.

⁶ *Lord Castlemain v. Lord Craven* [1733] 22 Viner, 523, pl. 11, 1 Ames, 466. In the absence of an agreement to keep the premises in repair, a tenant is not apparently liable for

deal with the estate as to render it less valuable for the remainderman, when his interest falls into possession. He cannot ordinarily commit even legal waste, and may be restrained from cutting timber,¹ digging for gravel, limestone, or the like.² Where there is an unconscientious abuse of a legal right or power, a court is clearly bound to interfere;³ and an act may in some sense be regarded as unconscientious, if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive.⁴ Where such motive is present, and there is an attempt at wanton destruction, the reason for granting an injunction is even stronger, and it will not matter if the wrong-doer is a tenant in fee simple, subject to an executory devise over,⁵ or a tenant for life *sans* waste.⁶ An infant *en ventre sa mere* may, through a next friend, have an injunction,⁷ and so may a trustee to preserve contingent remainders.⁸ In India, such questions may more frequently arise between a Hindu female heir and the expectant reversioner. If a Hindu widow, *e.g.*, in possession of her deceased husband's property, commits destruction of the property without any sufficient cause, the reversioner may clearly sue for an injunction to restrain her.⁹

permissive waste, *Re Cartright* [1889] 41 Ch. D., 532. Distinguish *Davis v. Davis* [1888] 38 Ch. D., 499 (case of tenant for years), and see *Woodhouse v. Walker* [1880] 5 Q. B. D., 404. Nor a mortgagor in India; see T. P. A., s. 66.

¹ *Garth v. Cotton* [1753] 2 Wh. & T., 8th. ed. 992.

² *Elias v. Snowdon Co.*, [1879] 4 A. C. 454. "The court ought, in general, to grant an injunction against tenant for life without impeachment for waste, for cutting down any timber not full grown or proper for building, or anything, the doing of which might be a spoil or prejudice to the estate for the future," *Aston v. Aston*, [1749] 1 Ves. Sr., 264.

³ *Baker v. Sebright* [1879] 13 Ch. D., 179, 1 Keener, 515. In *Micklethwait v. Micklethwait*, [1857] 1 DeG. & J., 504, 524, Turner, L. J., said: "If a deviser or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises

or settles it, so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed. This court, therefore, in such a case, protects the trees against the acts of the tenant for life." Cf. *Downshire v. Sandys* [1801] 6 Ves., 107. Among later cases in which the cutting of ornamental or sheltering trees has been enjoined, are *Bedoyere v. Nugent*, L. R., 25 Ir., 143; *Ashby v. Hincks* [1888] 58 L. T., 557.

⁴ *Per* Lord Campbell, *Turner v. Wright*, *supra*.

⁵ *Ibid*.

⁶ *Vane v. Lord Barnard* [1716] 2 Vern., 738, 1 Ames, 470.

⁷ *Lutterel's Case* [1670] Prec. Ch., 50 (cited), 1 Ames, 468.

⁸ *Birch-Wolfe v. Birch* [1870] 9 Eq., 683, 689.

⁹ S. R. A., s. 54, ill. (m).

But the widow's act must amount to spoliation and be of a gross character.¹ Where such a widow in possession of money invested in stock or shares, needlessly and improperly changed the investments, thereby exposing the capital to depreciation and loss, an injunction was granted.² An injunction will also lie against a mortgagor in possession to stay waste, for the court will not suffer him to prejudice the security.³ As between a landlord and a tenant, the former is entitled to have his houses and lands kept in an unaltered estate, and wilful waste will be enjoined.⁴ As between tenants in common, waste, destructive to the estate,⁵ and not within the usual and legitimate exercise of enjoyment,⁶ will be restrained. So, where pending a bill for partition, the tenant in common in possession proceeded to strip the land of its timber, Kent, C., considered the act destructive of the value of the estate and not consistent with a prudent enjoyment by the real owner, and granted an injunction.⁷ In India, among Hindus, joint tenants or co-parceners predominate over tenants in common, and they clearly have a right to prevent a member of the family from, say, cutting trees growing on the family property, or destroying part of the family house or selling some of the family utensils.⁸ Where a Hindu father alienated

¹ *Hurrydass v. Rungunmoney* [1851] Sev., 657, 661; Mayne, *H. L.*, 8th. ed. s. 647, p. 905.

² *Hurrydass v. Uppoorah* [1856] 6 M. I. A., 433.

³ *Usborne v. Usborne* [1740] Dick., 75; *Brady v. Waldron* [1816] 2 Johns. Ch., 148, 1 Ames, 433. As to what is sufficient security, see T. P. A., s. 66; *King v. Smith* [1843] 2 Hare. 239, 243. As to the liability of a mortgagee in possession, see T. P. A., s. 76.

⁴ *Smyth v. Carter* [1853] 18 Beav., 78; but see *Doherty v. Allman* [1878] 3 A. C., 727. *Conway v. Fenton* [1889] 40 Ch. D., 512; *Douglas v. Wiggins*, 1 Johns. Ch., 435. *Cf. Girish Chando v. Sirish Das* [1904] 9 C.W.N., 255.

⁵ *Hole v. Thomas* [1802] 7 Ves., 589 (sapling cut at wrong time); *Dougall v. Foster*, 4 Grant, Ch., 319 (soil removed to considerable depth and sold); *Goods v. Eorly*, 95 Va., 307 (building materially altered).

⁶ *Twort v. Twort* [1809] 16 Ves.,

128. Injunctions were refused where a mine was worked fairly, *Job v. Potton* [1875] 20 Eq., 84, and plaintiff was not excluded, *Meeord v. Oakland Co.*, 64 Calif., 145; *Mohesh v. Naubat* [1905] 32 Cal., 837; where a business begun by both tenants was continued by one, *Russell v. Merchants Bank*, 47 Minn., 286; and where fixtures were removed from a disused mill, *Dodd v. Watson*, 4 Jones, Eq., 48.

⁷ *Hawley v. Clowes* [1816] 2 Johns. Ch. 122, 1 Ames, 485. *Jacobs v. Seward* [1871] 5 H. L., 464 was a case of trespass between co-tenants. In *Smallman v. Onions* [1792] 3 Bro. C. C., 621, the tenant in common committing waste was insolvent.

⁸ S. R. A., s. 54, ill.(n). Compulsory partition may hurt more than help, but if co-parceners, acting *bona fide* and as prudent owners, cannot agree as to what is to be done or omitted, partition seems to be the only satisfactory remedy. "Should the courts interfere in such cases

undivided co-parcenary property, the Madras High Court enjoined him from transferring more than his share, but refused to interfere with alienations which appeared to be within this share.¹

A nuisance has also been recognised from very old times as a fitting subject for injunctive relief.² "I take it to be a head of equity to interpose, by way of injunction, when a party is erecting new works upon an old possession," said Lord Thurlow,³ and where the complaint was not of a public nuisance simply, but of the same being attended with extreme probability of irreparable injury to the property of the plaintiffs and danger to their existence, on such a case clearly established, Lord Eldon did not hesitate to say, an injunction would be granted.⁴ A modern American judge has stated, "The whole extent of equitable jurisdiction is the protection of a person's dwelling-house or home against nuisances upon other premises, of so serious a character as to render his life therein uncomfortable."⁵ The necessities of one man's business, it has been said, cannot be the standard of another man's rights,⁶ nor will it matter that the locality invaded or the person injured is humble and not aristocratic.⁷ Under a system

Nuisance.

and as to such matters, they might soon have to manage half the joint estates in the country." Collett, 5th. ed. 388.

¹ *Kanukurty v. Vencataramdass*, 4 Mad. Jur., 251.

² Cf. *Osborne v. Barter* [1583] Choyce Cas. Ch., 176, 1 Ames, 553.

³ *Weller v. Smeaton* [1784] 1 Bro. C. C., 572, 1 Ames, 555.

⁴ *Crowder v. Tinkler* [1816] 19 Ves., 617, 1 Ames., 557.

⁵ *Per Emery, V. C., Cronin v. Bloemcke* [1899] 58 N. J. Eq., 313, 1 Ames, 562 (annoyance caused by base-ball playing in grounds adjoining plaintiff's enjoined). *Wood v. Conway Corporation* [1914] 2 Ch., 47 (fumes and smoke causing serious permanent injury to plaintiff's property).

⁶ *Wheatley v. Chrisman*, 24 Pa., 302.

⁷ *Per Zabriskie, C.*, "I find no authority that will warrant the position that the part of a town occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings and is not

inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust that an additional factory, which adds a little to the common evil, would not be considered at law a nuisance, or be restrained in equity." *Ross v. Butler* [1868] 4 C. E. Gr., 302, 305, 1 Keener, 802. Cf. *Tipping v. St. Helen's S. Co.* [1865] 1 Ch. 66; *Sturges v. Bridgman* [1879] 11 Ch. D., 865. Distinguish *Bliss v. Annaconda Copper Mfg. Co.* [1909] 167 Fed. 342; 22 Harv. L. R., 596.

of constitutional government, nobody has a right to take another's property for his private purposes, upon making, from time to time, such compensation as a court of law may award.¹ Equitable relief is awarded, not by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorised use of the plaintiff's property and forbear from any further interference with his rights.² Courts of equity, accordingly, enjoin the making of noise³ or the pollution of air by smoke,⁴ which interferes materially and unreasonably with the physical comfort of the occupier of a neighbouring house. They do not allow neighbours to be annoyed by the assembly of crowds of disorderly persons upon the highways, drawn there by entertainments given by a third person upon his own lands for pecuniary profit.⁵ Brick-kilns,⁶ gas manufactories,⁷ hospitals for epidemic diseases,⁸ pottery,⁹ or bone works,¹⁰ slaughter houses,¹¹ oil-wells,¹² explosive factories,¹³ drains,¹⁴ fried fish-shop,¹⁵ may all be sources of nuisance.¹⁶ Where the defendant had successfully resisted municipal control, and discharged into an ordinary *kutchra* drain the refuse liquid of a shellac-factory, to the great discomfort and injury of the plaintiff, who had his garden close by, the Calcutta High Court granted exemplary damages and an injunction for the permanent stoppage of the nuisance.¹⁷ The working of large

¹ *Hennessy v. Carmony*, [1892] 50 N. J. Eq., 616, 1 Ames, 579.

² *Henderson v. N. Y. C. R. Co.* [1879] 78 N. Y., 423, 1 Keener, 627; *Galway v. Metropolitan Elev. R. Co.* [1891] 128 N. Y., 132, 1 Ames, 603.

³ *S. R. A.*, s. 54, ill. (s); *Soltan v. De Held* [1851] 2 Sim. N. S., 133, 1 Keener 665; *Gaunt v. Fynney* [1872] 8 Ch., 8, 12; *Christie v. Davey* [1893] 1 Ch., 316; *Rushmer v. Polsue* [1907] A. C., 121, affg. [1906] 1 Ch., 234.

⁴ *S. R. A.*, s. 54, ill. (t). *Shotts Co. v. Inglis*, [1882] 7 A. C., 518; *Fleming v. Hislop* [1886] 11 A. C., 686; *Atty.-Genl. v. Cole* [1900] 1 Ch., 205.

⁵ *Walker v. Brewster* [1867] 5 Eq., 25, 1 Keener, 722; *Bellamy v. Wells* [1890] 60 L. J., Ch., 156, 1 Keener, 778, *Cf. Lyons v. Gulliver* [1914] 1 Ch., 631.

⁶ *Pollock v. Lester* [1853] 11 Hare, 266, 1 Keener, 722 (interlocutory injunction issued).

⁷ *Broadbent v. Imperial Gas Co.* [1857] DeG. M. & G., 436, affd. 7 H. L.

C., 601.

⁸ *Metropolitan Asylum v. Hill* [1881] 6 A. C., 196.

⁹ *Ross v. Butler* [1868] 19 N. J. Eq., 294, 1 Keener, 800 (interlocutory injunction).

¹⁰ *Meigs v. Lister*, 23 N. J., Eq., 196 (ditto).

¹¹ *Catlin v. Valentine*, 9 Paige, 575 (ditto).

¹² *McGregor v. Camden*, 47 W. Va., 193 (ditto).

¹³ *McMurray v. Cudwell* [1889] 6 T. L. R., 133.

¹⁴ *Logombad v. Vuithinatha* [1915] 30 I. C., 768.

¹⁵ *Adams v. Ursile*, [1913] 1 Ch. 229

¹⁶ Injunctions have been issued against houses of ill-fame in America, *Hamilton v. Whitridge*, 11 Md., 128, 1 Ames, 613n.; *Cranford v. Tyrrell* [1891] 128 N. Y., 341, 1. Keener, 788.

¹⁷ *Galstaun v. Doonia Lal* [1905] 32 Cal., 697.

engines at a station for supplying electric light over a considerable area of London, which damaged an adjoining public house by making it less comfortable, injuring its structure, and decreasing its value, was enjoined in the leading case of *Shelfer v. City of London Electric Lighting Co.*¹ Diversion, obstruction, abstraction and pollution of running water have all formed subjects of equitable interference.² "If the diversion of water ... is a violation of the right of the plaintiffs," said Story, J., "and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act."³ The actual damage may be nominal; but, where there is an injury to riparian rights, Mellish, L. J., thought an injunction ought to issue, upon the ground of inconvenience of leaving the parties to repeated and successive actions for damages.⁴ Where a stream was polluted by the discharge of sewage and rendered unfit for domestic purposes, though the plaintiff, a lower riparian owner, had not as yet put the water to such a use, yet her right to the stream in its natural purity was affirmed and supported.⁵ One riparian proprietor cannot under any circumstances divert and consume the entire flow of a stream for irrigation purposes to the exclusion of lower proprietors, and the latter may claim a mandatory injunction to compel the restoration of the water-

¹ [1895] 1 Ch., 287, the lease-holder and the reversioners of the public house brought two separate suits, and both were held maintainable. Injunctions against nuisance have been allowed to tenant from year to year, *Inchbald v. Robinson* [1869] 4 Ch., 388, and tenant from week to week, *Jones v. Chappell* [1875] 20 Eq., 539, 1 Keener, 744. As to a reversioner's right, see also *Tucker v. Newman* [1839] 11 Ad. & E., 40.

² *Menzies v. Breadalbane* [1828] 3 Bligh, N. S., 414; *Herron v. Rathmines Co.* [1892] A. C., 498; *McIntyre v. McGavin*. [1893] A. C., 268; *Boily v. Clark* [1902] 1 Ch., 649; *Gardner v. Trustees of Newburgh* [1816] 2 Johns. Ch., 162, 1 Keener, 654. Cf. *Venkatagiri v. Muddukrishna* [1904] 28 Mad., 15. As to retention of water on one's

own land, see *Moholal v. Jivkore* [1904] 28 Bom., 472; *Ramanuja v. Krishnaswami* [1907] 31 Mad., 169. Defendant not restrained from obstructing plaintiff in raising a dam, *Venkatuchalam v. Gaurivalaba* [1904] 27 Mad., 509.

³ *Webb v. Portland Co.*, 3 Sumn. 190, 197. *Amsterdam Knitting Co. v. Dean* [1900] 162 N. Y., 278, 1 Ames, 573.

⁴ *Clowes v. Staffordshire Potteries W. Co.* [1873] 8 Ch., 125; *Pennington v. Brinsop Co.* [1877] 5 Ch. D., 769. *Rama v. Subramunia*, [1908] 31 Mad., 171 (channel blocked up, plaintiff granted injunction, though no express finding as to damage).

⁵ *Mann v. Willey* [1900] 51 N. Y. Ap., 169, 1 Ames, 572.

course to its natural form, and also a permanent injunction to restrain the former from repeating the wrongful act.¹ Removal of the support of land² and obstruction of highway or of navigation³ have also been specifically relieved by equity, even where the latter constituted a public nuisance.⁴ The right to obtain an injunction to restrain a public nuisance affecting the health of the community seems to be widely recognised.⁵

Disturbance
of easement.

Akin to the last topic is that of the disturbance of an easement. The mischief relieved against, thought Lord Hardwicke, is that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at law.⁶ But here, too, the beneficent jurisdiction of equity has expanded,⁷ so that an American judge has said: "Injunction is uniformly held to be a proper remedy to protect against an interference with the enjoyment of an easement."⁸ Page Wood, V. C., observed: "It cannot safely be held that this court will allow parties so to exercise rights which they may have in their soil as to inflict an injury on their neighbour if, the neighbour is unwilling to take any compensation; or even though he be willing to take compensation, if he is not ready to submit to valuation of a jury, but insists on his own right to determine what the value of his property is;"⁹ and, the plaintiffs having proved a right to light by an existing window, His

¹ *Balbadra v. Naiban* [1906] 4 C. L. J., 370.

² *Birmingham v. Allen* [1877] 6 Ch. D., 284.

³ *Atty.-Genl. v. Gr. East. Co.* [1871] 6 Ch., 572; *Atty.-Genl. v. Brighton* [1900] 1 Ch., 276. *Vibudapriya v. Esuf* [1910] 20 M. L. J. R., 879.

⁴ *Atty.-Genl. v. Richards* [1759] 2 Ans., 603, 1 Ames, 615; *Atty. Genl. v. Scott* [1904] 1 K. B., 404. *Re Debs* [1895] 158 U. S., 564, was a case of stopping the mails.

⁵ *Atty.-Genl. v. Birmingham* [1858] 4 K. & J., 528; *Atty.-Genl. v. Manchester* [1893] 2 Ch., 87; *Atty.-Genl. v. Hunter* [1826] 1 Dever. Eq., 12, 1 Ames, 621. C. P. C., s. 91. *Advocate General v. Haji Ismail* [1909]. 12 Bom. L. R., 294.

⁶ *Fishmongers' Co. v. East India Co.* [1752] 1 Dick., 163, ap. *Attorney-Genl. v. Nichol* [1809] 16 Ves., 338, 1 Ames, 536.

⁷ *Of. per Mellish, L. J., Leech v. Schweder* [1874] 9 Ch. Ap., 463, 476. See also *Colls v. Home & C. Stores* [1904] A. C. 179, 193, 212.

⁸ *Per Oldham, C., Keplinger v. Woolsey* (Neb.), 93 N. W., 1008. The American practice is carefully analysed in *Hart v. Leonard* [1886] 42 N. J. Eq., 416, 1 Ames, 549.

⁹ Here plaintiffs, before suit, had been willing to sell their comfort and ease for a high pecuniary reward, but that fact, the Vice-Chancellor thought, did not preclude them from urging that the injury was irreparable.

Honour continued, "I think they are clearly entitled to retain the right as they acquired it, without being compelled to make any alteration in their house to enable other people to deal with their property."¹ Without substantial interference there is no right of action, it has been more recently said, and, in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened.² He must show material diminution in the value of his heritage, or material interference with his physical comfort.³ An easement is always connected with the use of real property, and any obstruction of it, other than temporary, must go to the impairment of the use of the plaintiff's property.⁴ No action of damages, *e.g.*, can give adequate redress to a party who is hemmed in, so as to have no passage of egress from his own farm.⁵ Besides, the tort is continuing. Where a man buys land subject to an easement, or grants an easement, it has been judicially pointed out, "he cannot appropriate such property against an owner's will, and say, 'I will compensate him in damages.' A judgment for damages does not transfer the plaintiff's property in the way⁶ to the defendant, as would a judgment in trover or trespass for taking goods. Nor will the law restore the enjoyment to the owner. He may have repeated actions for damages, and neither gain enjoyment nor lose his right thereto. The

¹ *Dent v. Auction Mart Co.* [1866] 2 Eq., 238, 246-7. "It is the duty of the courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property, or to compel the owner to exchange the same for other property to answer private purposes or necessities." *Gregory v. Nelson*, 41 Calif., 278 (defendant offered plaintiff an aqueduct for a ditch.)

² *Home & C. Stores v. Colls* [1902] 1 Ch., 302, *revd.* [1904] A. C. 179, *s.n. Colls v. Home & C. Stores*. This was a case of interference with ancient lights, the rule of law in which has been thus stated: "In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly

done." *Aynsley v. Glover* [1874] 18 Eq., 544, 552, citing *Back v. Stacey* [1826] 2 C. & P. 446. *Eccles Comrs. v. Kino* [1880] 14 Ch. D., 213. *Kine v. Jolly* [1907] A. C., 1; *Higgins v. Betts* [1905] 2 Ch., 210. *Ramanjulu v. Apparan* [1911] 21 M. L. J. R., 313; *Arjan v. Ganesh* [1913] 303 P. L. R. *Of Easements Act*, ss. 33-5.

³ *Framji Shapurji v. Framji Edulji* [1905] 7 Bom. L. R., 825. Injunction was refused in *Holland v. Worley* [1884] 26 Ch. D., 578; *Dhunibhoy v. Lisboa* [1888] 13 Bom., 252; *Ghansham v. Morba* [1894] 18 Bom., 474; but granted in *Kadarbhai v. Rahimbhai* [1889] 13 Bom., 674.

⁴ *Koenig v. City of Watertown*, 104 Wis., 409; *Jorderson v. Sutton & Co.* [1899] 2 Ch., 217.

⁵ *Per Campbell, J., Nye v. Clark*, 55 Mich., 599.

⁶ The dispute in the case was about a right of way.

law does not offer an adequate remedy. He is entitled to a remedy that will restore him to enjoyment."¹ Rights of way, easements of light,³ and air,⁴ of support,⁵ and connected with water,⁶ are among those which have been supported and enforced by means of injunction.

Patent,
copyright.

Property rights, whether corporeal or incorporeal, are governed by the same principles, and should receive equal protection.⁸ A patent⁹ is created by statute, and so is a copyright.¹⁰ It is settled, said Kent, C., "that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt. The equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation as well as to have his right excessively impaired by frauds and evasion."¹¹ Where there is an infringement of an exclusive privilege,¹² the validity of this privilege being established,¹³

¹ *Hacke's Appeal*, 101 Pa. St., 245. It is this class of cases, in which the prevention of multiplicity of suits has been recognised as a ground of jurisdiction, that, in Pomeroy's opinion, marks the great advance of modern law over the doctrine of Lords Hardwicke and Eldon above referred to, 2 Eq. R., 938.

² *Thorpe v. Brumfitt* [1873] 8 Ch. Ap., 650, 1 Ames, 547; *Tucker v. Howard* [1880] 128 Mass., 361, 1 Keener, 854.

³ *Yates v. Jack* [1866] 1 Ch. Ap., 295, 1 Ames, 541; *Martin v. Price* [1893] 1 Ch., 276, 1 Ames, 537; *Colls v. Home & Co. Stores*, supra; *Anath Nath v. Gals-taun* [1908] 12 C. W. N., 519.

⁴ *Wilson v. Townend* [1860] 1 Dr. & Sm., 324, 1 Ames, 539; *Bass v. Gregory* [1890] 25 Q. B. D., 481; *Alden v. Latimer* [1894] 2 Ch., 437.

⁵ *Phillips v. Boardman*, 4 Allen, 147.

⁶ *London & Co. v. Evans* [1892] 2 Ch. D., 432; *Ivimey v. Stocker* [1866] 1 Ch. Ap., 396.

⁷ Public easements, as rights of common, *Hall v. Byron* [1877] 4 Ch. D., 607, may be so protected at the instance of individuals who have suffered special injury. Injunction in support of an irrevocable license was issued in *Dodge v. Johnson*, 67 N. E., 560. See, generally, *Gale, Easements*, 9th. ed. 524 sqq.

⁸ *Head v. Porter* [1895] 70 Fed., 498, 1 Ames, 649.

⁹ "It is a mental result...and the machine, process or product is but its material reflex and embodiment," *Smith v. Nichols* [1875] 21 Wallace, 112, 118. See Act V of 1888.

¹⁰ *Donaldson v. Beckett* [1774] 2 Bro. P. C., 129. *Jeffreys v. Boosey*, [1854] 4 H. L. C., 815. See Act XX of 1847.

¹¹ *Croton Turnpike Road Co. v. Ryder* [1815] 1 Johns. Ch., 611, 1 Ames, 664 (statutory right to take tolls and use turn-pike road). Monopolies of ferry (*Letton v. Gordon* [1866] 2 Eq., 123), market (*Wilcox v. Steele* [1904] 1 Ch., 212) and railway (*Raritan Co. v. Delaware Co.*, 18 N. J., Eq., 546) have been similarly protected.

¹² As to infringement of patent, see *Terrell, Patents*, Ch. xvi; of copyright, see *Copinger, Copyright*, Ch. vi.

¹³ Where, e.g., the patent is invalid, there can be no injunction to restrain an alleged infringement, *S. R. A.*, s. 54, ill. (u); so, where the work pirated is libellous or obscene, or pernicious, *ibid*, ill. (v); *Walcot v. Walker*, [1802] 7 Ves., 1; *Southey v. Sherwood* [1817] 2 Mer., 435; or, where the trade-mark imitated, was not honestly used, *S. R. A.*, s. 54, ill. (w).

an injunction is a matter of course,¹ and no question of actual damages can be mooted.² There may be an infringement of a patent in India, by importing for sale or even experimental purposes³ there, articles manufactured according to this patent in a foreign country;⁴ and an unfair abridgement⁵ or a servile or evasive imitation⁶ of the plaintiff's book will be a violation of his copyright. There is property in a trade-mark, too, in India;⁷ and, where the plaintiff has so used a mark or name in connection with his goods that the use of a similar mark or name by the defendant is likely to induce intending purchasers to think that they are purchasing the plaintiff's goods when they purchase the defendant's, the court will interfere in favour of the plaintiff.⁸ The resemblance need not be exact,⁹ nor is it necessary to prove actual

Trade-mark,
trade-name.

¹ *Badische v. Levinstein* [1885] 24 Ch. D., 156; *Werner Motors v. Gamage* [1904] 1 Ch., 264 (patent); *Hogg v. Scott* [1874] 18 Eq., 444, 1 Ames, 655, (copyright); *Exchange Co. v. Gregory* [1896] 1 Q. B., 147.

² *Tinsley v. Lucy* [1863] 1 H. & M., 747; *Cobbett v. Woodward* [1874] 18 Eq., 444; *Wirt v. Hicks* [1891] 46 Fed., 71, 1 Ames, 627.

³ *United Telephone Co. v. Sharpler* [1885] 29 Ch. D., 164.

⁴ *Von Heydon v. Neustadt* [1880] 14 Ch. D., 230. A patent is a privilege granted by the crown not against itself, but against subjects, *Dixon v. London S. A. Co.* [1876] 1 A. C. 632.

⁵ *Saunders v. Smith* [1838] 3 My. & Cr., 711. As to *bona fide* abridgment, see *Roussac v. Thacker* [1864] 1 Hyde, 9, 23.

⁶ *Emerson v. Davies*, 3 Story, 768; *Macmillan v. Suresh Deb* [1890] 17 Cal., 962; *Gangavishnu v. Moreshwar* [1888] 13 Bom., 558. Qy as to translation, *Abdurrahman v. Mahomed* [1890] 14 Bom., 586; *Macmillan v. M. Zakar* [1905] 14 Bom., 537. See Copinger, *Copyright*, 5th. ed. 156-8.

⁷ *S. R. A.*, s. 54, expln. Cf. *Ewing v. Chooneeloll* [1865] Cor. 150. There is a right in other markets, too, where the mark has not yet been used, *Laveryne v. Cooper* [1884] 8 Mad., 149.

⁸ 'Trademark' is defined in *I. P. C.*, s. 478. See also *Merchandise Marks Act* (IV of 1889). There being no system of registration or other provision for a

statutory title, however, claimant has to establish that the mark has acquired a reputation in connection with goods he sells, *Jawala v. Munna* [1910] 37 Cal., 204; *B. A. Tobacco Co. v. Ma-boob* [1910] 7 I. C., 279. English and American authorities doubt the existence of a property right, *Farina v. Silverlock* [1856] 6 DeG. M. & G., 214, 217; 4 Pomeroy, *Eq. J.*, s. 1354. Kerly, *Trade Marks*, 4, 483.

⁹ *Croft v. Day* [1843] 7 Beav., 84; *Singer Mfg. Co. v. Loog* [1881] 18 Ch. D., 395, [1882] 8 A. C., 32, 39; *Badische A. S. Fabrik v. Maneckji* [18 3] 17 Bom., 584, 593; *Ralli v. Fleming* [1878] 3 Cal., 430; *Taylor v. Virasami* [1882] 6 Mad., 110; *Barlow v. Gobindram* [1897] 24 Cal., 364; *Ewing v. Grant Smith* [1864] 2 Hyde, 185. Labels, forms of packages, facings, &c., too, may be protected to prevent unfair competition, *Coats v. Merrick Thread Co.* [1893] 149 U. S., 562. As to 'trade names,' see *Walter v. Ashton* [1902] 2 Ch., 282; *Reddaway v. Schroder Smith* [1905] 9 C. W. N., 281, affg. 8 ibid, 151. *American Waltham Watch Co. v. U.S. Watch Co.* [1899] 173 Mass., 85, 43 L. R. A., 826; *Wotherspoon v. Currie* [1871] 5 H. L., 508. *Nooroo-deen v. Sowden* [1904] 15 M. L. J. R., 45, F. B.; *Fine Cotton S. D. Assn. v. Harwood Cash Co.* [1907] 76 L. J. Ch., 670.

¹⁰ "It is sufficient if it be calculated to deceive the unwary, the incautious or the ignorant purchaser," *Cauffman v. Schuler*, 123 Fed., 205.

damage to the plaintiff¹ or even a fraudulent intent in the defendant.² Every person should so use his own property as not to injure the property of another;³ and he is held to be accountable for the natural and probable result of his acts.⁴ Whatever the intent, the imposition upon the public is the test of the invasion of the plaintiff's right, and it is this wrong which the courts seek to prevent.⁵ A man may have property in his name or reputation, and one who seeks to profit himself by making such use of either as is actually fraudulent or is calculated to deceive, is likely to find himself in court.⁶ A publisher who advertised for sale certain poems falsely ascribed to Lord Byron, was enjoined from publishing them.⁷ So may the promoter of a hubble company be restrained from publishing without authority and consent the names of respectable persons as directors and trustees.⁸

Literary
property.

A right of property analogous to a copyright, has been recognized and protected in unpublished writings,⁹ etchings and sketches.¹⁰ The writer of a letter retains such an interest in it as to entitle him or his representative to an injunction against its publication by the recipient or his representative,¹¹ though

Reply song, whether a colourable imitation? Francis, &c. v. Feldman [1914] 2 Ch., 728. Even where parties have the same name, care should be taken to avoid misleading. *Millington v. Fox* [1888] 3 My. & Cr., 338; *Singer v. Wilson* [1873] 3 A. C., 376; *Royal Baking Powder Co. v. Royal*, 122 Fed., 337; *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.* [1907] 76 L. J. P. C., 102; *Merriam Co. v. Ogilvie*, [1908] 16 L. R. A., N. S., 549. But to apply same name to private property may not be a wrong, *Day v. Brounrigg* [1879] 10 Ch. D., 294.
¹ *Bourne v. Swan & Edgar* [1903] 1 Ch., 211, 223. "The very life of a trade-mark depends upon the promptitude with which it is vindicated." Followed in *Royal Warrant Holder's Association v. Edward Drone & Beal Limited* [1912] 1 Ch., 10, injunction to restrain the unauthorised user of Royal Arms. *Johnson v. Orr Ewing* [1882] 7 A. C., 214. *Smidt v. Reddaway* [1905] 32 Cal., 401.

² *Ibid. Graham & Co. v. Kerr Dodds & Co.* [1869] 3 B. L. R., Ap. 4.

³ *Heublein v. Adams*, 125, Fed., 782.

⁴ *Enterprise Mfg. Co. v. Landers*, 124 Fed., 923, *affd.*, 131 Fed., 240.

⁵ *Pomeroy, Eq., n., ss. 578-9.*

⁶ *Clark v. Freeman* [1848] 11 Beav., 112, in so far as it purports to limit the interference of the court to mischief done to property, can hardly be supported after the Judicature Act. *Quariz Hill Con. Min. Co. v. Beall* [1882] 20 Ch. D., 501; *Re Riviere's Trade Mark* [1884] 26 Ch. D., 48, 53. *Cf. S. R. A., s. 54, ill. (x).*

⁷ *Lord Byron v. Johnston* [1816] 2 Mer., 20.

⁸ *South v. Webster* [1847] 10 Beav., 561; *Dixon v. Holden* [1869] 7 Eq., 488; *Walter v. Ashton* [1902] 2 Ch., 282.

⁹ *Mucklin v. Richardson* [1758] 2 Bro. P. C., 138. Representation of an unpublished play or musical composition, may be enjoined, *Morris v. Kelly* [1820] 1 J. & W., 41; *Tompkins v. Halleck*, 133 Mass., 32.

¹⁰ *Prince Albert v. Strange* [1849] 1 M. & G., 25, 2 DeG. & S., 652. The usurpation of a family name not restrained, *Du Boulay v. Du Boulay* [1869] L. R., 2 P. C., 430.

¹¹ *S. R. A., s. 54, ill. (y)* *Lytton v. Devey* [1884] 54, L. J. Ch., 293; *Folsom v. Marsh*, 2 Story, 100; *Gee v. Pritchard* [1818] 2 Sw., 402, 1 Keener, 59

the former cannot apparently compel the latter to surrender the letter.¹ Where a professor delivers an address, pupils may take notes for their own information, but not publish them for profit.² Nor, where one person has collected news, can another appropriate and use the fruits of his labour.³ And in one case a photographer was enjoined from exhibiting and selling, in the form of a Christmas card, the likeness of a lady photographed by him.⁴

In certain parts of India there is a customary right of privacy; and, though, strictly speaking, this is personal and unconnected with property, yet it may have to be protected by enjoining house-owners from making such constructions as are calculated to place adjoining premises occupied by *pardanishin* ladies in an exposed situation.⁵

Right of
privacy.

temporary injunction). Publication of Lord Chesterfield's letters to his son, *Thompson v. Stanhope* [1774] Amb., 737, and of literary letters written by poet Pope, *Pope v. Curl* [1741] 2 Atk., 342, was enjoined. The court said in the last case, "at most the receiver has only a joint property with the writer." *Philip v. Pennell* [1907] 76 L. J. Ch., 663.

¹ *Ree Wheatcroft* [1877] 6 Ch. D., 97. And recipient may publish the letters in self-defence, *Perceval v. Phipps* [1813] 2 V. & B., 19. See also *Hopkinson v. Burghley*, [1867] 2 Ch., 447.

² *Abernethy v. Hutchinson* [1825] 1 H. & Tw., 28 (temporary injunction). *Caird v. Sime* [1887] 12 A. C., 326; *Wulter v. Lane*, [1900] A. C. 541. Where persons are admitted, as pupils or otherwise to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures, whether that be to publication in print or oral delivery." *Tompkins v. Halleck*, 133 Mass., 32.

³ *Exchange Tel. Co. v. Gregory* [1896] 1 Q. B. 147; *Exchange Co. v. Central News* [1897] 2 Ch., 48.

⁴ *Pollard v. Photographic Co.* [1888] 40 Ch. D., 345, 1 Keener, 76. In America the right of an individual not to have his portrait or representation published in any form, without his consent, has been much discussed, 4 Harv. L. Rev., 193. It was denied by a divided court in *Robertson v. Rochester Folding Box Co.* [1902] 59

L. R. A., 478, 1 Scott, 178, and affirmed unanimously in *Pavesich v. New England L. I. Co.* [1905] 50 S. E., 68, 1 Scott, 194, and in *Edison v. Edison Polyform Mfg. Co.* [1907] 67 Atl., 392; *Peck v. Tribune Co.*, [1909] 214 U. S., 185 (publication of portrait for advertisement, libel). *Contra, Corelli v. Wall* [1906] 22 T. L. R., 532. Gray, J., dissenting in the first case, said: "The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own... The principle is fundamental and essential in organised society that every one, in exercising a personal right and in the use of his property, shall respect the right of others... I think that the plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph, but, if her face or her portrait has a value the value is hers exclusively until the use be granted away to the public." *Of. Schuyler v. Curtis* [1892] 64 Hun., 594, 1 Keener, 95 (statue). 1 Cooley Torts, 360 sqq.; 1 Street, *Legal Liability*, 318 sqq.

⁵ *Gokal v. Radho* [1888] 10 All., 358 (collects previous cases); *Abdul v.*

Divulging
of secret.

A trade secret is a property, and a breach of confidence resulting in the divulging of such secret, may cause irreparable loss to the plaintiff and be enjoined.¹ So may a breach of good faith on the part of a solicitor, who was previously another solicitor's clerk, and now is appearing for parties against whom his former master was employed.²

Tort need
not be in
respect of
property.

The tort, in order to attract equitable relief, need not violate a right of property. In a case otherwise proper, *e.g.*, the making of defamatory statements, may be enjoined, even though the publication may be shown not to be injurious to the plaintiff's property.³ Injunctions have been granted in England against marrying infant wards of court, and even parents have been restrained in the matter of the custody and education of their children.⁴ The main consideration with the court is the welfare, moral, religious and physical, of the infant, and ties of affection are not disregarded.⁵ An Indian Court can try and give damages in respect of all kinds of torts; there is no reason therefore why, if it thinks fit, it should not grant preventive relief by way of injunction in any case of civil injury which it has jurisdiction to redress.⁶ Where the alleged wrong

Emile [1893] 16 All., 69; *Kundan v. Bidhi Chand* [1906] 29 All., 64; *Abdul v. Bhagwan* [1907] *ibid.*, 582. *Contra*, *Azuf v. Ameerubibi* [1894] 18 Mad., 163; *Sri Narain v. Jodoo* [1900] 5 C. W. N., 147.

¹ S. R. A., s. 54, *ill.* (2); *Morrison v. Moat* [1851] 9 Hare, 241; *Yovatt v. Winyard* [1820] J. & W., 394. "One who invents or discovers and keeps secret a process of manufacture, whether patentable or not, has a property therein, which this court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or to disclose it to a third person." *Solomon v. Hertz* [1885] 40 N. J. Eq., 400, 1 Ames, 129. Secret medicines are not always protected, *Williams v. Williams* [1817] 2 Mer., 157. But see *Leather Co. v. Lonsont* [1870] 9 Eq., 345. Cf. *Tipping v. Clarke* [1843] 2 Hare, 383. Distinguish *James v. James* [1872] 13 Eq., 421.

² *Brichene v. Thorp* [1821] Jac., 300. Cf. *Mellor v. Thompson*, [1885] 31 Ch. D., 55 (motion heard *in camera* to preserve secret); *Hardy v. Veasey* [1868] 3 Ex., 107 (case of banker disclosing

state of customer's account.)

³ S. R. A., s. 55, *ill.* (e), (f). English courts formerly did not (*Prudential Assurance Co. v. Knott* [1874] 10 Ch. Ap., 142, 1 Keener, 53); and American courts even now do not (*Raymond v. Russell*, 143 Mass., 295) restrain a publication, merely because it is libellous. The Judicature Acts have altered the English practice, *Gollard v. Marshall* [1892] 1 Ch., 571; *Monson v. Tussauds* [1894] 1 Q. B., 671, 690, 698. *Odgers, Libel*, Ch. XIV; Bower, *Defamation*, 196-8. As to a trade libel, see *Liverpool & Assen. v. Smith* [1888] 37 Ch. D., 170.

⁴ *Smith v. Smith* [1745] 3 Atk., 304, 307; *Shelley v. Westbrook* [1817] Jac., 26n.; Kerr, *Inv.*, 5th. ed. 633-5.

⁵ *Re McGraith* [1893] 1 Ch., 143, 148; *Everseley, Dom. Rel.*, 513, 514.

⁶ Cf. *Srinivasa v. Tiruvengada* [1888] 11 Mad., 450; *Mohadin v. Shivlingappa* [1899] 23 Bom., 666; *Chapsey v. Jethabhai* [1907] 9 Bom. L. R., 569. *Woodroffe, Inv.*, 541. *Soma v. Thiruvengkatachariar* [1912] 15 I. C., 409 (precedence in distribution of honours in temple).

is not one of which the municipal courts take cognisance, it is clear, however, that there will be no right to sue even for an injunction.¹ Where, *e.g.*, the plaintiffs, who were Mahomedans, wished to prevent the defendants, who were also Mahomedans, from performing a service, called *kutbah*, in their own private mosque on Fridays, not on the ground of any disturbance or illegal annoyance to the rest of the community or any infringement of the rights of their co-worshippers, but because the practice was alleged to be contrary to the Mahomedan religion, the Madras High Court held that the plaint disclosed no cause of action.²

The growing conflict between capital and labour has brought into existence combinations and trades-unions and has resulted in the strike,³ the boycott,⁴ and in picketing.⁵ A large body of cases, especially in America, has arisen out of interference by third persons with the rights of employers and the employed.⁶ The question, however, is generally one of the substantive law of torts, *viz.*, is the act complained of an actionable wrong? Where it is, the right to an injunction cannot be denied; and when such cases arise in India—and they may in the not very distant future,—I am sure that the wrong-doer will find that the arm of the law here, too, is long enough to reach him.

Conflict between labour and capital.

Courts of equity have deliberately abstained from fixing any definite bounds as regards the wrongs and abuses which they will and will not restrain by injunction. The objection, therefore, that the use of an injunction for the particular purpose for which it is sought is novel, can scarcely be fatal in any case.⁷ "The traditional limits of proceedings in equity," says Holmes, J., "have not embraced a remedy for political wrongs";⁸ but the Supreme Court of Colorado has held that the

Political wrongs.

¹ *Mahammad v. Asan Mohidin* [1907] 17 M. L. J. R., 421; *Barsati v. Chamru* [1907] 4 A. L. J. R., 715; *Madhusudan v. Madhav* [1908] 11 Bom. L. R., 58.

² *Maine Moilar v. Islam Amanath* [1891] 15 Mad., 355; *Gadigeya v. Basaya* [1910] 34 Bom., 455 (caste question).

³ *Reynolds v. Davis* [1908] 17 L. R. A., N. S., 162.

⁴ *Lindsay v. Montana Federation* [1901] 18 *ibid.*, 707.

⁵ *Jones v. Winkle G. & M. Works*, 17 *ibid.*, 848.

⁶ See art., 28 Amer. Law Rev., 47 (Hodge). 2 Pomeroy, *Eq. R.*, ch. xxviii.

⁷ Spelling, *Inj.*, 777.

⁸ *Giles v. Harris* [1903] 189 U. S., 475, 486.

state can enjoin election officials from committing illegal and fraudulent acts in the matter of a forthcoming state election.¹

Perpetual
mandatory
injunction.

A word now about perpetual mandatory injunctions. It may be impossible in some cases to restore the *status quo*, unless the wrong-doer is made to undo the wrong which he has committed. To prevent the breach of an obligation, therefore, a court of equity may find it necessary to compel the performance of certain acts; and if they are such as the court is capable of enforcing, it may, in its discretion, enjoin the performance of these acts by the defendant.² Such mandatory relief may be proper in many cases of wilful waste, as of trespass to property; and where there is an actual existing nuisance³ or disturbance of a right of easement, the wrong can seldom be redressed by a purely restrictive injunction. Now, the history of mandatory injunctions, said one of the greatest Masters of the Rolls in England, "is a curious one. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution; and I do not know what is meant by extraordinary caution. Every judge ought to exercise care; and it is not more needed in one case than in another. In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunctions. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make if, instead of fouling

Smith v.
Smith.

¹ *Miller v. Tool*, 86 Pac. R., 224; 20 Harv. L. R., 158.

² S. R. A., s. 55.

³ In this case, it may be questioned, however, if a mandatory injunction, issued after trial, is in fact other than an ordinary decree for abatement,⁴ *Pomeroy, Eq. J.*, s. 1359. But no

mandatory injunction against a private individual for a mere nuisance in law will be granted, except where it has been created and persisted in, in defiance of local authority, which has not sufficient power to enforce compliance with law, *Adv.-Genl. v. Ismail* [1910] 12 Bom. L. R. 274.

it day by day, he stopped it altogether? In granting a mandatory injunction, the court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property, if he would give him a price for it. Where, therefore, money could not adequately reinstate the person injured, the court said, as in cases of specific performance, "we will put you in the same position as before the injury was done." When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence."¹

Disturbance
of easement.

Let us now look at some concrete instances. The case before Sir G. Jessel was one of an interference with the access of light and air to the house which the plaintiff owned and occupied. The defendant had built up to the height of 28 feet 8 inches, exactly opposite to some of the plaintiff's windows, a wall which originally was only 9 feet high, with the result that one of the plaintiff's rooms, used as a workshop, had been rendered useless for that purpose, and the others could scarcely be used except by gas-light, and the plaintiff and his family had been injured in health. The learned judge said, "The injury was most serious to the plaintiff, and he could not be compensated without the defendant buying the house, while, as regards the defendant, I am not satisfied that any considerable sum has been laid out upon his buildings.....I think I have no right to say that the plaintiff is to give up the house and take pecuniary compensation for it, because it is more convenient for the defendant." A mandatory injunction for the removal of the new wall was granted.² This is a typical case of an interference with an easement.

¹ *Smith v. Smith* [1875] 20 Eq., 500, 1 Ames, 543. Cf. *Lakshmi Narain v. Tara* [1904] 8 C. W. N., 710, 712-3.

² *Smith v. Smith*, supra. Cf. S. R. A., s. 55, ill, (a) *Per Gray, C. J.*, "The

injury caused to the plaintiff's estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrong-doer to compel innocent persons to sell their right

Nuisance.

A nuisance may arise from some construction, say, a projecting eave,¹ or a sewer,² or of horse stables³ or an obstruction placed along a highway,⁴ or a dam across a stream,⁵ which clearly cannot be abated by enjoining mere passivity upon the wrong-doer. Overhanging branches or extending roots of trees may cause a nuisance against which a merely restraining injunction will not be a workable remedy.⁶ And if a copyright or trademark has been pirated or a patent infringed, it will generally be necessary for the protection of the plaintiff that the product of such piracy or infringement should be surrendered or destroyed.⁷ So, in a case of waste, the wrong-doer may be compelled to undo his devastation. Such was the case of *Vane v. Lord Barnard*,⁸ where the defendant, who had, on the marriage of the plaintiff, his eldest son, settled Raby Castle on himself for life, without impeachment of waste, and remainder to his son for life, in a fit of displeasure against this son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass doors, and boards, etc., to the value of £3,000. Lord Cowper, C., decreed that the castle should be repaired and put to the same condition it was in, at the expense and

Patent,
copyright.

Waste.

at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition." *Tucker v. Howard* [1880] 128 Mass., 361, 1 Ames, 549. A plaintiff cannot be asked to give up his ancient lights, because the defendant is willing to provide fresh lights for him in another way, *Muthukrishna v. Somalinga* [1911] 21 M. L. J. R., 742. *Cf. Krehl v. Burrell* [1878] 7 Ch. D., 551, 1 Keener, 850; 11 Ch. D., 146. Recent Indian cases, where interference with light and air has been prevented by mandatory injunctions, are *Yaro v. Sana Ullah* [1896] 19 All., 259; *Chotalal v. Lallubhai* [1904] 29 Bom., 157; *Anderson v. Hardut* [1905] 9 C. W. N., 543; *Framji Shapurji v. Framji Edulji* [1904] 7 Bom. L. R., 73, 352, 825; *Ramanjulu v. Apparanji* [1911] 21 M. L. J. R., 313.

¹ S. R. A., s. 55, ill. (b).

² *Rand Co. v. Burlington* [1904] 97 N. W. R., 1096 (Iowa); *Pyari v. Raja* [1911] 11 I. C., 45 (privy). In *Sellers v. Local Board* [1885] 14 Q. B.

D., 928, a public urinal, which was a nuisance to a private house, was directed to be removed.

³ *Bai Bhicaiji v. Perojshah* [1915] 17 Bom. L. R. 1040.

⁴ *Turpin v. Dennis*, 139 Ill. 274. Distinguish *Atty.-Genl. v. Ely* [1868] 6 Eq., 106. *Cf. Newmarch v. Brandling* [1818] 3 Sw., 99; *Spencer v. London & B. R. Co.* [1836] 8 Sim., 193.

⁵ *Rothery v. N. Y. Rubber Co.* [1882] 90 N. Y., 30, 1 Ames, 567. *Cf. Jairam v. Babaji*, [1905] 1 N. L. R., 184; *Raja of Venkatagiri v. Muddu Krishna*, [1904] 28 Mad., 15.

⁶ *Lakshmi Narain v. Tara Prosanna* [1904] 31 Cal., 944.

⁷ S. R. A., s. 55 ill (g) *Warne v. Seebohm* [1888] 39 Ch. D., 73; *Isaacs v. Fiddleman* [1889] 42 L. T., 395; *Betts v. De Vitre* [1865] 34 L. J. Ch., 289, 291. Letters and compromising communications, the publication of which may be enjoined, may also be required to be destroyed or given up, S. R. A., s. 55, ill. (c), (d), (g).

⁸ [1716] 2 Vern., 788, 1 Ames, 470.

charge of Lord Barnard.¹ Similarly, as a general rule, “where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff’s property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such a case, the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property...One who has gone on wrongfully in a wilful invasion of the plaintiff’s right in real estate has no equity to set up against the plaintiff’s claim to have his property restored to him as it was before the wrong was done.”² Where two railway companies were rivals in traffic, and the defendants, with the object of diverting that traffic and inducing persons to travel on their line of railway, erected a strong stockade upon a foot-path used by passengers on the plaintiff’s railway, Page Wood, V. C., said there was trespass and irremediable damage which the court would interfere to prevent, the diversion of the traffic being a sort of damage which could not be measured.³ So, where in abuse of a license, the defendant piled huge quantities of rock upon some unoccupied lots of the plaintiff and, in spite of repeated demands, neglected to remove them, the New York Court of Appeals held that the plaintiff’s remedy was not to remove the stone and then sue the defendant for the recovery of the expense

Trespass.

¹ Cf. *Rolt v. Lord Somerville* [1737] 2 Eq. C. Abr., 759, 1 Ames, 471.

² *Per* Knowlton, J., *Lynch v. Union Inst.* [1893] 159 Mass., 306, 308, 1 Keener, 647; *Jethalal v. Lalbhai* [1904] 28 Bom., 298. The maxim *de minimis non curat lex* does not apply to the law of trespass; *Somasundaram v. Bappu* [1911] 10 M. L. T., 473 (Rahim, J.). Where defendant built a wall, partly on his own land and partly on plaintiff’s, a mandatory injunction was issued for the removal of the encroachment, Ismay, J. C., saying: “It is a well-established law in England that, if a stranger builds on the land of another, although believing it to be his own, the owner

is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building.” *Mohan Lal v. Chunni Lal*, [1906] 2 N. L. R., 4; *Abdul v. Ram Charan* [1911] 38 Cal., 687.

³ *London & Ry. Co. v. Lancashire & Ry. Co.* [1867] 4 Eq., 174. In *Bidwell v. Heldon* [1891] 63 L. T., 104, North, J., decreed restoration of a ditch, bank, and fence.

incurred,—the owner could not be compelled to do in advance for the trespasser what the latter was bound to do,—and that a mandatory injunction must go.¹

Form of injunction.

The object of a mandatory injunction, I may note here, is to restore things to their original condition and not to create a new state of things. Where, therefore, the defendant had made a roof which interfered with the privacy of the plaintiff's house, the Allahabad Court held that he could not be ordered to erect a wall on the roof, so as to prevent a view of the plaintiff's house from the roof.² A mandatory injunction will not also be issued against a trespasser compelling him to come on the land, on which he had trespassed, to remove an encroachment made thereon by him.³ But the injunction granted must not be vague and inappropriate.⁴

Co-sharers.

In India, the question as to right to a mandatory injunction is frequently raised between co-sharers. If several owners are in possession of undivided property, none of them has a right to appropriate to his exclusive use any portion of this property and thus effect a compulsory partition in his own favour according to his choice.⁵ One co-parcener, therefore, has no right to place any constructions upon what belongs to all, and, if he does so, another co-parcener may obtain a mandatory injunction for its removal, without proving (according to the Allahabad High Court)⁶ any special damage. But Wilson, J., denied that there was any such broad proposition that one co-owner was entitled to an injunction restraining another co-owner from exceeding his rights absolutely, and without reference to the amount of damage sustained by the one side or the other from the granting or withholding of the injunction.⁷ And the Calcutta

¹ *Wheelock v. Noonan* [1888] 108 N. Y., 179, 1 Ames, 527.

² *Sheonath v. Ali Hussain* [1904] 1 A. L. J. R., 118.

³ *Navroji v. Dastur* [1903] 28 Bom., 20, 57.

⁴ *Appayya v. Puvvala* [1912] 14 I. C., 267.

⁵ *Shadi v. Anup Singh* [1889] 12 All., 436, F. B.

⁶ *Ibid.*, overruling *Paras Ram v. Sherjit* [1887] 9 All., 661; *Najju v. Imtiyazuddin* [1895] 18 All., 115, *Mu-*

hammad v. Faiz [1896] *ibid.*, 361; *Ram Bahadur v. Ram Shanker* [1905] 27 All., 688, F. B. (here lower court had refused an injunction, because the area built upon had been reclaimed by defendant, plaintiffs and other co-sharers had similarly previously built upon areas reclaimed by them without objection, and no special damage appeared). Cf. *Nadir v. Zainulabdin* [1900] 20 A. W. N., 196

⁷ *Shamnugger Jute Co. v. Ram Narain Chatterji* [1886] 14 Cal., 189.

High Court has refused a mandatory injunction for refilling a tank which the defendant had excavated in common land, which was shown to be fit for cultivation. The learned judges said: "Before an injunction is issued in favour of one against another co-sharer, directing that a portion of the property alleged to have been dealt with adversely should be restored to its former condition, the plaintiff must show that he has sustained some substantial injury that affects his position."¹ It is difficult to see on principle why encroachment upon land, in which the defendant has some title, should be put upon a different footing from that upon land in which he has no title, and if in the latter case an injunction, mandatory or restrictive, is not a matter of course, why it should be so in the former.² Where a co-owner is carrying on a necessary work on the common property, another co-owner obviously cannot get an injunction to prevent him from doing so.³

A mandatory injunction may also be granted to prevent a breach of contract. In fact, where an express contract has been broken, English courts are not in the habit of scrutinising the damage actually caused.⁴ Where it had been agreed that certain grounds would be laid out as a garden, and the defendants erected stables thereupon, they were compelled to remove them.⁵ And where the estate had been laid out for building purposes according to a regular scheme, and the defendant built two houses with bay windows projecting about three feet beyond the line of frontage of the other houses, *Hall, V. C.*, refused to listen to suggestions of hardship and loss

Breach of contract.

Fazilattunnisa v. Ijaz [1903] 30 Cal., 901. *Cf. Dwijender v. Purnendu* [1910] 11 C. L. J. 189; *Basanta v. Mohesh* [1914] 18 C. W. N. 328 (ouster defined).

¹ *Joy Chander Rukhit v. Bippro Churn Rukhit* [1886] 14 Cal., 236; *Brommomyi v. Gopi* [1910] 15 C. W. N., 183; *Atarjan v. Ashuk* [1900] 4 C. W. N., 788; *Ananda v. Parbuti* [1906] 4 C. L. J. 198. *Distinguish Israil v. Samser* [1913] 19 C. L. J., 47.

² In *Phani Singh v. Nawob Singh* [1905] 28 All., 161, Stanley, C. J. and Burkitt, J., refused an injunction against a co-owner, who had taken exclusive possession of joint property and was dealing with it without plaintiff's consent.

The only remedy of co-sharer under such circumstances seems to be suit or application for partition, *Jagar Nath v. Jai Nath* [1904] 27 All., 88. But see *Nannhi v. Daulat* [1905] 2 A. L. J. R., 256; *Soshi Ghose v. Gonesh Ghose* [1902] 29 Cal., 500.

³ *Kuttayan v. Mammanna* [1912] 35 Mad., 681.

⁴ *Doherty v. Allman* [1878] 3 A. C., 729, 1 Keener, 481; *Leech v. Schweder* [1874] 9 Ch., 463; *Atty.-Genl. v. Mid-Kent Ry. Co.*, [1868] 3 Ch., 104.

⁵ *Rankin v. Huskisson* [1830] 4 Sim., 13.

of value, and so forth, and granted a mandatory injunction.¹ A diversion of a stream of water, in breach of an agreement, may be remedied by a mandatory injunction to restore the original condition and direction;² and a tenant of a coal mine, who, contrary to his covenants, keeps a communication with an adjoining mine open and permits water to flow thereby, may be compelled to close the channel.³ You will remember the cases of restrictive covenants I discussed in Lecture VII. The doctrine of *Tulk v. Moxhay*,⁴ has been held in England not to extend to affirmative covenants.⁵ A mandatory injunction therefore will not be issued where the parties before the court are not the original parties to the contract.⁶

Statutory
powers.

It may be useful to note with regard to the defence of statutory authority, which is sometimes raised, that "if a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers, or, as in the case of a railway, partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition, sometimes expressed and sometimes understood, that the undertakers

¹ *Lord Mannors v. Johnson* [1875] 1 Ch., 67, 1 Ames, 130. He referred to *Kemp v. Sober* [1851] 1 Sim. N. S., 517, 520, where Lord Cranworth said: "A person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept, and the feeling of anxiety is damage." Cf. *Atty.-Gen. v. Wimbledon House Estate Co.* [1904] 73 L. J. Ch. 593 (building created in contravention of English Public Health Act, 51 & 52 Vict., c. 52, s. 3); *Nussey v. Provincial Bill-Posting Co.*, [1909] 1 Ch., 734. But, where a contract has been entered into and a scheme made for carrying out two purposes which

turn out to be incompatible with each other, neither party has any remedy against the other in respect of damage sustained by the execution of the scheme where nothing has been done, or omitted which was not contemplated by both parties, *Lyttleton Times Co. v. Warners* [1907] 76 L. J., P. C., 100.

² *Duke of Devonshire v. Elgin* [1851] 14 Beav., 530.

³ *Earl of Moxborough v. Bower* [1843] 7 Beav., 127.

⁴ [1848] 2 Ph., 774, 777, Finch, 777. . .
Ante, 393.

⁵ *Harris v. Boots Cash Chemists* [1904] 73 L. J., Ch., 708.

shall do as little damage as possible in the exercise of their statutory powers."¹ The court will, therefore, in a proper case, restrain the abuse of statutory authority by an injunction.²

Delay, acquiescence.

It has been observed that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred.³ Delay in itself, short of the limitation period, whether in objecting or in suing, is, as we have seen, of scarcely any consequence, where the defendant has not been prejudiced thereby.⁴ All the circumstances of the case have to be taken into consideration by the court, not only the injury to the plaintiff, but also the amount which has been laid out by the defendant.⁵ And though there is nothing to prevent a court granting a mandatory injunction for the removal, say, of a building or structure after it has been completed,⁶ yet a plaintiff, who waits till such completion and knowingly permits the defendant to incur large expenditure, may then find the balance of convenience incline heavily against the drastic remedy of a mandatory injunction.⁷ Delay may also be evidence of acquiescence; and, in the case of a continuing breach, acquiescence will bar the grant of an injunction of any kind whatsoever.⁸ The court does not on light grounds act against the legal rights of parties; there must be fraud or such acquiescence, said Lord St. Leonards, as in view of this court would make it a fraud afterwards to insist

¹ *Per* Lord Macnaghten, *Gaekwar v. Gandhi* [1902] 27 Bom., 344, 352, P.C., *Ricket v. Metropolitan Ry. Co.* [1867] 2 H. L., 175, 202; *Geddis v. Prop. of Bann Reservoir* [1878] 3 A. C., 430, 455. *Garrett, Nuisances*, Ch. viii.

² *Canadian Pacific Ry. Co. v. Parke* [1899] A. C., 535; *Sankaravazhivelu v. Secy. of State* [1904] 28 Mad., 72. Onus on the defendant, *Garrett, op. cit.*, 224. *Ante*, 635-6. *Gf. L. & N.W. Ry. v. Westminster Corp.* [1904] 73 L. J. Ch., 386; *Saundby v. City of London Water Comrs* [1905] 75 *ibid.*, P. C., 25.

³ *Pomeroy, Eq. J.*, s. 1359. *Ghan-sham v. Moroba* [1894] 18 Bom., 474; *Benode Coomarie v. Soudaminey* [1884] 16 Cal., 252.

⁴ *Greatrex v. Greatrex* [1847] 1 De G. & S., 692; *Senior v. Pawson* [1867] 3 Eq., 330. *Per Fry, J.*: "Mere lapse of time, unaccompanied by anything else has, in my judgment, just

as much effect, and no more, in barring suit for an injunction as it has in barring an action for deceit." *Fullwood v. Fullwood* [1878] 9 Ch. D., 176. *Gf. Uda Begam v. Imamuddin* [1875] 1 All., 82, 86.

⁵ *Ante*, 606-7.

⁶ *Durrell v. Pritchard* [1865] 1 Ch. Ap., 244, 250, 1 Keener, 846. *Raja Ram v. Moti Ram* [1906] 26 A. W. N., 221; *Tumula v. Koppula* [1913] M. W. N., 188.

⁷ *Gaskin v. Balls* [1880] 13 Ch. D., 324; *Ranchhod v. Lallu* [1873] 10 Bom. H. C. R., 95; *Muhammed v. Gulab Rai* [1898] 20 All., 345. *Rewa v. Vrijvalabh* [1904] 6 Bom. L. R. 41; *Shama Charan v. Babu Lal* [1904] 24 A. W. N., 70; *Ulagappan v. Chidambaram* [1906] 29 Mad., 497; *Atty-Genl. v. Grand Junction Canal Co.* [1909] 78 L. J. Ch., 681.

⁸ S. R. A., s. 56 (h).

upon the legal right.¹ It is no answer, *e.g.*, to an application for an injunction to restrain a defendant from waste by cutting down trees on the complainant's land, that, because the latter has taken no steps to prevent the wrong-doer from cutting down one-half of the trees, he has thereby acquired a right to cut down the other half.² And it is no defence to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer of a patent that the latter has been trespassing on the rights of the patentee for years with impunity.³ "I apprehend," said Turner, L. J., "that to justify the court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence than is required upon an interlocutory application; for at the hearing of a cause it is the duty of the court to decide upon the rights of the parties; and dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost."⁴ The proper sense of 'acquiescence' was thus explained by Lord Cottenham: "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain."⁵ And the essentials of acquiescence were formulated by Fry, J., in a later case:⁶ (i) *A* must have made a mistake as to his legal rights; (ii) he must have laid out money or done some act on the faith of such mistaken belief; (iii) *B* must have known of his own right inconsistent with that claimed by *A*; (iv) *B* must have known of *A*'s mistaken belief as to his (*A*'s) rights; and (v) *B* must have encouraged *A* in his outlay or acts, either directly or indirectly, or by not asserting his own right. But acquiescence will not avail the defendant, where the violation of the plaintiff's right

Acquies-
cence.

¹ *Gerrard v. O'Reilly* [1823] 3 Dr. & War., 414, 433. *Rogers v. Nowill* [1853] 3 DeG. M. & G., 614.

² *Attu. Genl. v. Eastlake* [1853] 11 Hare, 205, 228.

³ *Menendez v. Holt* [1888] 128 U. S., 514, 523; *Idé v. Thorlicht* [1902] 115 Fed., 187, 1 Ames, 644.

⁴ *Johnson v. Wyatt* [1863] 2 DeG. J.

& S., 18, 25. *Cf. Bovill v. Grate* [1866] 1 Eq., 388; *Ware v. R. C. Co.* [1863] 32 L. J., Ch., 136.

⁵ *Duke of Leeds v. Earl of Amherst* [1846] 2 Ph., 117. *Cf. Ramsden v. Dyson* [1866] 1 H. L., 129; *Beauchamp v. Winn*, [1873] 6 H. L., 223.

⁶ *Willmot v. Barber* [1880] 15 Ch. D., 96.

was complete from its commencement,¹ a completed breach must have been continued and acquiesced in.² A preliminary act³ or a temporary⁴ or slight violation⁵ may be acquiesced in, and yet the right to object to the injury when complete may not be gone. Nor a previous breach, if distinct and complete in itself, if not objected to, can justify a subsequent breach.⁶ "Mere lapse of time as evidencing acquiescence," said Lord Campbell, C., "is not to be measured by any cycle of the heavenly bodies, but must depend upon the circumstances of each particular case. ... Generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."⁷ A right may be released or abandoned after full knowledge both of the right and its breach.⁸

The court has a discretion to exercise under section 54, Specific Relief Act. But "this discretion must be a judicial discretion," to quote Jessel, M. R., once more, "exercised according to something like a settled rule, and in such a way as to prevent the defendant doing a wrongful act, and thinking that he could pay damages for it. Without laying down any absolute rule, in the first place, it is of great importance to see if the defendant knew he was doing wrong and was taking his chance about being disturbed in doing it."⁹ Where a party, despite repeated warnings from the plaintiff, persisted in building over a court-yard and thus obstructing the latter's right of way to

Discretion.

¹ *Atty.-Genl. v Bradford Navigation Co.* [1866] 35 L. J., Ch., 619 (growing nuisance.)

² *S. R. A.*, s. 56 (h); *Barret v. Blagrove* [1801] 6 Ves., 104.

³ *Northam Bridge Co. v. London & S. Ry. Co.* [1840] 9 L. J. Ch. 277.

⁴ *Gordon v. Oheltenham Ry. Co.*, [1842] 5 Beav., 229, 238.

⁵ *Bankart v. Houghton* [1860] 27 Beav., 425, 430.

⁶ *Macher v. Foundling Hospital* [1813] 1 V. & B., 188; *Hogg v. Scott* [1874]

18 Eq., 444, 1 Ames, 655; *Courtown v. Ward*, 1 Sch. & L., 8.

⁷ *Cairncross v. Lorimer* [1860] 7 Jur. N. S., 149. The party pleading acquiescence must prove it, *Nand Kishor v. Bhagubhai* [1883] 8 Bom., 95, 98; *Benode v. Soudaminy* [1889] 16 Cal., 252, 259; by clear and unequivocal evidence, *Wavell v. Watson* [1866] W. N. (Eng.), 344.

⁸ *Leeds v. Amherst*, supra.

⁹ *Smith v. Smith*, supra.

his shop, and refused terms of compensation which the plaintiff was willing to accept, the court issued a mandatory injunction for the demolition of the building, though constructed at an enormous cost.¹ But where, by an innocent mistake, erections were placed upon a narrow strip of the plaintiff's land, and the damage caused to the defendant by removal of them would have been greatly disproportionate to the injury of which the plaintiff complained, equity did not aid in an attempted act of oppression.²

Hardship to
defendant.

This brings me to the next point for consideration, which is the materiality of the injury to the plaintiff,³ and the amount laid out by the defendant;⁴ for, though ordinarily, there is no sympathy to be wasted on a trespasser,⁵ yet all the circumstances of the case have to be weighed.⁶ Where, therefore, the building complained of has been completed, if compensation is possible, or there has been undue delay on the plaintiff's part, the court will only grant such an injunction to prevent extreme or very serious injury.⁷ Even in cases between co-sharers, under such circumstances, the Allahabad Court has refused to issue a mandatory injunction.⁸ And, where a public monument had been erected wrongfully, but at great cost, upon the plaintiff's land, an American Court refused to interfere.⁹ The court may take into consideration the fact whether some benefit has not resulted to the plaintiff also, through the act of the defendant.¹⁰ But, ordinarily, the rights of

¹ *Krehl v. Burrell* [1878] 7 Ch. D., 551, 11 Ch. D., 146.

² *Hunter v. Carroll* [1888] 64 N. H., 572, 1 Ames, 529 (the strip was "comparatively valueless, except for purposes of litigation."); *Somasundaram v. Bappu* [1911] 10 M. L. T., 473 (Phillips, J.). Cf. *Lynch v. Union Inst.* [1893] 159 Mass., 306, 1 Keener, 647 (defendant built vault believing plaintiff's title invalid, plaintiff a lessee whose term was to expire in 18 months; plaintiff's damage small, cost of removal and inconvenience to defendant great); *Brande v. Grace* [1891] 154 Mass., 210, 1 Keener, 868 (unnecessary destruction of property.)

³ *Jessel v. Chaplin* [1856] 2 Jur. N. S., 931.

⁴ *Smith v. Smith*, supra.

⁵ *Per Finch, J., Wheelock v. Noonan*, supra, 1 Ames, 528.

⁶ *Consider Atty.-Genl. v. Acton Local Board* [1883] 22 Ch. D., 221.

⁷ *Durrell v. Pritchard*, supra, *Gaskins v. Ball* [1880] 13 Ch. D., 329; *Alderley v. Shrewsbury* [1875] 19 Eq., 616.

⁸ *Ganesh v. Kaushal* [1900] 20 A. W. N., 55, affd. [1901] 21 ibid, 53; *Shib Saran v. Ameri* [1900] 20 ibid, 191.

⁹ *Boyden v. Bragan*, 53 N. J. Eq., 26. In *Hall v. Rood*, 29 Am. Rep., 528, an encroachment of 3 in. on plaintiff's right of way, begun *bonâ fide*, was not removed.

¹⁰ *National P. P. G. Insurance Co. v. Prudential Assurance Co.* [1877] 6 Ch. D., 757.

the plaintiff must be protected, and inconvenience or loss to the defendant is not material,¹ unless the hardship likely to be inflicted upon him by a mandatory injunction amounts to injustice.² And the defendant's own conduct may have been such as readily to incline the court to accede to the plaintiff's prayer. The defendant may, *e.g.*, have persisted in his wrongdoing after the legal proceedings were commenced,³ or the right he claimed was judicially denied,⁴ or the defendant's ulterior purpose may have been to effect something that is not lawful.⁵ But where the dispute is of a public nature, the court may, for the benefit of the plaintiff, accede to some arrangements proposed by the defendant. Where a town corporation built upon land which should have been left open, and during the pendency of a suit instituted on behalf of the inhabitants the building was completed, but the defendant corporation offered to dedicate another piece of open ground instead, the court approved of the arrangement as more for the benefit of all parties concerned.⁶

In every suit for an injunction, whatever be the nature of the relief claimed, the court has to exercise its discretion.⁷ Pearson, J., in a case of disturbance of an easement of light, said, "Damages should be given where the injury is not so serious that the property might not still remain the plaintiff's and be as substantially useful to him as before."⁸ And this principle is of general application. The question may be asked

Damages.

¹ *Jamadas v. Atmaram* [1877] 2 Bom., 133; *Isenberg v. E. I. House Estate Co.* [1863] 3 DeG. J. & S., 263; *Kelk v. Pearson* [1871] 6 Ch. Ap., 806, 813; *Muthukrishna v. Somalinga* [1911] 21 M. L. J. R., 742.

² *Myers v. Catterson* [1890] 43 Ch. D., 470. The balance of injury is not taken into consideration where the wrong-doer has not acted innocently, 2 Pomeroy, *Eq.*, R. s. 552, p. 951, and in any case, damages will be given, *Maganlal v. Chotalal* [1901] 3 Bom. L. R., 543.

³ *Kadarbhai v. Rahimbhai* [1889] 13 Bom., 674; *Krehl v. Burrell*, *supra*; *Greenwood v. Hornsey* [1886] 33 Ch. D., 471; *Ives v. Edison* [1900] 50 L. R. A., 134.

⁴ *Atty.-Genl. v. Acton Local Board*, *supra*, 231.

⁵ *Great N. E. Ry. Co. v. Clarence Ry. Co.* [1844] 1 Coll. Ch., 507.

⁶ *Grahame v. Swan* [1882] 7 A. C., 547.

⁷ S. R. A., s. 52. Per Cottenham, L. C.: "There is no branch of the equitable jurisdiction requiring more discretion in the exercise of it, but certainly none more beneficial than that of injunction." *Dietrichsen v. Cabburn* [1846] 2 Ph., 258, 1 Ames, 110. But this was in the olden days, when injunction was treated as an extraordinary remedy. Injunction to a municipality from enforcing an alleged money claim was refused in *Chunilal v. Surat Municipality* [1903] 27 Bom., 403.

⁸ *Holland v. Worley* [1884] 26 Ch. D., 578. But see *Nelson, Inj.*, 63-4.

in every case—Will damage in money afford a practicable, sufficient and certain remedy to the plaintiff?¹ Where the plaintiff in negotiations with the defendant offered to accept money in compensation for the injury, a mandatory injunction was refused.² Where specific relief is asked for in respect of a contract, the nature of the contract and the relation of the parties have to be considered and an order made upon the equities of the case. The plaintiff must come into court with clean hands.³ A covenant not to work for a rival tradesman will therefore not be enforced where the parties have not dealt on equal terms,⁴ or it is likely to press too harshly on the workman.⁵ Where the circumstances have been altered by the lawful action of third parties and a covenant regarding building is no longer effective for the purpose contemplated by the parties when they made it, a compulsory and literal enforcement will not be decreed. To quote an American judge, "If the building restriction were of substantial value to the dominant estate, a court of equity might enforce it, even if the result would be a serious injury to the servient estate; but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff, will always be withheld as oppressive."⁶ The plaintiff seeking a perpetual injunction must establish his right to relief,⁷ and if he complains of a nuisance, he must make it reasonably clear to the court that the act sought to be prevented will be a nuisance.⁸ The court will aid even when an injury is only threatened.⁹ A suit will lie when the threatened act is of such a character that it must inevitably result in injury, that is to say that, in view of ordinary men, using ordinary sense, the injury would follow.¹⁰ "In

Threatened
injury.

¹ Cf. *S. R. A.*, s. 56 (i); *Ranchhod v. Lallu* [1873] 10 Bom. H. C. R., 95.

² *Senior v. Pawson* [1867] 3 Eq., 330, 335.

³ *Abdul v. Mahommed* [1901] 3 Bom. L. R., 220.

⁴ *Narsi Tricum v. Callunji* [1894] 18 Bom., 702; 19 Bom., 764.

⁵ Cf. *Sternbergh, v. O'Brien* [1891] 48 N. J. Eq., 370, 1 Ames, 127.

⁶ *McClure v. Leaycraft* [1905] 183 N. Y., 36, 2 Scott 517 (Vann, J.).

⁷ As to injunctions of an indefinite nature, see *Kalu v. Jan Meah* [1901] 29 Cal., 100.

⁸ *S. R. A.*, s. 56 (g).

⁹ *Ibid.*, s. 54.

¹⁰ *Bindu Basini v. Jahnabi* [1896] 24 Cal., 260; *Prag Das v. Ori* [1901] 21 A. W. N., 23; *Hargu Lal v. Dwarka* [1904] 1 A. L. J. R., 239; *Mahadeo v. Narayan* [1904] 6 Bom. L. R., 123. *Atty.-Genl. v. Corp. of Manchester* [1893] 2 Ch. 87, 92.

matters of this description," said Lord Brougham, C, "the law cannot make overnice distinctions and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. I say it will go further, according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming."¹ If, therefore, the thing sought to be prohibited is in itself a nuisance, the court will immediately interfere to stay irreparable mischief.² But there are cases where it is not easy to foretell if a nuisance will cause substantial injury until the injury has actually happened, *e.g.*, where air is polluted by smoke³ or water by discharge of sewage.⁴ There can be no private nuisance where the inconvenience is merely fanciful, and does not materially interfere with the ordinary physical comfort of human existence, according to plain, sober, and simple notions of living;⁵ and in a case of doubt it is fit that the court should pause before it interrupts men in those modes of enjoying or improving their property which are *prima facie* harmless, or even praiseworthy.⁶ An injunction to restrain construction of gaswork in the vicinity of the plaintiff's house was accordingly refused, where it was not reasonably clear that upon completion of the works the manufacture of gas would prove a nuisance.⁷ The rule is general that the court does not act upon vague apprehensions,⁸ though

Injury
doubtful.

¹ *Earl of Ripon v. Hobart* [1834] 3 M. & K., 169, 176. *Of Hepburn v. London* [1865] 34 L. J., Ch., 293 (combustibles stored in neighbourhood of plaintiff's property). *Of also Atty.-Genl. v. Shrewsbury Co.* [1882] 21 Ch. D., 752 (contemplated construction of bridge likely to interfere with navigable river; public nuisance).

² *Ibid.*; *Haines v. Taylor* [1846] 10 Beav., 75; *Luscombe v. Steer* [1868] 17 L. T., 229.

³ *Salvin v. North Brancepeth Coal*

Co. [1874] 9 Ch. Ap., 705, 713.

⁴ *Fletcher v. Bealey* [1885] 28 Ch. D., 688.

⁵ *Walter v. Selfe* [1851] 4 DeG. & S., 315.

⁶ *Ripon v. Hobart*, *supra*; *Fletcher v. Bealey* [1885] 28 Ch. D., 688, 698.

⁷ *Radcliffe v. Portland* [1862] 8 Jur. N. S., 1007.

⁸ *Chabildas v. Munl. Commrs. of Bombay* [1871] 8 Bom. H. C. R., O. O. J., 85; *Proctor v. Bayley* [1889] 42 Ch. D., 390.

Injury
trivial.

it will interfere where the defendant claims a right to do the thing threatened, which the plaintiff alleges to be a wrong, and declines to give an undertaking that he will not do it.¹ Recently the Judicial Committee had a case of *junglebari* lease before them. The lessee had cleared a tract from jungle and brought it to cultivation and held it at a certain rent. The holder of a *khorporosh* grant for maintenance objected to the raising of minerals in or under the soil by any person claiming under the lessor. Their lordships held that the grantee might claim damages upon proof of injury to his reversion, but there being no evidence that anything had been done or threatened which would interfere with any right vested in him, and the invasion of his right, if any, being of a theoretical or trivial character, giving him at most a claim to nominal damages, and it appearing that any injunction which could be granted would inflict far more injury on the defendant than any advantage which the plaintiff could derive from it, their lordships, in the exercise of a sound discretion, refused an injunction.²

Result of
trial.

The fact that no temporary injunction has been granted, does not affect the kind or the extent of the remedy to which the plaintiffs are entitled upon establishing their right at the hearing on the merits.³ And considerations of lapse of time and the balance of injury, which are appropriate where an interlocutory motion is made, are often out of place when the issue between the parties has been fully tried out.⁴ There are some cases where learned judges have professed to act upon public grounds⁵

¹ *Phillips v. Thomas* [1890] 62 L. T., 793; *Farina v. Silverlock* [1858] 4 K. & J., 650. *Per Wood, V. C.*: "In a case of contract it is enough if the defendant claims and insists on a right to do the act (shewn to be a breach), although he has not already done it, *modo et forma*, as alleged. In such a case, I should have no difficulty in granting an injunction," *Tipping v. Eckersley* [1855] 2 K. & J., 264, 270.

² *Tituram v. Cohen* [1905] 33 Cal., 203, 218, P. C.

³ *Tucker v. Howard* [1830] 128 Mass., 261, 1 Ames, 549; *Bailey v. Taylor* [1829] 1 R. & My. 73, 1 Ames, 655

⁴ *Hennessy v. Carmony* [1892] 50 N.

J. Eq., 616, 1 Ames, 583. But see *per Wilson, J.*: "The principle is well settled that, in granting or withholding an injunction, the courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant," *Shamnugger Jute Factory v. Ram Narain* [1886] 14 Cal., 189, 200. *Ante*, 607.

⁵ *Of. Whitechurch v. Hide* [1742] 2 Atk., 391, 1 Ames, 662; *Anonymous* [1750] 1 Ves., 476, 1 Ames, 663; but these were cases of exclusive franchises or monopolies.

and have said that individual interest must yield to that of the many.¹ Some courts have accordingly thought that it may be safely assumed that the rule in equity is, that where the damages sustained can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience.² A striking illustration in point is *Richards's Appeal*.³ The plaintiff here was the owner of a dwelling-house and cotton-factory in a village, where the defendants owned very extensive iron works. The latter were using semi-bituminous coal in their furnace, the smoke and soot from which injured the plaintiff's house as a dwelling and blackened his cotton fabrics, thus deteriorating the saleable value of both. But the nuisance complained of was incident to a lawful business conducted in the ordinary way, and by no unusual means, and the Supreme Court of Pennsylvania thought that, even if injury to the plaintiff were ever so clearly established, "it may not be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin."⁴ But a party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct,⁵ and in adjudicating upon the right of a proprietor to an injunction against a nuisance, the convenience of the public is not a relevant consideration for the court.⁶ The government, no doubt,

Public
benefit.

¹ *Atty.-Genl. v. Hunter* [1826] 1 Dever, Eq., 12, 1 Ames, 621; but this was a case of public nuisance.

² *Daniels v. Keokuk Water-works* [1883] 61 Iowa, 549, 1 Ames, 588; see footnote. Also 14 Harv. L. Rev., 458. *Valparaiso v. Hagen* [1899] 48 L. R. A., 707, 710. Cf. *Atty.-Genl. v. Doughty* [1752] 2 Ves. Sr., 455 (per Lord Hardwicke, "I know of no general rule of common law which says that building so as to stop another's prospect is a nuisance. Was that

the case, there would be no great cities; and I must grant injunctions to all the new buildings in this town").

³ [1868] 57 Pa., 125, 1 Ames, 574.

⁴ As to the latter part of the dictum, see *Hilton v. Earl of Granville* [1841] Cr. & Ph., 292.

⁵ Per Ruger, C. J., *Galway v. Metropolitan Elev. Ry. Co.* [1891] 128 N. Y., 132, 1 Ames, 604.

⁶ *Atty. Genl. v. Birmingham* [1858] 4 K. & J., 528, 539; *Imperial Co. v.*

is at liberty to take a higher view upon a balance struck between private rights and public interests,¹ but, as Lord Cranworth said in a case, where the complaint was that vegetables growing in the plaintiff's market-garden were injured by the gas of the defendant company, "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on."² The Allahabad High Court has protected by injunction the common law rights of an individual against the religious feelings of a community.³ Under certain circumstances, the Bombay Court holds, the safety of the public must be considered in priority to the rights of private individuals, as in the case of imminent danger; and a municipal corporation may have power to require the demolition of a structure in a ruinous condition, but the power cannot be exercised arbitrarily and without due consideration to the rights of individuals, who are entitled to be heard as a matter of common justice and may even get an injunction against the corporation.⁴

Public safety.

Another almost equally dubious ground which some judges have, in the exercise of their discretion, thought fit to entertain, has reference to the motive which actuates a plaintiff. *Edwards v. Allouez Mining Co.*⁵ is a case in point. The defendant company were working a stamp mill, erected at great cost, for copper mining purposes. The plaintiff purchased some land below as a matter of speculation, expecting to be able to force the defendant to buy it at a large advance on the purchase price. The defendant declining to purchase, the plaintiff filed a bill for injunction restraining the company from depositing stamp sand on his land and polluting the

Plaintiff's motives.

Broadbent [1859] 7 H. L. C. 690, 615; *Dwight v. Hayes*, 150 Ill., 273.

¹ Cf. per Lord Selborne, *Goodson v. Richardson* [1874] 9 Ch. Ap., 221, 223-4. 22 Harv. L. R., 61.

² *Broadbent v. Imperial Gas Co.* [1857] 7 DeG. M. & G., 436, 462.

³ *Behari Lal v. Ghisa Lal* [1902], 24

All., 499; *Shahbaz Khan v. Umrao Puri* [1908] 5 A. L. J. R., 147 (a very strong case, because court granted injunction, though plaintiff did not want one. See p. 149.)

⁴ *Lalbhai v. Munl. Comr.* [1908] 33 Bom., 334.

⁵ [1878] 38 Mich., 46, 1 Ames, 608.

waters of the adjoining stream by milling operations.¹ The Supreme Court of Michigan ruled that the plaintiff might have damages, but no injunction. Cooley, J. observed: "It may be said that no one is concerned with the motives of another in making a lawful purchase or in doing any other lawful act; and this is true as a rule, but it is not true universally. Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general, it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to enquire how he came to be placed in such circumstances. If a man invites an injury, he may still have his redress in the courts of law, but his prayer for the special interposition of equity on the ground that what he invited and expected was about irreparably to injure, would not be likely to trouble the judicial conscience very much if it were wholly ignored. . . . The land having been bought to make money from by sale, a legal award of damages for injury to it, is in furtherance of the purpose of the purchase, and therefore a suitable and a just redress." Excellent doctrine this for a court of morality to preach, but there was more logic, I conceive, in the dissenting judgment of Campbell, C. J., who said: "I cannot concur in the doctrine that any one's rights of this kind are subject to judicial discretion. . . . It would be, I think, a very dangerous principle to hold that a civil wrong can be lessened by the motives of the party injured, so long as he has done no wrong himself. The property of one man is as much entitled to the protection as that of another, not because he bought it or intends to use it without selfish motives, but because it is property."²

¹ As the result of the operations in the mill was the deposit of sand upon the plaintiff's land, his case was that there was an appropriation of his property by the defendant and no-

thing but an injunction could secure to him the use of this property.

² *Of. Hare v. L. & N. W. Ry. Co.* [1861] 7 Jur., N. S., 1145.

So said James, L. J., "I do not think it is the business of the Court of Chancery thus to inquire into motives."¹ In any event, I apprehend the decision of no case can turn upon extraneous considerations regarding the plaintiff's motives and character, unless the claim is manifestly dishonest and oppressive.

Procedure.

It remains to notice a few points of procedure. An Indian court having plenary jurisdiction over a matter of which it is properly seized, can award damages in lieu of an injunction, where, in its opinion, the ends of justice so require. A plaintiff, *e.g.*, may fail to show that he is entitled to a mandatory injunction and yet get compensation in money.² And even where acquiescence is shown against a party, that will not necessarily take away his right to damages.³ If for part of the injury complained of by the plaintiff, damages will afford adequate relief, he may have a decree for damages in respect thereof and an injunction for the remainder.⁴ Where the defendant's conduct has been contumacious, and damages have been sustained by the plaintiff *pendente lite*, there may be a decree for an injunction, and for payment of damages in addition.⁵ And compensation for damage suffered up to the time of the decree is often given where the plaintiff establishes his right to a permanent injunction against the continuance of a nuisance.⁶ Where the prevention of an infringement of copyright or patent right is prayed for, the plaintiff may ask for an account of profits, and also recover damages.⁷ There is no special article in the first schedule of the Indian Limitation Act providing for suits for injunctions. Article 120, therefore, applies, and an injunction may be sued for within six years of the date when the cause of action accrues.⁸

Limitation.

¹ *Denny v. Hancock* [1870] 6 Ch., 1, 2 Keener, 974.

² *Cf. City of London Brewery Co. v. Tennant* [1874] 9 Ch. Ap., 212, 213-9; *Lady Stanley v. Earl of Shrewsbury* [1875] 19 Eq., 616.

³ *Cf. Wood v. Sutcliffe* [1851] 2 Sim. N. S., 163; *Rochdale Canal Co. v. King* [1853] 22 L. J., Ch., 604.

⁴ *Land Mortgage Bank v. Ahmedbhai* [1882-3] 8 Bom., 35, 91-2; *Jawitri v. Emile* [1890] 13 All., 98.

⁵ *Krehl v. Burrell* [1879] 11 Ch. D.,

146; *Tucker v. Howard* [1880] 128 Mass., 361.

⁶ *Hunt v. Peake*, Johns., 705; *Hole v. Chard-Union* [1894] 1 Ch., 293.

⁷ *Cf. Ager v. Peninsular Co.* [1884] 26 Ch. D., 337; *United Co. v. Stewart* [1888] 13 A. C., 401; *Penn v. Bibby* [1867] 3 Eq., 308. In England, the plaintiff has to elect between damages and an account for profits, *Neilson v. Betts* [1870] 5 H. L., 1.

⁸ *Kanakasabai v. Muttu* [1890] 13 Mad., 445; *Aga v. Peltzer* [1903] L. B.

Where, however, the injury complained of is a continuing injury, section 24 will be in point.¹ An injunction may be obtained after as well as before judgment,² and it may be enforced by imprisonment of the defendant³ for six months or the attachment of his property or both.⁴ An application to enforce such a decree is not governed by Article 182, Schedule I, Limitation Act.⁵ In a suit to obtain an injunction, the plaintiff has to state the amount at which he values the relief sought and pay an *ad valorem* court-fee on his plaint or memorandum of appeal.⁶ But where the valuation is manifestly unjust, the court may reject the plaint under section 54, Civil Procedure Code, 1882.⁷ A party deprived, by an injunction unlawfully taken out, of exercising acts of ownership, is entitled to such damages as are the necessary and proximate result thereof.⁸

Gentlemen, I have done. It is only a very small field which I have been able to traverse in your company, and that, too, very imperfectly. For there is hardly any form of human activity or of human relations which law cannot touch. Cases are daily multiplying, and, in their application to new circumstances, even old rules are assuming novel forms. But complex though be its evolutions and illimitable the applications, the spirit of law is one and it lives and grows with time. I have therefore deliberately abstained from leading you into the bewildering wilderness of single instances, and, bearing in mind the old adage—all the truer for its being so old—that he knoweth not the law who knoweth not the reason of the law, I have

Conclusion.

R., 113; *Waziran v. Babu Lal* [1904] 26 All., 391. Cf. *Kedar v. Khettur*, [1880] 6 Cal., 34.

¹ *Sankaravadi velu v. Secretary of State* [1904] 28 Mad., 72, 77.

² C. P. C., s. 493; Act V of 1908, Sch. I, Or. 39, r. 2. Not after decree apparently.

³ The decree may be executed against a legal representative, *Sakar-lal v. Parvatibai* [1901] 26 Bom., 283. But an injunction does not run with the land, *Dahyabhai v. Bapalal* [1901] 3 Bom. L. R., 564.

⁴ C. P. C., Sch. I, Or. 39, r. 2. Cf. also *Velu v. Pakarvoor* [1910] 6 I. C., 289, Or. 21, r. 32; *Ante*, 432. As to need of notice for execution, see *Durgados v. Dewraj* [1905] 33 Cal., 306. Forms of

plaint including a prayer for perpetual injunction will be found in C. P. C., Sch. IV, nos. 100-3; for form of temporary injunction, see *ibid*, no. 166; the next no. (167) gives the form of notice of application for such injunction. Act V of 1908, Ap. A., nos. 35-39; Ap. D., nos. 14-6 (forms of perpetual injunction); Ap. F., no. 8 (temporary injunction).

⁵ *Bhagwan Das v. Sukhdei* [1906] 28 All., 390. Cf. *Ramsaran v. Chata Singh* [1901] 23 All., 465. Contra, *Ahmed v. Poker* [1912] 15 I. C., 945.

⁶ Act VII of 1870, s. 7, sub-s. 4, cl. (d).

⁷ *Umatul Batul v. Nau'i Koer* [1907] 6 C. L. J., 427.

⁸ *Bhut Nath v. Chandra* [1912] 16 C. L. J., 34.

endeavoured to explain to you the reason of the rules in which the collective wisdom of centuries has found expression. It is to a sacred profession that you are called, and, whether as advocates or judges, your function will be high. For it is in the glorious shrine of justice that you will all have to minister. To repress oppression, to put down fraud, to enforce even-handed dealing between the strong and the weak, to secure his due, his bare but clear right, even to the vile and the mean, that will be your duty, that will be your privilege. "Not what thou and I have promised to each other, but what the balance of our forces can make us perform to each other, that" said the seer of Chelsea, "in so sinful a world as ours, is the thing to be counted upon."¹ Verily, man makes but a sorry exhibition of himself in the courts of law; and when I say that, I am not thinking only of the suitors and litigants. Unhappily, advocates are not always honest, nor judges impartial, and ignorance and short-sight may combine to make a trade of the law and reduce all litigation to a game of chance. The fault is with the workman, and this deplorable result you can prevent by refusing to see either in worldly success or in the acquirement of riches, the goal and purpose of your lives. Be you missionaries in the cause of justice—justice which sees all and knows all and is tempered with mercy. Carry the standard of Truth aloft and keep your arms ever engaged in the combating of wrong in its protean and multitudinous shapes. For there is nothing so hard to kill as error, nothing so obstinate as a fallacy. The motto of your *alma mater* and mine is: "Advancement of Learning." In all humility and with deep devotion must you approach the altar of knowledge. Long and laborious will probably be the days of earnest thought and of honest endeavour that you will have to live, but I would ask you not to cease work till you get to the truth of things. Principles you must seek, principles you must hold fast to, and by principles you must test new situations and strange issues. Avoid all rigidity of thought, eschew all conceit of mind, strive for no other

¹ Carlyle, *French Revolution*, vol. ii, bk. i, ch. 7. These memorable words are adopted as motto by Sir E. Fry

for his *magnum opus* on the "Specific Performance of Contracts."

reward than the consciousness of work well done. It is only in the establishment of Right and its triumph that man finds the proper realisation of a self that is divine.

Good bye, God speed you !

•

•

APPENDIX A.

Abstract of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament 24 and 25 Vic. cap. 67.

The Council met at Government House, on Tuesday, the 23rd November, 1875.

SPECIFIC RELIEF BILL.

The Hon'ble MR. HOBHOUSE moved for leave to introduce a Bill to define and amend the law relating to certain kinds of Relief. He said that the first thing he must do was to apologise to the Council for the want of explicitness in the wording of the motion. He understood that some of his Hon'ble colleagues thought he was going to propose a Poor Law and others that it had reference to the movement of troops. But that was not the case. This Bill had nothing to do with the relief of taluqdars or other distressed members of the community, nor with the change of sentries, but was intended to deal with that which was well-known to lawyers under the technical term of "relief," namely, the remedy which was granted by courts of justice to suitors. The subject was of considerable complexity and intricacy of detail. But he should be able, he thought, in no great number of sentences to explain to the Council what was the general nature of it, and the reason why they should pass a law on the subject.

The Council would recollect that there was now pending before them a Bill for the purpose of reforming the Code of Civil Procedure, and it was in connection with that Bill that MR. HOBHOUSE asked leave to introduce the Bill he was now speaking about. The forms of decrees made by civil courts of justice would be readily enough recognised as closely connected with the procedure of those courts, though so far forth as those forms regulated the remedies which a suitor might obtain against his adversary, the subject was connected more with substantive law than procedure. Still, in framing the Code of Civil Procedure, we were constantly coming into contact with the kind of decree which had to be pronounced ; indeed there

were some processes, such, for instance, as interlocutory injunctions, of which it was difficult to say whether they partook more of the nature of procedure or substantive law. Now the framers of the Code of Civil Procedure, had confined themselves almost entirely to that which was procedure proper, or to that debatable ground to which he had been referring. But in two instances they had clearly overstepped the boundary, and had passed over into substantive law. These two instances were in section 15. of the Code, which dealt with declaratory decrees, and in section 192, the subject of which was the specific performance of contracts. In the Bill pending before the Council, it was proposed to repeal the whole existing Code, excepting those two sections; and those were not dealt with by the Bill, because it was intended to confine it to that which was properly procedure, and to keep our hands off substantive law. But it had always been intended, and he thought he had mentioned it before, to supersede the two sections in question by a fresh measure which would deal with the subject of them in a much more full and comprehensive manner.

Now, the remedies which were administered by civil courts of justice might be divided into two great classes, those by which the suitor obtained the very thing to which he was entitled, and those by which he obtained, not that very thing, but compensation for the loss of it. The first branch was known as specific relief, and the second was known as, or at all events might be termed, compensatory relief. If A agreed to sell a house to his neighbour and then refused to perform his agreement, his neighbour might seek relief, either by compelling A to sell the house, or by making him pay damages for not selling the house; and so if A published a piratical copy of his neighbour's writings and invaded his copyright, his neighbour might seek either specific relief by restraining A from so doing, or compensatory relief by making A pay damages for the wrong inflicted by him. It was obvious that the first kind of relief did more exact and complete justice whenever it was applicable. But in the complicated transactions of life that kind of relief was often not applicable, and then more inconvenience and hardship were caused by attempts to carry the contract into effect according to its specific terms, than by the simpler and rougher method of giving compensation for the breach of it. The consequence was that there were very different considerations which regulated the exercise of jurisdiction by way of specific relief, whether in the performance of a contract or in the prevention of wrong, and the exercise of jurisdiction by the simpler and rougher method of giving relief by compensation. In England that difference had been accentuated in a remarkable manner, owing to historical causes. At a very early period in our history, the courts of common law

refused to accommodate themselves to the growing wants of society, and declined to recognise a great number of transactions which sprang up more and more as society became richer and more civilised. The consequence was that large tracts of natural justice, so to speak, were left vacant and unprovided for, and they were occupied by the Chancellors, who assumed the jurisdiction of compelling parties to do justice when the courts of law refused to do so. Amongst other things the courts of law refused to give any remedy by way of specific performance or by way of prevention. If A contracted to sell a field, he could not be compelled by common law to do so, but he might be ordered to pay damages for not doing so; or, if he encroached upon his neighbour's property, he could not be compelled by common law to abstain from doing so, though he might be ordered to pay damages for the wrong actually done. In fact, in all such cases, courts of Common Law adhered to the rougher and simpler jurisdiction of compensatory relief. The result was that two important and extensive heads of equity jurisdiction, in other words, the jurisdiction of the Court of Chancery, became established; namely, the remedy by way of specific performance of contracts, and the remedy by way of injunction for preventing people from doing wrong.

In India we possessed the great advantage of having a single court for the purpose of administering every kind of justice, by which we are enabled to get rid of many refinements and subtleties which beset this kind of jurisdiction as administered by the Court of Chancery. But still the inherent difference between the two great classes of relief, remained, and there remained the fact that the former of these, namely, specific relief, though more exact, was more delicate and more difficult to administer, and that it required more skill and care on the part of the judge, and that some guidance of the legislature would therefore be acceptable to him.

The Bill he asked leave to introduce did not deal with compensatory relief at all, except incidentally and so far as it was either supplementary or alternative to specific relief. Its direct object would be specific relief, and mainly the two subjects he had mentioned, the remedy by way of specific performance, which rested entirely upon contract between the parties, and the remedy by way of injunction, which might rest upon the right to have property protected from invasion. It would be an additional inducement to the Council to accept legislation upon this subject when he reminded them that it had formed part of the comprehensive plan which had been so ably laid down by his predecessor, MR. STEPHEN. He mentioned the matter in one of his latest speeches in Council on the passing of the

Contract Act. They had not accomplished any large portion of that plan, because their hands had been quite full of business with reference to matters which were more pressing under the circumstances, or which appeared to them to be more pressing. But they had never lost sight of it, and the Bill for the amendment of the Civil Procedure was an attempt to accomplish one substantial portion of it, and the Bill he now asked leave to introduce was an attempt to accomplish another.

The motion was put and agreed to.

The Council then adjourned to Tuesday, the 7th December, 1875.

CALCUTTA, The 23rd Novr., 1875.	}	WHITLEY STOKES, <i>Secretary to the Government of India, Legislative Department.</i>
------------------------------------	---	---

The Council met at Government House, on Tuesday, the 7th December, 1875.

SPECIFIC RELIEF BILL.

The Hon'ble MR. HOBHOUSE introduced the Bill to define and amend the law relating to certain kinds of specific relief, and moved that it be referred to a Select Committee, with instructions to report in three months.

When he asked for leave to introduce the Bill, he had explained its general objects, and he now had to show the mode in which the Bill carried those objects into effect. The Council knew that the Bill was designed to occupy a middle place between the Civil Procedure Code on the one hand, and the Indian Contract Act on the other hand. All rules relating to the validity or invalidity of contracts, and the legal relations of parties to contracts, were dealt with by the Contract Act; and the technical processes by which parties were to obtain their remedies were provided for in the Civil Procedure Code. What it was proposed to do in the Bill before the Council was to point out the nature of the remedy to be obtained. Therefore, this Bill was not intended to cover any part of the ground which was already covered by the Contract Act, any more than it covered the ground already covered by the Civil Procedure Code; and if it did trespass on either ground it was by mistake, which ought to be corrected when the Bill was before the Select Committee.

Now, MR. HOBHOUSE had mentioned on the last occasion, that the main subjects of the Bill were the remedies by way

of specific performance of contracts, and by way of injunction for the prevention of wrong. Any one who looked at the Bill would see that the bulk of it was taken up with these two subjects. There were, however, one or two other subjects of considerably narrower range, with which the Bill attempted to deal, and to which he would first call attention very briefly

Chapter III dealt with the subject of the rectification of instruments. That, no doubt, was in itself a kind of specific performance, because if there was no contract between parties, there would be nothing to rectify. But it was specific performance of a very peculiar nature, because it involved the alteration of that which the parties to the contract had already settled in a formal way. Therefore it was a subject which needed more strict rules than the other kinds of specific performance.

Chapter IV dealt with the rescission of contracts, a proceeding exactly the opposite of the specific performance of contracts.

Chapter V dealt with the cancellation of instruments, occasions for which arose when one of the parties had got possession of a document, on which he might not indeed be able to found a legal claim in a court of justice, but which might give him such *primâ facie* right against the other as would expose him to vexatious claims and litigation. In these cases it was just that the aggrieved party should apply to a court of justice, in order to have the instrument destroyed.

Chapter VI dealt with the subject of declaratory decrees, and that was a matter of jurisdiction of some delicacy, as to which some direction should be given. Mr. HOBBHOUSE had previously mentioned that the subject was dealt with in the Civil Procedure Code. That Code embodied the English law on the subject, and merely said that a decree should not be invalid, on the ground only that it was a declaratory decree, but it did not show in what cases a declaratory decree should be made.

Chapter VII dealt with matters which seldom arose, but when they did arise, they were usually of great importance. These were now the subject of the writ of *mandamus*. It was called a chapter for the enforcement of public duties ; and the rules here laid down were intended to take the place of the procedure for a *mandamus*, to supply a procedure more simple than the rather intricate and technical procedure which was now in force.

In all of the various matters embraced by the Bill, it was intended almost entirely to follow the present rules of English law ; and by English law he meant that portion of English law

which had been imported into India, and which he might also call Indian law. There were some material variances between the law as administered here, and as administered in England; a discrepancy mainly owing to the different conditions which existed in India. The principal one of these differences Mr. HOBHOUSE had already mentioned to the Council, namely, that we had not the double jurisdiction which existed in England. We had not to commit our law to a judicial system, worked upon the principle of having one set of courts to do injustice, in order that another set might interfere to do justice by way of injunction or in some other way. Owing to that circumstance the process of choosing and seeking a remedy was very much more simple in this country than in England. If a contract was not performed, a plaintiff in India might apply to one tribunal and ask for the whole of the remedies to which he was entitled, instead of being obliged to go backwards and forwards to the two sides of Westminster Hall, perhaps after all obtaining no justice in either.

If the Council would examine section 18, they would see that the Bill contemplated an entire settlement of all disputes arising from the non-performance of a contract.

It ran as follows :—

“ Any person suing for the specific performance of an agreement, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

“ If in any such suit the court decides that specific performance ought not to be granted, but that there is a valid agreement between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

“ If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the agreement should also be made to the plaintiff, it shall award him such compensation accordingly.”

So, again, in section 28, it was provided that the dismissal of a suit for specific performance of an agreement should bar the plaintiff's right to sue for the breach of such agreement. In England that was not so—or rather, Mr. HOBHOUSE was speaking of what was the law in England until a few days ago; for it was possible that the alterations which had just come into effect would make a great difference in the state of the law and bring it nearer to what was expressed in this Bill. But certainly, before these alterations were made, a man might sue in the Court of Chancery for the specific performance of a

contract; after the whole case was gone through, it might be discovered that the appropriate remedy was not specific performance, and the case might accordingly be brought before a court of law, where the whole subject of dispute would have to be tried over again. Here we had the advantage of a single tribunal, and, as was clearly right, the plaintiff might come to it and ask for the whole of the remedies to which he was entitled. He must make up his mind to what remedy he is entitled, whether to specific performance, or to compensation, or to both. And, as he could get in one suit all he was entitled to, it was but just that the whole dispute should be concluded in one suit, and that no second suit should be brought.

Another ground of difference was this, that in India the very artificial law, known as the Statute of Frauds, no longer affected contracts. It had been said by a very great authority that every line of the Statute of Frauds was worth a subsidy. It might, however, be affirmed with equal truth that every line had cost a subsidy, for there was probably no statute on the books which had given rise to so much litigation as the Statute of Frauds. The reason was this, that it had introduced an artificial system, and enjoined strict formalities in transactions of every day occurrence between simple people, who were accustomed to use no formalities in them. People went on in their old natural informal way, and then, when a dispute arose, one party would prevent the other from getting justice by insisting on the want of the requisite formality. The Courts, as usually happens in such cases, refined on the Statute to prevent glaring injustice, and thus the points of dispute were largely multiplied. There was no part of the subject of specific performance of contracts which was more subtle or refined than those parts in which the provisions of the Statute of Frauds came under the handling of the Court of Chancery. But the Statute had been repealed in India by the Contract Act, and with it we got rid of a large and troublesome portion of the subject of the measure before the Council.

There was another subject of considerable practical difficulty on which it was almost impossible to lay down rules. That subject was the delay occurring before the institution of a suit. There was no express law limiting the time within which a suit for specific performance should be instituted in the Court of Chancery. But the Court of Chancery laid down the rule that suitors should come quickly to obtain such a remedy, and it was frequently a very difficult question to decide whether a plaintiff had or had not come into court in time. Here in India, the Limitation Act provided a period of three years in which a suit for the specific performance of a contract should be brought; and, as it was not proposed to alter the law upon this

point, we were able to avoid treating the difficult question—what was or was not delay.

The foregoing were the points on which the conditions of Indian law brought about a variance between the provisions of this Bill, and what would be necessary if a similar Bill were introduced in England. Besides that, there were in this branch of law, as in others, matters on which authorities differed. Some of these the Bill attempted to settle one way or the other ; and in that sense it might be said that it altered the law, by ascertaining what was doubtful, or ruling one way what might possibly be ruled another way in a court of law. He had followed what he conceived to be the balance of authority, or what appeared to be the clearer and more intelligible rulings in each matter. He would mention the principal of these points.

There was one point of considerable difficulty in the Bill, and that related to the part which made provision for the specific performance of contracts, so far as they could be performed, and for compensation, so far as it was not possible to perform them. This jurisdiction was a very delicate one, for it amounted to something like making a new contract between the parties, when the person seeking performance was the person in default. Yet it often happened that there was some quite insignificant part of the contract which the party seeking performance was bound to perform, but could not do. In such a case, it was wrong that, because some little thing remained undone, the whole contract should fail.

Among the rules to choose from, the Bill had followed that which was the most restrictive of the jurisdiction. It was expressed in section 14, which ran as follows :—

“Where a party to an agreement is unable to perform the whole of the agreement, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the agreement as can be performed, and award compensation in money for the deficiency.”

Then, section 15 exhibited the different positions held by the party in default and his opponent, when the default is of greater magnitude. It ran as follows :—

“Where a party to an agreement is unable to perform the whole of the agreement and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, the party in default is not entitled to obtain a decree for specific performance, but the court may, at the suit of the other party, direct the party in

default to perform specifically so much of the agreement as he can perform, provided that the party seeking specific performance relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the other party."

For both these sections the Bill gave some illustrations to show the more clearly what was meant. Mr. HOBHOUSE believed that they were framed in accordance with the most careful decisions. At all events, there was no intention on his part to alter any recognised rule of law.

Another subject of difficulty was connected with the performance of agreements consisting of a number of minute acts, the doing of which the court could not attend to, as it might attend to the doing of a single act, such as the execution of a lease, giving possession of a house, and so forth. He meant, for example, such a contract as one to repair a house or to cultivate land in a given way. The Bill dealt with such cases in section 20, which set forth certain agreements that could not be specifically enforced. Sub-section (c) included among these:—

"An agreement which runs into such minute or numerous details, or which from its nature is such, that the court cannot enforce specific performance of all its material terms."

Then there were some illustrations given of this class of contract. He believed that the sub-section (c) and the illustrations represented with fidelity the law administered in England and in India too. If it did not, it was from the difficulty of specifying in concise terms a rule drawn from many decisions.

Another point occurred in the same section, where sub-section (g) included among the agreements not capable of specific performance, "an agreement the performance of which involves the performance of a continuous duty, extending over a longer period than five years from its date."

There the Bill endeavoured to fix a term which by the present law was not fixed. The courts now would not decree the performance of a contract involving the performance of a continuous duty for a number of years; but the number was indefinite. Whether it was wise to define it, Mr. HOBHOUSE had his doubts; and if it was, the length of the term might be a subject of doubt. It was a question which might well be settled in Select Committee. The proposal was put on the face of the Bill, in order that it might receive comment, a course often pursued with advantage.

MR. HOBHOUSE was much obliged to the learned Secretary, MR. STOKES, for reminding him of that which for the moment he had forgotten, namely, that this term of five years was inserted in the draft of the Civil Procedure Code which was settled and published in the year 1865. It was so settled by SIR HENRY MAINE and SIR HENRY HARRINGTON, so that it had the authority of two eminent men, one a great jurist, the other the first authority of his day on the subject of Indian procedure.

The foregoing were the only points which occurred to MR. HOBHOUSE to mention on which the Bill attempted to ascertain doubtful or indefinite law. Distinct and conscious alterations of the law he had made none, except one that he would mention immediately.

In section 23, sub-section (c), it was provided that a contract for the sale of property should not be enforced by any one who had made a previous voluntary settlement of the same property. And in section 24, sub-section (d), a corresponding provision was made with respect to a purchaser who had notice of such a voluntary settlement. By a 'voluntary settlement' the Council must understand a settlement for which no money was paid, or for which no other valuable consideration, such as marriage, was given; as when a man from affection or prudence settled property on his wife or his children. Well, most people would ask what necessity there was of passing a law to this effect; for that, if a man had settled his property, he had parted with it, and how could he sell it? It resulted, however, from some very remarkable decisions on a Statute of Queen Elizabeth's reign passed for the prevention of frauds upon purchasers, that if a man made a voluntary settlement of his property, he might subsequently sell that very property for money, and the purchaser might take it away from the true owners, or, as they were called, the volunteers. He thought most people would say that a statute of that kind, instead of being one for the prevention of fraud, was one for the commission of injustice; and so it frequently operated. Courts of Equity, however, would not allow the settlor himself to enforce specific performance of his contract in a case where his hands were so very far from clean. But, inasmuch as his sale of the property vacated the prior settlement as against the purchaser, the purchaser was allowed to maintain a suit for enforcing the sale, even though he had notice of the settlement before paying his money. The Bill, however, proposed that, in such a case, the purchaser should not be entitled to specific performance. He might take whatever other remedy he could get on his contract, but he should not take away the property which he knew that the vendor had no moral right to sell to him. On

that point the law was altered, and Mr. HOBHOUSE thought that the alteration would commend itself to all unsophisticated minds.

There was another point on which the Bill adopted a provision taken from the New York Code which Mr. HOBHOUSE did not remember to have observed in any judgment or text-book. Section 12, sub-section (a), provided that an agreement might be specifically enforced—

“When it has been expressly agreed in writing between the parties to the agreement that specific performance thereof may be required by either party, or that compensation in money shall not be considered adequate relief for its non-performance.”

Mr. HOBHOUSE had never seen a contract of this kind, but was told that it was one not unlikely to be made in India. No doubt such provision would have its effect in the discretion of the court without any specific rule of law on the subject. He hardly knew whether it was an addition to the existing law, but he mentioned it as being something not yet expressed in English or Indian law.

He had now shown how far the Bill was intended to be a mere expression of existing rules, and how far he had consciously altered those rules, or ascertained them when indefinite. As for codifying law without unconsciously producing some alterations, it was a matter of extreme difficulty, if not an impossibility. By codifying law, he meant the reduction to writing of that which was before unwritten. And partly because the law-makers might err in their conception of what they ought to set down as law, partly because, having a right conception, they might use inappropriate language to express it, partly because the expressions were construed by other minds who might give to them quite a different turn from what they were intended to take, it would be a very wonderful thing if after codification the law remained precisely the same as before. That consideration, however, applied to all attempts at codification; all he could do now was to mention the variations of which he was conscious, and he had done his best to explain to the Council the relations which the Bill bore to existing laws.

Only one other point he had to mention in connection with the chapter on injunctions. The Council would see that the Bill did not meddle with interlocutory injunctions at all, by which term he meant those processes of the Code which were simply intended to preserve the *status quo* pending the decision of the dispute. They were treated as of the nature of procedure, and were dealt with by the Civil Procedure Code. In giving rules about perpetual injunctions, it was laid down that the

court should be able to grant mandatory injunctions. The term "injunction" was rather deceptive, for it looked as if designed to enjoin the performance of something, whereas its technical meaning was the prevention of something, and the courts used to hold that they could not by injunction command an act to be done. That, however, was found inconvenient, and indirectly they assumed the power of commanding a positive act under a negative form; for instance, a man might be restrained from keeping up a wall, thereby being in effect compelled to pull it down. All those circuitous modes of action had their points of weakness, and this Bill went more directly to the required object. In section 52 it was provided that by injunction the court might not only prevent the breach of an obligation, but compel performance of the requisite acts.

The motion was put and agreed to.

* * * * *

WHITLEY STOKES,

*Secretary to the Government of India,
Legislative Department.*

CALCUTTA,

The 7th December, 1875. }

APPENDIX B.

SPECIFIC RELIEF BILL.

STATEMENT OF OBJECTS AND REASONS.

The object of this Bill, which is intended as a supplement to the Code of Civil Procedure, as revised and published in March, 1875, is to define and amend the law relating to specific and preventive relief.

2. Under the head of specific relief, it deals with suits for—

- (a) the possession of specific property, moveable or immoveable;
- (b) the specific performance of agreement;
- (c) the rectification of instruments;
- (d) the rescission of contracts;
- (e) the cancellation of instruments;
- (f) the declaratory decrees; and
- (g) the enforcement of public duties.

3. Under the head of preventive relief, it treats of perpetual injunctions.

4. The chapter relating to the recovery of possession of specific property embodies the English rules as to detinue, and the useful provision of the Indian Act XIV of 1859, section 15, as to the right of persons informally dispossessed of land to recover possession by a summary suit. Words have been introduced to show expressly that this provision does not apply to lands claimed to belong to Government. This exemption in effect resulted from section 17 of Act XIV of 1859.

5. The matter of the chapter relating to specific performance is distributed under the following heads:—

- (a) Agreements which may be specifically enforced;
- (b) Agreements which cannot be specifically enforced;
- (c) For whom agreements may be specifically enforced;
- (d) Of the discretion of the court;
- (e) For whom agreements may not be specifically enforced;

- (f) For whom agreements may not be specifically enforced, except with a variation ;
- (g) Against whom agreements may be specifically enforced ;
- (h) Against whom agreements may not be specifically enforced ;
- (i) The effect of dismissing a suit for specific performance.

It attempts to codify the English law on this subject, with the following modifications :—

6. Subject to the negative rules afterwards set forth in this chapter, the Bill empowers the Courts to decree the specific performance of any agreement when the parties have expressly agreed in writing that specific performance thereof may be required by either of them or that damages shall not be considered adequate relief. This novel provision taken from the New York Civil Code, is one of the means by which the Bill proposes to extend a useful jurisdiction, one, it may be remarked, peculiarly adapted to India, where the alternative remedy for a breach of contract, that, namely, of damages, is owing to the poverty of the bulk of the population, and the difficulty of executing money decrees, often so utterly nugatory.

7. In England, it has more than once been ruled that the Court of Chancery will not compel the performance of a continuous duty extending over many years. The Bill renders this doctrine more precise by declaring that an agreement, the performance of which necessarily involves the performance of continuous duties over a longer period than five years from its date, shall not be specifically enforced. Whether this is the best limit of time, will be a point for consideration before the Bill is passed.

8. With regard to specific performance of contracts to execute buildings or to cultivate lands, the Bill is intended to express the present law.

9. The rules as to when a contract for the sale of a married woman's estate will be specifically enforced, are, in England, excessively complicated. The Bill makes no distinction in her case, and thus recognises the principle embodied in the Indian Succession Act, section 4, and Act III of 1874.

10. In England, a voluntary settlement of personal chattels is binding on the settlor, and cannot be defeated by a subsequent sale. But it is otherwise in the case of freeholds, copyholds and leaseholds ; and specific performance of a subsequent agreement to sell land may be enforced against the voluntary settlor and the parties claiming under the settlement. The

Bill does not recognise this distinction (which is due to an artificial construction of 27 Eliz., C. 4) and treats land, in this respect, as if it were moveable property.

11. The absence in India of any enactments resembling the Statute of Frauds, sections 1, 3, 4 and 17, renders it unnecessary to embody in the Bill the intricate rules of the Court of Chancery as to when a parol agreement to sell land will, and when it will not, be specifically enforced.

12. It seems impossible to elicit a consistent doctrine from the English decisions as to the rights of a purchaser or lessee to specific performance with abatement or compensation, when the title of the person agreeing to sell or lease is defective. The Bill lays down that only in one case can such relief be granted, namely, where the part of the agreement, which must be left unperformed, bears only a small proportion to the whole in value, and admits of compensation in money. This will relieve the courts from the exercise of a duty which, in many cases, must be a matter of guess work than of judicial discretion.

13. The right to enforce a contract specifically may, in England, be lost by delay in resorting to the court, and a large mass of cases exists relating to this doctrine. The Bill contains no rules on the subject, for, in India, the provision of the Limitation Act (IX of 1871), Schedule II, No. 113, that suits for specific performance must be brought within three years from the day on which the plaintiff has notice that performance is refused, renders the doctrine of laches inapplicable to this kind of litigation. See 2 Madras High Court Rep., 114, 270.

14. It seems to be erroneously supposed by some of the *mofussil* judges that, when a contract is proved, the grant of a decree for its specific performance is a matter of course. Care has been taken in this chapter to show distinctly that grant of such decrees is purely within the sound discretion of the court.

15. As in this country all remedies on an agreement can be granted by one and the same court, it is conceived that only one suit should lie on account of its non-performance. It has, on this account, been provided in Section 29, that, if a suit for specific performance is dismissed, no other suit shall be brought on the same agreement.

16. Chapter III, as to the rectification of instruments, Chapter IV, as to the rescission of contracts, and Chapter V, as to the cancellation of instruments, require no special notice. They are taken with a few verbal changes, from the New York Civil Code and represent substantially the law on these subjects administered by English Courts of Equity.

17. Chapter VI, as to declaratory decrees, is intended to

take the place of Act VIII of 1859, Section 15, and differs from the English law on the subject principally in authorising the court to make declarations of future rights, provided only that such rights are vested. In the absence of such a jurisdiction, it would seem to be necessary to authorise suits to perpetuate testimony, and there are obvious reasons why such suits should not be allowed in India.

18. Chapter VII deals with the subject of mandamus, and applies only to the Presidency High Courts. Care has been taken to exempt from orders under this chapter the Secretary of State in Council, the Government of India, and the Local Governments.

19. In part III are contained some general rules as to when perpetual injunctions will, and when they will not, be granted. The chief modifications of the present law, which the Bill proposes to make, are as follows :—

20. By the Bill, the courts are expressly given power to grant injunctions to do substantive acts, when such injunctions are necessary to prevent the breach of an obligation. In England, the same thing is partially effected by the indirect method of making orders called mandatory, to refrain from leaving a thing undone.

21. Under the Bill, an injunction to restrain a partner may be obtained without seeking a dissolution of the partnership, even when the partnership is determinable at will. In England the rule on this subject is still unsettled.

22. In England a married executrix will, as a rule, be restrained from getting in the assets, if her husband be out of jurisdiction, or a lunatic. The reason is that the husband, and he alone, is liable for devastavit committed by his wife. The Indian Succession Act, Sections 4 and 275, appears to relieve husbands of this liability, and the Bill accordingly contains no provision on the subject.

23. It is hardly necessary to observe that, in a country where law and equity are administered by the same courts, the subject of staying legal proceedings need not be dealt with at much length. The provisions of the Bill relating to the matter are contained in Section 56, clause (c), illustration (m), and in Section 57, clauses (a) and (b), which relate to injunctions necessary to prevent a multiplicity of suits.

24. It may, in conclusion, be remarked that most of the many illustrations contained in the Bill are taken from the English Equity Reports.

SIMLA,
The 25th October, 1875. }

A. HOBHOUSE.

APPENDIX C.

SPECIFIC RELIEF ACT.

ACT No. 1 OF 1877.

(*Received the Governor-General's assent on the 7th
February, 1877.*)

An Act to define and amend the Law relating to certain kinds of Specific Relief.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; it is hereby enacted as follows :— Preamble.

Specific Relief—Remedy which contemplates the complete enforcement of a right and the exact fulfilment of an obligation. Ante, 1-3. The *preamble* shows the scope of the enactment. As to the effect of a preamble, see *Chinna v. Mahomed* [1865] 2 Mad. H.C.R., 332; *Q. E. v. Indrajit* [1889] 11 All., 262; *Kadir v. Bhawani* [1892] 14 All., 145, 154; *Promotho v. Kali* [1901] 28 Cal., 744, 747; Maxwell, 5th ed., 69-82; Craies, 183-9; Ghose, 19-30. See also *Crawford v. Spooner* [1846] 4 M. I. A., 179, 187. The statute does not purport to be exhaustive. As to other forms of specific relief which will be found elsewhere dealt with, see ante, 30-1; also 1 Stokes, *A.-I. Codes*, 928-9, 945.

Civil suits—In criminal cases also specific relief may sometimes be given, Act V. of 1898 (Cr. P. C.), Ch. x-xii, xliii, also s. 552. But see s. 7 *infra*.

PART I.

PRELIMINARY.

1. This act may be called the Specific Relief Act, 1877. Short title.

It extends to the whole of British India, except the Scheduled Districts, as defined in Act No. XIV of 1874. Local extent.

And it shall come into force on the first day of May, 1877. Commencement.

British India—"All territories and places within His Majesty's dominions which are for the time being governed

by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India."—Act X of 1897 (General Clauses Act), s. 3, cl. 7. A new province on acquisition becomes part of British India, *Ouseley v. Plowden*, Boulnois, 161-2.

Scheduled Districts—The Act has been extended to the following Scheduled Districts by notifications, as under :

DISTRICTS.	NOTIFICATIONS.
Scheduled Districts of the Punjab (including at the time districts which now form the North-west Frontier Province), Kamrup, Nalgong, Darrang.	Gazette of India, 1877, pt. I, p. 562.
Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Duars), Sylhet, and Kachar (excluding the North Cachar Hills.)	Ibid, 1877, pt. I, p. 662.
Hazaribagh, Lohardaga (now called Ranchi, including Palamau), Manbhum, and pargana Dhalbhum, in District Singbhum.	Ibid, 1878, pt. I, p. 82.
Cantonment of Morar.	Ibid, 1878, pt. I, p. 539.
Jhansi Division.	Ibid, 1879, pt. I, p. 592.
Scheduled Districts of the Central Provinces.	Ibid, 1879, pt. I, p. 772.
Sind.	Ibid, 1880, pt. I, p. 676.
Coorg.	Ibid, 1882, pt. I, p. 217.
Western Jalpaiguri.	Ibid, 1882, pt. I, p. 511.
Upper Burma (except the Shan States).	Gazette of India, 1893, pt. II, p. 272.
Kumaon, Garhwal, and the Tarai Parganas.	Ibid, 1895, pt. I, p. 573.
Portion of the Jalpaiguri District known as the Western Duars.	Ibid, 1896, pt. I, p. 44.
Ajmere and Merwara.	Ibid, 1897, pt. II, p. 1415.
Section 9 only was extended to :— Talucs of Bhadrachalam and Rakapilli and the Rampa country.	Ibid, 1879, pt. I, p. 630.
Kumaon, Garhwal, the Tarai parganas, the scheduled portion of the Mirzapur District, and Jaunsar Bawar.	Ibid, 1886, pt. I, p. 452.
Tracts in the Godavari Agency to which it had not already been extended.	Ibid, 1900, pt. I, p. 59.

Extension of the Act—The Act has been further declared to be in force in the town of Mandalay, Act XX of 1886, s. 6 (now see Act XIII of 1898), and s. 9 in British Baluchistan, Reg. I. of 1890, s. 3. Where the Specific Relief Act does not apply, suits are governed by the ordinary rules of justice, equity and good conscience, *Janardan v. Bhairab* [1915] 30 I. C. 365.

Commencement—Marginal notes do not form part of the section, *Punardeo v. Ramsarup* [1898] 25 Cal., 858; *Balraj v. Jagatpal* [1904] 26 All., 393, 406, P. C. (contra, *Kameshar v. Bhikhan* [1893] 20 Cal., 609, 628). A new law generally has no retrospective effect, unless it provides merely for procedure, Maxwell, 5th ed., 341-371; Craies, 321-35; Ghose, 347-53; *Ratansi*

Kalianji [1877] 2 Bom., 148; *Javanmal v. Muktabai* [1890] 14 Bom., 516; *Deb Narain v. Narendra* [1889] 16 Cal., 267; *Jogodanund v. Amrita Lal* [1895] 22 Cal., 767; *Muhammad v. Qurban* [1903] 26 All., 119 P. C. Cf. General Clauses Act (X of 1897), ss. 5, 6.

2. [Repealed by *Repealing and Amending Act* (XII of 1891), Schedule I.]

3. In this Act, unless there be something repugnant in the subject or context,—

Interpretation clause.

‘Obligation’ includes every duty enforceable by law.

‘Obligation.’

Interpretation clause—Legislative definitions are to be received rather as general examples than as overruling provisions, *Uda v. Imamuddin* [1878] 2 All., 74, 86; Ghose, 53-9; Craies, 193-7.

Obligation—Ante, 3-4. ‘Obligation’ is a tie or bond which constrains a person to do or suffer something. Just. *Inst.* III, 13. It implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances. If these latter do not possess or cannot be reduced to a money value, the obligation may be moral or social or religious, but it is not legal. Pothier, *Obl.*, 1; Savigny, *Obl.*, ch. i, ss. 2-4; Anson, *Con.*, 6-10. English lawyers frequently use the term as correlative to a right *in personam*, and not a right *in rem*, Pollock, *Con.*, 4; Markby, *Elem. Law*, s. 137; *Foster v. Wheeler* [1887] 36 Ch. D., 695. The Indian legislature uses the term in its wider juristic sense which is limited to duties arising either *ex contractu* or *ex delicto*. 1 Austin, *Jur.*, 90-8.

Includes—this word has an extending force, *Re Nasibun* [1882] 8 Cal., 534, 536, and is intended to be enumerative and not exhaustive, *Q. E. v. Ramanjiyya* [1878], 2 Mad., 5, 7; *Mangaldas v. Jewanram* [1899] 23 Bom., 673. Ghose, 55-7.

Reference.—The word occurs in ss. 5 (b) and (c), 54, and 55 *infra*.

‘Trust’ includes every species of express, implied, or constructive fiduciary ownership :

‘Trustee’ includes every person holding, expressly, by implication, or constructively, a fiduciary character :

Illustrations.

(a) Z bequeaths land to A, “not doubting that he will pay thereout an annuity of Rs. 1,000 to B for his life.” A accepts the bequest, A is a trustee, within the meaning of this Act, for B, to the extent of the annuity.

(b) A is the legal, medical or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which

might otherwise have accrued to B. A is a trustee for B, within the meaning of this Act, of such advantage.

(c) A, being B's banker, discloses for his own purpose the state of B's account. A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure.

(d) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(e) A, one of several partners, is employed to purchase goods for the firm. A, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, within the meaning of this Act, of the profit so made.

(f) A, the manager of B's indigo-factory, becomes agent for C, a vendor of indigo-seed, and receives, without B's assent, commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.

(g) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(h) A buys land from B, having notice that C is in occupation of the land. A omits to make any inquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of that interest.

Trust, trustee—The Act does not purport to define either of these terms, it simply states what each includes; Craies, 194-6, Ilbert, *Leg. Forms*, 281. The Indian Trusts Act (II of 1882) gives the following definitions (s. 3): "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner. The person who reposes the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'."

With this definition, the definitions given by text-writers, where a distinction is made between legal and equitable estates, may be compared, 2 Spence, *Eq.*, 875; 2 Story, *Eq.*, s. 964; 3 Pomeroy, *Eq., J.*, s. 986; Lewin, *Trusts*, 2; Godefroi, *Trusts*, 1-2. Cf. *per* Lindley, M. R., "A trust is really nothing except a confidence reposed by one person in another, and enforceable in a court of equity," *Re Williams, Williams v. Williams* [1897] 2 Ch., 12, 18. As the Indian law on the subject has been codified, the principles embodied in Act II of 1882 may be applied even in those parts of India where the Act is not yet in force (cf. *Kadir v. Nepean* [1898] 26 Cal., 1, 6-7, P. C.), and a lengthened discussion of the law of trusts will be out of place here.

It may, however, be explained that, where the author of the trust clearly expresses it either in writing or by words (*Suddasook v. Ram Chunder* [1890] 17 Cal., 620), there is an *express* trust, but where there is no such expression but there is ground for presuming an intention to dispose of property in favour of

another, there is an *implied* trust; Snell, *Eq.*, 17th ed., 45, 102. Two special classes of implied trust, which are classified by text-writers as *resulting* trust, may be here mentioned: (i) *benami* purchases, where A advances funds for conveyance or assignment of property ostensibly in favour of B; Act II of 1882, s. 82, cf. *Ameeroonnissa v. Ashrufoonnissa* [1872] 14 M. I. A., 433, *Dyer v. Dyer* [1788] 2 Wh. & T., 8th ed., 820; (ii) unexhausted residue of property left after execution of trust or by reason of its failure; Act II of 1882, s. 83, *Lallubhai v. Man-kuvarbai* [1876] 2 Bom., 388. A *constructive* trust, lastly, is one which the court elicits by a construction put upon certain acts of the parties, Agnew, *Trusts*, 107. There is no reference here to any intention of the parties, whether expressed or presumed; for the matter of that, the parties may not have intended any trust. But a court of equity will raise such a trust wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as such. Lewin, *Trusts*, 196. The party may have acted fraudulently, 1 Story, *Eq.*, ss. 186-9, or may have gained an unfair advantage, *ibid.*, s. 258, or there may be only an equitable lien, 3 Pomeroy, *Eq. J.*, pt., 3, ch. vii. As to *executed* and *executory* trusts, see *Glenorchy v. Bosville* [1733] 2 Wh. & T., 8th ed., 778, and notes. As to charities, see *Commrs. of Income Tax v. Pemsel* [1891] A. C., 545, 583, Act VI of 1890. As to religious endowments and public trusts in India, see Reg. XIX of 1810, Reg. VII of 1817 (Madras), Act XX of 1863, and Act V of 1908, s. 92. See also Act XVII of 1864 (Official Trustees), and Acts XXI of 1860 (Literary, Scientific and Charitable Societies) and I of 1880 (Religious Societies).

Fiduciary character—applies apparently to “all the variety of relations in which dominion may be exercised by one person over another” (*Huguenin v. Baseley* [1870] 1 Wh. & T., 8th ed., 259, Romilly, *arguendo*), where “confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other” (*Tate v. Williamson* [1886] 2 Ch., 55, 61). Such are the relations, *e.g.*, of parent and child, man and wife, doctor and patient, attorney and client, guardian and ward, principal and agent, promoter and company, director and company, etc.

References—The word ‘trust’ occurs in ss. 12 (a), 21 (e), and 56 (i), *infra*, and the word ‘trustee’ in ss. 10, *expln.*, 11 (a), 21 (e), 42, *expln.*, 43 and 54 *infra*.

Illustrations—Illustrations in Indian Acts have been described as cases decided by the highest authority, *viz.*, the legislature, *Charlesworth v. MacDonald* [1898] 23 Bom., 103, 112; *Reg. v. Rahimat* [1876] 1 Bom., 147, 155. Cf. Collett, 4th ed., 10n.;

1 Stokes, *A.-I. Codes*, xxiii-vi, 297. But see *Omed Ali v. Nidhee* [1874] 22 W. R., 367; *Nanak v. Mohan* [1877] 1 All., 487, 495-6; *Kailash v. Sonatun* [1881] 1 Cal., 132; *Balaram v. Mangta Dass* [1907] 34 Cal., 941, 950; Ghose, 60-5. The better opinion seems to be that illustrations cannot be taken to control the plain meaning of the section and curtail any right which, so understood, it confers, 1 Blackstone, *Com.*, 183; ante, 282.

III. (a). This is an instance of *precatory* trust, though authorities are divided as to whether it is to be classed as *express* (3 Pomeroy, *Eq. J.*, s. 1010) or *implied* (Lewin, *Trusts*, ch. viii., 144) trust. *Parsons v. Baker* [1812] 18 Ves., 476; *Harding v. Glyn* 1739] 2 Wh. & T. 8th ed., 339; *Sale v. Moore* [1827] 1 Sim., 531. As to precatory trust, see further *McCormick v. Crogan* [1868] 4 H. L., 82; *Re Adams and Kensington Vestry* [1884] 27 Ch. D., 394; *Re Diggles* [1888] 39 Ch. D., 253; *Mussoorie Bank v. Raynor* [1882] 4 All., 500, P. C., *Kumarsami v. Subbaraya* [1886] 9 Mad., 325; *Gckool Nath v. Issur* [1886] 14 Cal., 222; 2 Story, *Eq.*, s. 1068 b. The trend of English decisions now is for restricting the doctrine, but the British Indian legislature frankly recognises it here Collett, 5th ed., 22.

III. (b). This illustration by no means exhausts the cases where the 'equitable doctrine of undue influence' is properly applicable. Kerr, *Fraud*, 4th ed., 145, sqq.; *Allcard v. Skinner* [1887] 36 Ch. D., 145. As to **legal** adviser, see *McPherson v. Watt* [1877] 3 A. C., 254; *Carter v. Palmer* [1841] 8 Cl. & F., 657; *Fuzelun v. Omdah* [1868] 10 W. R., 469; *Taylor v. Asmedh Koonwar* [1865] 4 W. R., 86; 1 Story, *Eq.*, s. 310; **medical**, *Smith v. Kay* [1859] 7 H. L. C., 750; 1 Story, *Eq.*, s. 314; **spiritual**, *Huguenin v. Baseley* [1807] 1 Wh. & T., 8th ed., 259; *Morley v. Loughnan* [1893] 1 Ch., 736. See also I. C. A., s. 16; Trusts Act, s. 88. This and the following illustrations are all instances of constructive trusts.

III. (c). This and the next three illustrations are cases of contractual relationship and a breach of confidence implied from same; "in each the act of A is a breach of the unexpressed but implied obligation in the contract that no other than the agreed profit is to be made out of the contract." Collett, 5th ed., 49. As to bankers' duty, see 1 *Laws of Eng.*, 643, Hart, *Banking*, 211-4.

III. (d). *Per* Nottingham, C.: "The mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit," *Rushworth's case* [1676] 2 Freem., 13. Cf. *Keech v. Sandford* [1726] 2 Wh. & T., 8th ed., 706; *Kashi v. Indra* [1908] 5 A. L. J. R., 590.

III. (e). *Bentley v. Craven* [1853] 18 Beav., 75. Cf.

Kimber v. Barber [1872] 8 Ch., 56; *Damodar v. Sheoram* [1907] 4 A. L. J. R., 587; I. C. A., s. 216 (principal and agent); *Mayen v. Alston* [1892] 16 Mad., 238, 249; *Bowstead, Agency*, 137-47.

III. (f). *Massey v. Davies* [1794] 2 Ves., 317. The principle is that an agent, or any person in a fiduciary position for the matter of that, should avoid tempting situations where his interest might come into conflict with his duty. *Gillett v. Peppercorn* [1842] 3 Beav., 78. *Fox v. Mackreth* [1791] 2 Wh. & T., 8th ed., 722, will cover this, and the last illustration.

III. (g). Case of actual notice. Act II of 1882, ss. 91, 96, prov.; Act IV of 1882, ss. 39, 40; *Le Neve v. Le Neve* [1748] 2 Wh. & T., 8th ed., 187. Flying reports do not amount to actual notice, *Wildgoose v. Wayland* [1601] Gould, 147, which "must be given by a party interested in the property and in the course of the treaty for the purchase," Sugden, *V. & P* 755; but see 2 Dart, *V. & P.*, 875.

III. (h). Case of constructive notice. *Taylor v. Stibbert* [1794] 2 Ves., 437; *Barnhart v. Greenshields* [1853] 9 Moo. P. C., 18. "A person is said to have notice of a fact, either when he actually knows that fact or when, but for wilful abstention from inquiry, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229," T. P. A., s. 3; Trusts Act, s. 3. *Ware v. Egmont* [1854] 4 DeG. M. & G., 460; *Jones v. Smith* [1841] 1 Hare, 55. See also *Mancharji v. Kongseoo* [1869] 6 Bom. H. C. R., 59; *Ahmedbhoy v. Balkrishna* [1894] 19 Bom., 391. As to a *bonâ fide* purchaser for value, see T. P. A., ss. 43, 53, 78, 81; *Bassett v. Nosworthy* [1673] 2 Wh. & T. 8th ed., 163.

'Settlement' means any instrument (other than a will or codicil, as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of :

Similar law. Act II of 1899, s. 2 (24); *Ref. under Stamp Act* [1884] 7 Mad., 349., F. B.

Will.—"A legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." Ind. Suc. Act (X of 1865), s. 3.

Codicil.—"An instrument made in relation to a will and explaining, altering or adding to its dispositions." *Ibid.*, s. 3.

Settlement, therefore, as above defined, is a document transferring property *inter vivos*. The transfer is in favour of two or more persons, who take successive and not concurrent

estates, and the transfer takes effect in the lifetime of the transferor. Where the property is "disposed of" by the deed, the settlement is an *executed* one; where it is only "agreed to be disposed of," the settlement is *executory*. A settlement may or may not be supported by valuable consideration. In the former case (e.g., a marriage settlement), the settlement stands on the same footing as a contract; in the latter, it is called a *voluntary* settlement, as to which see *Ellison v. Ellison* [1802] 2 Wh. and T., 8th ed., 853, and notes; also I. C. A., s. 25. For 'directions in a will or codicil to execute a particular settlement,' see s. 30, *post*. Ante, 383-5.

Destination or Devolution.—The distinction probably is that the latter term implies succession to or representation of another, which the former does not. Collett, 5th ed., 86; ante, 383. In ordinary legal phraseology, 'destination' means the purpose to which it is intended a fund shall be applied, and 'devolution' the passing of an estate from one person to another by operation of law, 14 *Cyc.*, 231-285.

Successive, i.e., the interests follow, or are substituted for one another.

References. The word occurs in ss. 23(c), 24(d), 25 c), 30, and 31, ill.(b).

Words defined
in Con-
tract Act.

And all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Indian Contract Act.—The definitions in Act IX of 1872 are to be read into the S. R. A.; and by virtue of T. P. A., s. 4, parts of Act IV of 1882 may also be deemed as herinto incorporated. The following words occurring in the S. R. A. will be found defined in the I. C. A. in the sections noted below:

WORD.	I. C. A.	S. R. A.
Agreement	s. 2.(c)	ss. 4(a), 23(c) and (f), 32.
Consideration	s. 2.(d)	ss. 24(d), 25(c), 28(a).
Contract	s. 2.(h)	<i>passim</i> .
Fraud	s. 17	ss. 22(1), 26(a) and (b), 28(a), 31.
Misrepresentation	s. 18	ss. 22(1), 26(c), 28(b).
Principal	s. 182	s. 23(b).
Sale	s. 77	ss. 18, 25, 35(c).
Voidable	s. 2(j)	ss. 35 (a), 39.
Void	ss. 2(g), (i)	s. 39.

[*Vide* App. E *post*.]

[“Immoveable property,” which occurs in ss. 8, 9, 12 expln., and 25, and “moveable property,” which occurs in ss. 10, 11, 12 expln., and 25, will be found defined in the General Clauses Act (X of 1897), s. 3, cls. (25) and (34) respectively.]

4. Except where it is herein otherwise expressly enacted, Savings.
nothing in this Act shall be deemed—

(a) to give any right to relief in respect of any agreement which is not a contract ;

Agreement—“every promise, and every set of promises, forming the consideration for each other,” I.C.A., s. 2 (e).

Contract—“an agreement enforceable by law.” I.C.A., s. 2 (h). “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object,” *ibid*, s. 10. This is further explained in *ibid*, ss. 11-23. The object of this enactment is to exclude (i) agreements which are *void*, I.C.A., ss. 2 (g), 24-30, *Monosseh v. Shapurji* [1908] 10 Bom. L. R., 1004 (contract by lunatic) ; (ii) agreements which do not contemplate the creation of a jural relation and give rise only to imperfect obligations (*e.g.*, moral, religious or social duties) ; and (iii) agreements which are incomplete, by reason, *e.g.*, of the terms not having been finally settled and accepted, *Koylash v. Tariny* [1884] 10 Cal., 588, or the contract having been left contingent on the sanction of a third party (*e.g.*, the permission of the Court in the case of an agreement for sale made by a certificated guardian of a minor) which is never obtained, *Narain v. Aukhoy*, [1885] 12 Cal., 152. A *voidable* agreement is “enforceable by law at the option of one or more of the parties thereto,” though not at the option of the other or others, I.C.A., s. 2 (i) ; it is therefore a contract in respect of which relief may be claimed by the former. Ante, 77. *Gregson v. Uday*, [1889] 17 Cal., 223, P. C.

(b) to deprive any person of any right to relief, other than specific performance, which he may have under any contract ; or

Relief other than specific performance, that is, damages by way of compensation, which is the relief ordinarily sought in cases of breach of contract, I.C.A., s. 73. A plaintiff is not bound to sue for specific performance ; he may sue for damages instead, or for damages by way of an alternative or additional relief (s. 19 *post*). But the dismissal of a suit for specific relief will bar a subsequent suit for damages (s. 29 *post*). The English practice was different, because the two reliefs had to be sought in two different courts. Ante, 80-2.

Specific performance—“consists in the contracting party’s exact fulfilment of the obligation which he has assumed—in his doing or omitting the very acts which he has undertaken to do or omit,” Pomeroy, *S.P.*, s. 3. Ante, 1-2, 76. See Ch. II *post*.

(c) to affect the operation of the Indian Registration Act on documents.

Indian Registration Act.—Act XVI of 1908. See esp. ss. 17 and 49; documents, which are compulsorily registrable under the former, cannot, if unregistered, affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property. But this does not prevent their being admissible for the purpose of obtaining specific performance of the agreement embodied in the document, *Bengal Banking Corp. v. Mackertich* [1884] 10 Cal., 315; *Adakkalam v. Theethan* [1889] 12 Mad., 505; *Nagappa v. Devu* [1890] 14 Mad., 55; *Mahomed v. Nunda* [1913] 16 I. C., 390 (unregistered *amalnamah* and oral evidence); *Hemanta v. Midanapur Zamindari Co.* [1915] 19 C. W. N. 347. *Kathari v. Bhupati* [1915] 29 M. L. J. 721. Cf. I. R. A., s. 17 (v). *Contra, Sambayya v. Gangayya* [1890] 13 Mad., 308. As to agreement in writing to grant lease, see *Narayanan v. Muthiah* [1910] 21 M. L. J. R., 44. Where a document remains unregistered through no default of the plaintiff, secondary evidence may be given of its contents, and plaintiff may compel execution and registration of fresh deed, *Nynakka v. Vavana* [1869] 5 Mad., H.C.R., 123 (loss by fire); *Chinna v. Dorasami* [1896] 20 Mad., 19. Distinguish *Venkatasami v. Kristayya* [1893] 16 Mad., 341. Where there is notice of even an unregistered contract of transfer, the subsequent purchaser is a trustee [s. 3, ill.(g), ante], and the prior purchaser will be entitled to relief on the basis of the constructive trust, Collett, 4th ed., 71. Act III of 1877, s. 50. *Nemai v. Kokil* [1880] 6 Cal., 534; *Hurnandun v. Jawad* [1899] 27 Cal., 468. But where purchase abortive by reason of non-registration of sale-deed, subsequent purchaser by registered deed takes precedence, *Zackaraya v. Chunnu* [1911] 9 M.L.T., 270.

As to the bearing of this clause on the doctrine of part performance, see ante, 254-6. Cf. *Ardeshir v. Sirdar* [1908] 10 Bom. L.R., 1146.

Effect of registration—"Registration in the name of a transferee only gives complete effect to a prior valid transfer; registration does not make effectual a document which was, as between the alleged transferor and transferee, inoperative and of no effect," *France v. Clarke* [1884] 26 Ch. D., 263.

5. Specific relief is given—

[a] by taking possession of certain property, and delivering it to a claimant;

[b] by ordering a party to do the very act which he is under an obligation to do;

[c] by preventing a party from doing that which he is under an obligation not to do;

Specific
relief how
given.

[*d*] by determining and declaring the rights of parties otherwise than by an award of compensation ; or

[*e*] by appointing a receiver.

Similar law—Draft New York Civil Code, s. 1881.

cl. (a). See Ch. I, ss. 8-11, post.

cl. (b). See Ch. II, ss. 12-30, Ch. VIII, ss. 45-51, post.

cl. (c). See Ch. IX, ss. 52-53, Ch. X, ss. 54-57, post.

cl. (d). See Ch. III, ss. 31-34, Ch. IV, ss. 35-38, Ch. V, ss. 39-41, Ch. VI, ss. 42-43, post.

cl. (e). See Ch. VII, s. 44.

6. Specific relief granted under clause (*c*) of section 5 is called preventive relief. Preventive relief.

Preventive relief.—See Chs. IX and X, post (injunctive). The remedy is *preservative*, the object being to preserve a person's rights unviolated ; where the injury is threatened, the relief granted is *preventive* ; where it is in progress, the relief is *suppressive*, Bentham, *Theory Leg.*, 271-5.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law. Relief not granted to enforce penal law.

Ante, 5. Cf. Draft New York Code, s. 1883 (where a case of nuisance is expressly excepted). See also s. 56 (*e*), post.

Mere—The enforcement of a penal law should not be the sole object and result of the relief sought. The jurisdiction of a court of equity, said Turner, L. J., “rests upon injury to property actual or prospective, and this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property,” *Emperor of Austria v. Day* [1861] 3 DeG. F. & J., 217, 232. See further *Gee v. Prichard* [1818] 2 Sw., 402 ; *Springhead Co. v. Riley* [1868] 6 Eq., 551 ; 2 Story, *Eq.*, s. 1494. In India, however, it is not necessary that any rights of property should be affected, there may be specific relief to enforce obligations as defined in s. 3, ante ; see s. 55, ill. (*e*), where, though defamation is a criminal offence (I.P.C., s. 499), since it is also a tort, the Civil Court protects the civil right of private reputation. But relief will not be given against the provisions of a statute, *Keating v. Sparrow* [1810] 1 Ba. & Be., 367, 373 ; 2 Wh. & T., 285.

Copies of order of discharge made by and depositions taken before a Presidency Magistrate were directed to be granted to the prosecutor affected by the order, as such copies might be required for many purposes other than the enforcement of a penal law, *Bank of Bengal v. Dinonath Roy* [1881] 8 Cal., 166.

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(a) *Possession of Immoveable Property.*

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

Recovery of specific immoveable property.

Entitled, *i.e.*, either as owner or as possessor, for, said Clarendon, C., "He that hath possession hath right against all but him that hath the very right," *Smith v. Oxenden* [1663] 1 Ch. Ca., 25. There may be a title by contract, inheritance, prescription, or even by possession, and this last will prevail where no preferable title is shown, *Pedda Venkata v. Arcovala* [1841] 6 W. R., P. C., 13; *Ismail Ariff v. Mahomed Ghous*, [1893] 20 Cal., 843, P. C.; *Asher v. Whitlock* [1865] 1 Q. B., 1; *Perry v. Clissold* [1907] A. C., 73. *Vide* authorities collected and discussed, ante, pp. 49-56; Salmond, *Torts*, 175-6. Cf. *Subbaroya v. Aiyaswami* [1908] 32 Mad. 86. Lightwood, *Time Limit*, ch. I, s. 9.

Possession—In a suit for recovery of possession of property (action in ejectment, as it is called, the plaintiff can succeed only on the strength of his own title, *Giridhari Lall v. Bengal Government* [1868] 12 M. I. A., 448; *Shornomoyee v. Watson & Co.* [1873] 20 W. R., 211, P. C.; *Sivagnana v. Periasami* [1878] 1 Mad., 312, 323, P. C. He must therefore prove his title, even if a merely possessory one, against the defendant (ante, 50, *Maenooddeen v. Greesh* [1867] 7 W. R., 230); but he has all the ordinary rights of discovery of matters tending to support his title, *Emmerson v. Ind Coope & Co.* [1886] 33 Ch. D., 233. Cf. *Purmeshur v. Brojo Lall* [1889] 17 Cal., 256. But a wrong-doer cannot set up a *jus tertii* to justify trespass or conversion, Pollock, *Torts*, 10th. ed., 387; *Kullammal v. Kuppu* [1862] 1 Mad. H. C. R., 85, *Kumul v. Mohun* [1871] 15 W. R., 278. Cf. Bigelow, *Torts*, 393.

Immoveable property—includes, unless there be

something repugnant in the subject or context, "land, benefits to arise out of land, and things attached to the earth," or permanently fastened to anything attached to the earth, Act X of 1897, s. 3 (25).

In the manner, that is, by bringing a regular suit for ejectment and executing the decree under C. P. C., ss. 263, 264; Act V of 1908, Sch. I., Or. 21, r. 35 (1), 36. For the decree, see *ibid*, Or. 20, r. 9.

Suit by
person dis-
possessed of
immoveable
property.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit,* recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

Old law—Act XIV of 1859, s. 15. Ante, 53.

Principle—The object of the enactment is to protect possession. Several grounds have been suggested for this, ante, 57-9 : (a) to discourage people from taking the law into their own hands, *Krishnarav v. Vasudeva* [1884] 8 Bom., 371, 375, and thereby deriving any benefit, *Kunhi v. Changarachan* [1865] 2 Mad. H. C. R., 313, *Enaetoollah v. Kishen Soondur* [1867] 8 W. R., 386, 388; (b) to put an additional restraint upon illegal dispossession, by depriving the dispossessioner of the privilege of proving a better title to the land in dispute, *ibid*; (c) to prevent the shifting of the burden of proof by illegal dispossession, *Kalee v. Adoo* [1868] 9 W. R., 602, 603. The object of the section is to provide a special, summary and speedy remedy for a person who, being, whatever his title, in possession of immoveable property, is illegally ousted therefrom without his will and consent, *Tarini v. Gunga* [1887] 14 Cal., 649; *Wali Ahmed v. Ajudhia* [1891] 13 All., 537, *F. B. Ram v. Sheodihal* [1893] 15 All., 384.

Scope—Ante, 55, 59. It does not control the operation of

* After this the words "instituted within six months from the date of the dispossession" were originally enacted. They were repealed by Act XII of 1891, Sch. I. pt. 1. See now Act IX of 1908, sch. I, art. 3.

section 110 of the Evidence Act, *Sambhasheo v. Mahadeo* [1915] 10 N. L. R., 188, 27 I.C., 506.

Similar law—For Criminal Courts see Cr. P.C., s. 145, *Lolit v. Surja* [1901] 28 Cal. 709, 715, *Dinomoni v. Brojo* [1901] 29 Cal., 187, P.C., *Kishori v. Srinath* [1908] 13 C.W.N., 530; for Mamlatdar's Courts in the Bombay Presidency, see Bombay Act III of 1876, *Ram v. Bhikibai* [1882] 6 Bom., 477. But an order of neither the Criminal Court, *Chytun v. Brojo* [1873] 20 W. R., 12, *Nagappa v. Badruddin* [1901] 26 Bom., 353, *Jwala v. Ganga* [1908] 30 All., 331; nor the Mamlatdar, *Ram v. Narsinh* [1899] 24 Bom., 351, F. B., *Rajaram v. Ganesh* [1895] 21 Bom., 91, can oust the jurisdiction of the Civil Court to try a suit under s. 9, S.R.A. Nor s. 139, Chota Nagpur Tenancy Act (VI of 1908, B. C.), *Khetra v. Piru* [1911] 15 C.W.N., 387. But s. 108, Oudh Rent Act, does, *Fateh v. Bhawani* [1911] 14 O. C., 60; and in *Moore v. Manoranjan*, [1908] 12 C.W.N., 696, an unsuccessful party under s. 145 Cr., P. C. was defeated.

Any person—One of two persons who, by mutual agreement, is in exclusive possession of immoveable property, may sue the actual dispossessor, or, if he is an agent, his principal, or both, *Virjivandas v. Mahomed* [1880] 5 Bom., 208. All persons dispossessed need not join as plaintiffs, but some may be made *pro forma* defendants, *Devendra v. Bindhubala* [1912] 13 I. C., 125. A mortgagee, if dispossessed, may sue the mortgagor, *Sayaji v. Ramji* [1881] 5 Bom., 446, and a tenant may sue his landlord, who has wrongfully ejected him, *Jonardun v. Haradhun* [1868] 9 W. R., 513, F.B.; *Bhagabati v. Luton* [1902] 7 C.W.N., 218; *Rudrappa v. Narsinghrao* [1904] 29 Bom., 213; cf. *Jambla v. Kingsley* [1913] 17 C.W.N., 1201 (s. 23(6), Act X of 1859); or a purchaser of a portion of an occupancy jote, *Kuldip v. Gillanders* [1899] 26 Cal., 615. A licensee or lessee may sue, *Sita v. Jagan* [1913], 17 I. C., 469. In the U. P., in a dispute between a landlord and his tenant, the Revenue Court will have exclusive jurisdiction, Agra Tenancy Act, s. 167; so also in the C. P., *Balaji v. Sakharam* [1902] 16 C.P.L.R., 41; and in the Punjab, *Kesar v. Mangal* [1913] P. R. No. 84 (sub-tenant).

Dispossessed.—*Dispossession* occurs when property, capable of possession, is taken actual possession of by another person. Cf. *Sundarasastrial v. Govinda* [1908], 31 Mad. 528. 'Act of God' (e.g., submergence of land by flood) does not cause dispossession, *Kally v. Secy. of State* [1881] 6 Cal., 725, 739; nor a casual act of trespass, *ibid*, 735, *Golam v. Bissonath* [1869] 12 W. R., 9; nor carrying off of produce of land in occupation of tenant, *Seetul v. Indro* [1876] 25 W. R., 180; nor, apparently, discontinuance of payment of rent by tenant,

Dispossession.

Tarini v. Gunga [1887] 14 Cal., 649, *Krishnaji v. Antaji* [1893], 18 Bom., 256 (*sed quaere*, see *infra*); nor delivery of possession under a decree of court which is subsequently reversed, *Dagdu v. Kalu* [1897] 22 Bom., 733.

Possession,
juridical
actual,

Dispossession presupposes **possession**, which must be *juridical*, i.e., not of a mere trespasser, *Virjivandas v. Mahomed* [1880] 5 Bom., 208, 221, *Amirudin v. Mahamad* [1891] 15 Bom., 685, *Dadabhai v. Sub-Collector* [1870] 7 Bom. H.C.R., A.C., 82; nor of a licensee or mere custodian, *Nritto v. Rajendro* [1895] 22 Cal., 562. Ante, 60. But trespass acquiesced in may give juridical or permissive possession to the trespasser, *Hellier v. Silcox* [1850] 19 L.J., Q.B., 295; *Wise v. Ameerunnissa*, [1879] 7 I.A., 73; *Krishnaji v. Antaji* [1893] 18 Bom., 256. As against trespasser, antecedent possession is enough, *Umrao v. Ramji* [1913] 11 A. L. J. R., 1012.

construc-
tive.

Possession, again, may be *actual*, i.e., physical, *Virjivandas v. Mahomed*, supra, *Sivasubramanya v. Secy. of State* [1885] 9 Mad., 285, *Sita v. Jagan* [1912] 15 O.C., 317 (lessee), or *constructive*, or *symbolical*, ante, 40-1. There is strong authority for holding that the possession of the lessee is the possession of the lessor (see, e. g., *Krishna v. Hari* [1882] 9 Cal., 367), or that of the mortgagee is that of the mortgagor (see, e. g. *Jageshar v. Jawahir* [1876] 1 All., 311, F.B.). But authorities are not agreed as to whether adverse possession against the lessee or mortgagee gives a right of action to the lessor or mortgagor, *Chinto v. Janki* [1892] 18 Bom, 51, *Muhammad v. Mul Chand* [1904] 27 All., 395, and *Thamman v. Vizianagram* [1907] 29 All., 593, collect the authorities and give a negative answer; *Harak v. Luchmi* [1879] 5 C.L.R., 287, 289; *Vithoba v. Gangaram* [1875] 12 Bom., H.C.R., 180; *Ammu v. Ramkrishna* [1879] 2 Mad., 226, support an affirmative answer. *Mitra, Lim.*, 164-9; *Ittappan v. Manavikrama* [1897] 21 Mad., 153; *Pratap v. Maheshwar* [1908] 12 O. C. 45. The Calcutta High Court formerly refused relief under present section to a landlord whose tenant had been dispossessed, *Tarini v. Gunga* [1887] 14 Cal., 649; *Fadu v. Gour* [1892] 19 Cal., 544, 571, F.B.; *Sonaton v. Helim* [1902] 6 C. W. N., 616; Mukhopadhyaya, 22-3; but the Madras High Court took the contrary (and, it is apprehended, sounder) view in *Innasi v. Sivagnana* [1894] 5 M. L. J. R., 95, *Jagannatha v. Rama* [1904] 28 Mad., 238; and the Calcutta Court now agrees, *Nobin v. Kailash* [1910] 12 C. L. J. 483; *Bindubashini v. Jahnavi* [1897] 13 C. W. N., 303; *Janoki v. Dina Mani* [1909] *ibid*, 305; *Shyama v. Mahomed*, *ibid*, 835; *Akhil v. Akhil* [1911] 15 C.W.N., 715; *Bissessuri v. Baroda*, [1884], 10 Cal., 1076. Ante, 61-2. But see *Jumla v. Kingsley* [1913] 17 C. W. N. 1201;

Symbolical.

Possession delivered to a decree-holder, under ss. 263, 264, 318 and 319, C. P. C. (Act V of 1908, Sch. I, Or. 21, rr. 35-6, 95-6), though spoken of as *symbolical* or formal, is actual as against the judgment-debtor, ante, 41-2. For, as soon as the person entitled to possession, enters in the assertion of that possession, the law immediately vests the actual possession in that person, *Lows v. Telford* [1876] 1 A. C., 414. Therefore, if the judgment-debtor exercises acts of dominion after such delivery, the decree-holder may sue for possession. Cf. *Azimdad v. Ghansham* [1904] 1 A. L. J. R., 20; Mitra, S. R. A., 93.

Evidence of possession—Plaintiff must prove anterior possession, i.e., an exercise of a more or less discontinuous series of acts of dominion, to the exclusion of others, over the immoveable property in question, Pollock & Wright, *Pos.*, 29, 30. *Ishan v. Ram Lochun* [1868] 9 W. R., 79; *Pemraj v. Narayan* [1882] 6 Bom., 215, F. B.; *Kawa v. Khawaz* [1879] 5 C. L. R., 278; *Mohabeer v. Mohabeer* [1881] 7 Cal., 591. Ante, 62. Possession in being before displacement will continue where displacement is caused by *vis major*, *Kally v. Secretary of State* [1881], 6 Cal., 725, 739, or order of court subsequently superseded, *Rambhat v. Collector* [1876] 1 Bom., 592 (wrongful attachment), *Dagdu v. Kalu* [1897] 22 Bom., 733 (erroneous decree). Possession of part may sometimes be possession of whole, *Sivasubramanya v. Secy. of State* [1885] 9 Mad., 285; *Iqbal Husen v. Nandkishore* [1902] 24. All. 294 (appendages of a garden); *Maheshwar v. Pratap* [1908] 12 O. C. 58; the plaintiff will have to prove juridical possession and not isolated acts of trespass, *Rajkrishna v. Muktarani* [1910] 12 C. L. J. 605; Mitra, *Lim.*, 137. Occasional visiting and making use of a house is evidence of possession, *Ununto v. Brojo* [1869] 11 W. R., 136; so also receipt of rent, *Abdool Ali v. Abdoor Ruhman* [1874] 21 W. R., 429; or registration of name under Bengal Act VII of 1876, *Saraswati v. Dhanpat* [1882] 9 Cal., 431; or mutation of names in the revenue proprietary registers in the U. P. Land Revenue Act III of 1901, U. P.), s. 40. But apparently occasional grazing of cattle on a piece of land is not, *Debendra v. Bindhubala* [1912] 13 I. C., 125. So a *thakbust* award of boundary is evidence of possession at the time it was made, *Perhlad v. Rajendur* [1869] 12 M. I. A., 292; a *thakbust* map, *Syama v. Jogobundhu* [1888] 16 Cal., 186; or a survey map, *Syam v. Luchman* [1888] 15 Cal., 353, *Fahamidunnisa v. Secy. of State* [1886] 14 Cal., 67, F. B. So also surrounding of land with pillars by Government officers, *Collector v. Kalee* [1872] 17 W. R., 195, or measurement of it as appurtenant to a certain taluk, *Kussessur v. Jogodishuri* [1880] 7 C. L. R., 269. Where possession is doubtful, the court ordinarily holds it to follow the title, *Runjeet v. Goburdhun* [1873] 20 W. R., 25, 30,

P. C.; *Dharm v. Hur Pershad* [1885] 12 Cal., 38, Ameer Ali & Woodroffe, *Ev.*, 6th. ed., 692; but in a suit under s. 9, if the plaintiff fails to prove prior possession, the claim will be rejected and the court will not try any question of title, *Ali v. Pachubibi* [1903] 5 Bom. L. R., 264. Cf. *Browne v. Dawson* [1840] 12 A. & E., 624. Where a plaintiff obtained a decree for possession, but did not execute it, see *Nasrudin v. Venkatesh* [1879] 5 Bom., 382.

Admissibility of evidence—Deposition of witness, since deceased, in former case of criminal trespass respecting a house, is admissible in evidence, under I. Ev. A., s. 33, in subsequent suit under S. R. A., s. 9, for possession of same house, *Fool v. Nobin* [1895] 23 Cal., 441. The Court is entitled to go into the question of title to ascertain the nature of possession. *Chatgir v. Matanomal*, 8 I. C., 215.

Partial dispossession—may be redressed by possessory suit under s. 9, *Sabapathi v. Sabraya* [1881] 3 Mad., 250; *Omar v. Nawab* [1869] 11 W. R., 229; ante, 62.

Facts to be proved: (i) plaintiff was in juridical possession (a) of immoveable property, (b) within six months, (ii) he was dispossessed (a) without his consent, (b) otherwise than in due course of law, *Balram v. Bairagi* [1898] 12 C.P.L.R., 52. *Tamizuddin v. Ashrub* [1904] 31 Cal., 647, 651-2. *Devati v. Kunchuvorthy* [1914] 22 I. C., 279. Ante, 59-60. Where no dispossession is proved because plaintiff was not in possession, suit must be dismissed, *Jhan v. Lochh* [1912] 13 I. C., 541.

Without his consent—*Baldeo v. Magni* [1899] 20 A. W. N., 7. The right to receive rent is, *Rangasawmy v. Krishna*, 1 M. W. N. 838; 8 I. C. 844.

Immoveable property—Specific portion of survey number is, *Sahibrakhio v. Jumromal* [1911] 12 I. C., 190. There is a conflict of authority as to whether a suit will lie in respect of an incorporeal right under s. 9. Cases will be found collected and discussed, ante, 63-5.

Due course of law, i.e., the regular normal process and operation of the law invoked by the ordinary method of a civil suit, *Rudrappa v. Narsingrao* [1904] 29 Bom., 213, and applicable, *Roshanulla v. Hazir* [1913] 18 I. C., 727, or a judicial proceeding which may even be criminal in its nature, *Moore v. Manoranjan* [1908] 7 C. L. J., 547, 551. Cf. *Sofaoll v. Wopean* [1868] 9 W. R., 123; *Bhagabati v. Luton* [1902] 7 C. W. N., 218; distinguish *Tamizuddin v. Ashrub* [1904] 31 Cal., 647, P. C. See also *Protab v. Kantaeswurree* [1865] 2 W. R., 250; *Jadab v. Hera* [1866] 1 Ind. Jur. N. S., 21 (seizure by sheriff of property specified in warrant, but not coming within description in decree); *Muluk v. Bharat* [1908] 12 C. W. N.,

694 (dispossession of tenant by auction-purchaser, under Sch. I, Or. 21, r. 95, and not r. 96, Act V of 1908). *Kamini v. Sabad* [1910] 14 C. W. N. 403 (dispossession of tenant in execution of decree against landlord); *Suresh v. Nesa Bibi* [1910] 11 C. L. J. 433 (possession taken by landlord, after service of notice under s. 87, Bengal Tenancy Act). All trespass implies force in the eye of the law, *Asher v. Whitlock* [1865] 1 Q. B., 1; but it is not necessary under the section that actual physical force should have been used by the dispossessor. Cf. *Mendu v. Sridhar* [1908] 5 A. L. J., 214.

Person claiming through, i.e., heir or representative, who, however, cannot sue during the life-time of the person dispossessed, *Nritto v. Rajendro* [1895], 22 Cal., 562.

Suit, i.e., a possessory suit, not based either partially or wholly on title, *Ramasami v. Paraman* [1901] 25 Mad., 448; *Lachman v. Shambhu* [1910] 33 All., 174 F. B., overruling *Ram Harakh v. Sheodihal* [1893] 15 All., 384. Ante, 67. A suit under s. 9 is not a suit for possession within the meaning of s. 28, Lim. Act, *Mitra, Lim.*, 388-9. But a party, who might have sued under s. 9, is not bound to do so. *Jhangi v. Ramzan* [1910] P. R., No. 13.

Recover possession, together with crops growing on the land, *Shirajdee v. Emam* [1870] 13 W. R., 104, and costs (in the discretion of the court), *Radha Kristo v. Kalee Prosunno* [1871] 15 W. R., 268, *Re Omar* [1869] 11 W. R., 229. Any other relief, e.g., a mandatory injunction or damages, is beyond the scope of a possessory suit, *Tilak v. Fatik* [1890] 25 Cal., 803; *Nazir v. Abid* [1911] 8 A. L. J. R., 1910. Ante, 66.

Possession, exclusive, not joint, *Hari v. Elemjan* [1914], 19 C. L. J., 17; *Koothan v. Vandu* [1915] 29 M. L. J., R. 760; but see, *Atiman v. Reasut*, [1915] 19 C. W. N. 1917.

Removal of house built by defendant, *Rahmatullah v. Mojizullah* [1915] 28 I. C., 472.

Notwithstanding—i.e., no matter what title might be shown against him, *Ram v. Sheodihal* [1893] 15 All., 384, 385. Ante, 54-5.

Any other title, i.e., other than mere anterior possession, e.g., ownership, *Enaetoollah v. Kishen* [1867] 8 W. R., 386, 390; *Wise v. Ameerunnisa* [1879] 7 L. A., 73; *Bandu v. Naba* [1890] 15 Bom., 238, 241; *Nisa v. Kanchiram* [1899] 26 Cal., 579.

Defences not allowed: (i) plea of agency, *Virjivandas v. Mahomed* [1880] 5 Bom., 208; (ii) fraud in obtaining anterior possession or deed, *Sayaji v. Ramji* [1881] 5 Bom., 446; (iii) partial dispossession, *Omar v. Nawab* [1869] 11 W. R., 229;

(iv) Magistrate's award under Cr. P. C., s. 145 ; or (v) Mamlatdar's decree. See under *Similar Law*, supra. Also ante, 66.

Effect of the decree : (i) It shifts the onus of proving title to the defeated party, when he subsequently brings an action in ejectment, *Maenooddeen v. Greesh* [1867] 7 W. R., 230, *Surbo v. Surut* [1871] 16 W. R., 34, *Juggurnath v. Mahomed* [1872] 17 W. R., 161, *Ziaullah v. Inu* [1896] 23 Cal., 693. Cf. *Monohar v. Ananta* [1913] 17 C. W. N., 802 ; (ii) is *prima facie* evidence of plaintiff's title, *Kailash v. Gajendra* [1911] 15 C. L. J., 1, to warrant a subsequent decree for mesne profits, *Radha v. Zamiroonisa* [1868] 11 W. R., 83, even where the possessory decree was passed in a suit beyond the court's pecuniary jurisdiction, *Ziaullah v. Inu*, supra ; (iii) passes crops growing on the land along with the land, and entitles the decree-holder to cut them, *Shirajdee v. Emam* [1870] 13 W. R., 104 ; (iv) affords cause of action to rightful owner, who had regained lost possession without help of the law, but is evicted by defendant in execution of a possessory decree ; limitation—12 years, from date of such dispossession, *Mumtazuddin v. Barkatulla* [1905] 2 C. L. J., 1 ; *Pratap v. Durga* [1905] 9 C. W. N., 1061 ; *Jonab v. Surjya* [1906] 33 Cal., 821 ; distinguish *Prem v. Huree* [1874] 22 W. R., 259. As to Act VIII of 1859, s. 230 (corresponding to Act XIV of 1882, s. 332), see *Brohmo v. Burkut* [1870] 13 W. R., 264. The weight to be attached to the possessory decree will, however, depend upon the nature of the summary enquiry which preceded it, *Surbo v. Surut*, supra.

Suing to establish title—*Lakshmi v. Vithal* [1872], 9 Bom. H. C. R., A. C. 53, 57 ; *Krishnarao v. Vasudev* [1884] 8 Bom., 371, 376 ; *Tamizuddin v. Ashrub* [1904] 31 Cal., 647, F. B. (non-occupancy tenancy). There has been no adjudication on any question of title, so there can be no *res judicata*.

Cause of action—Where a suit has been brought under present section, Act V of 1908, sch. i, or. 2, r. 2, will not bar a subsequent suit for mesne profits, *Sheo v. Narain* [1902] 24 All., 501, or for cancellation of a deed under which defendant claimed title, *Jai v. Lalit* [1903] 26 All., 236. A suit for damages may be maintained after dismissal of a suit for possession, *Baban v. Nagu* [1876] 2 Bom., 19.

Government, i.e., the Secretary of State in Council, 21 & 22 Vic., c. 106, s. 65.

Suit independent of section—Authorities are not agreed as to whether a suit may not be based on a possessory title, independently of s. 9, *Manik v. Bani* [1911] 13 C. L. J., 649. Ante, 52-7. For the affirmative view, see also *Nandaram v. Naibad* [1898] 12 C. P. L. R., 59, 62 ; *Makhdoom v. Hashim*

[1915] 29 I. C. 210. But a mere temporary squatting will not do, *Tulla v. Gopi* [1904] P. R. No. 51.

Appeal—Applications for execution of decrees are proceedings in suits, C. P. C., s. 647, *Thakur v. Fakirullah* [1894] 17 All., 106, P. C., and no appeal will lie against an order passed in proceedings in execution of a decree under s. 9, *Souza v. Gulam* [1902] 26 Mad., 438. But proceedings under C. P. C., s. 331, were in the nature of a fresh suit, and an order passed therein was appealable, *Nasir v. Meher* [1895] 22 Cal., 830, though, apparently, no question of title could be gone into in such claim case, as that would result in reopening in execution the decree which was in force, *Mahomed v. Bashotappa* [1903] 27 Bom., 402. Ante, 66-7. Where, however, the order should not have been made under s. 9, *e.g.*, where the court makes a decree for possession *and* damages, the whole decree should be appealed against, *Nazir v. Abid* [1911] 8 A. L. J. R., 910.

Review, under Act V of 1908, s. 114, is prohibited. But there may be a rehearing under *ibid*, sch. i, or. 9, r. 13, *Anthony v. Dupont* [1881] 4 Mad., 217, and a revision under s. 115 in a proper case, *Rudrappa v. Narsingrao* [1904] 29 Bom., 213; *Nabin v. Amir* [1911] 9 I. C., 132; *Ram v. Upendra* [1913] 17 C. W. N., 501. But see *Jwala v. Ganga* [1908] 30 All., 331, *Bejai v. Sarat* [1908] 5 A. L. J., 181, *Mandu v. Sridhar*, *ibid*, 214; *Ram v. Jai Kishan* [1911] 33 All., 647; *Safder v. Shankar* [1903] P. R. No. 13; *Bawa v. Matanomal* [1910] 8 I. C. 215. *Qy.* if power to revise under s. 21 A (2), Punjab Act XIII of 1900, *Phuman v. Chhanga* [1914] 153 P. L. R.

Limitation—Six months from the time when the dispossession occurs, Act IX of 1908, sch. i, art. 3. It is immaterial whether the plaintiff was in possession within six months from the date of dispossession, *Jnan v. Lochh Mohan*, 13 I. C. 541.

Tenancies—As to tenancies in the Punjab, see the Punjab Tenancy Act (XVI of 1887), s. 51.

(b) *Possession of Moveable Property.*

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

Recovery of
specific
moveable
property.

EXPLANATION 1.—A trustee may sue under this section for the possession of property, to the beneficial interest in which the person for whom he is trustee is entitled.

EXPLANATION 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations.

(a) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title deeds. B may recover them from C.

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(c) A receives a letter addressed to him by B. B. gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(d) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under section 168 of the Indian Contract Act, 1872.

(e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

Similar Law—English Com. Law Proc. Act, 1854, s. 78, seems to have been the foundation of this section. Cf. also I. C. A., ss. 167-170.

Person entitled to possession—by reason of a right of ownership or a special or temporary right to present possession. *White v. Morris* [1852] 21 L. J. C. P. 185. Ante, 69.

Moveable property—"Property of every description except immoveable property," Act X of 1897, s. 3 (34.) This should be **specific**, *i.e.*, ascertained and ascertainable, ante, 68, for it being the object of detinue to obtain, if possible, specific restitution, the action will not lie for money, corn or the like ; for that cannot be known from other money or corn ; unless it be in a bag or a sack, for then it is distinguishably marked, 3 Stephen, *Com.*, 437.

Code of Civil Procedure—For form of plaint, see Act V of 1908, App. A (3), No. 32 ; the decree will be as provided in *ibid*, sch. i. Or. 20, r. 10, and it will be executed, as directed by Or. 21, r. 31 of the Code.

Trustee, *defd.*, s. 3 ante. *Suthianama v. Saravanabagi* [1893] 18 Mad., 266, 272. See also Bullen & Leake, *Pleadings*, 370 ; Act V of 1908, sch. i, Or. 31, r. 1 ; it does not seem to be necessary to make the beneficiary a party to the suit, 14 *Cyc.*, 246.

Expln. II. Roscoe, *Evidence*, N. P., 981-2.

Special or temporary right—(i) arising by an act of the owner, *e.g.*, bailment, pawn, or lien [I. C. A., s. 95] ; (ii) not arising by such act, *e.g.*, finding of lost goods [I. C. A., s. 71] or unauthorised pledge or sale. See notes to s. 11 (*d*) *post*. Ante, 69-70. It is not necessary that plaintiff should have been

in possession before. See *ill.(a.)* The illustrations are all of special or temporary right to immediate possession.

III. (a) *Lord Backhurst's Case* [1572] 1 Coke Rep. 2a ; *Garner v. Haunynghton* [1856] 22 Beav., 444. 1 Dart, V. & P., 485. If B were the beneficiary, his trustee would be entitled to the title-deeds, Trusts Act, s. 31.

III. (b) *Donald v. Suckling* [1866] 1 Q. B., 585. The bailor must pay or tender, before he becomes entitled to the possession, 1 Stokes, A.-I. Codes, 950.

III. (c) *Oliver v. Oliver* [1862] 32 L. J., C. P., 4.

III. (d) Story, *Bailment*, 94.

III. (e)—illustrates Expln. 2, 1 Stokes, A.-I. Codes, 951.

Appeal—An order under this section is a decree and open to appeal, Act V of 1908, s. 96.

Limitation—3 years from the time when the property is wrongfully taken, Act IX of 1908, sch. i, art. 49 ; *Murugesu v. Jotharam*, [1899] 22 Mad., 478.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

- (a) when the thing claimed is held by the defendant as the agent or trustee of the claimant ;
- (b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ;
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss ;
- (d) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations—

of clause (a)—

A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

of clause (b)—

Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

of clause (c)—

A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

Person having possession or control—Suit not maintainable against a decree-holder, in execution of whose decree goods had been sold but purchased by a stranger; plaintiff's proper remedy is a suit for damages, *Murugesu v. Jotharam* [1899] 22 Mad., 478.

Not the owner—Suit under s. 11 cannot be maintained against the owner, though suit under s. 10 may be, where the owner has parted with the right of immediate possession [cf. s. 10, ill. (b), ante]; and even as against a person, who is not the owner, it can be maintained only in the four special cases specified in cl. (a) to (d). Ante, 70-1.

Entitled to immediate possession—A servant, though entrusted with the goods, is not entitled to such possession as against the master, *Biddomoye v. Sittaram* [1878] 4 Cal., 497. As to the right to immediate possession, see ante, 69.

Cl. (a) Fiduciary relation, ante, 71, *Edwards v. Clay* [1860] 28 Beav., 145; 2 Story, *Eq.*, s. 709.

III. *Wood v. Rowcliffe* [1847] 2 Ph. 383. If C had no notice of B's limited authority, s. 178, I. C. A., would have applied.

Cl. (b) Pecuniary compensation inadequate, ante, 72-3.

III. *Pusey v. Pusey* [1684] 1 Vern., 273.

Cl. (c) Pecuniary compensation impracticable, ante, 73-4.

III. *Lowther v. Lowther* [1806] 13 Ves. 95. Cf. *Falcke v. Gray* [1859] 4 Drew., 458.

Cl. (d) Unauthorised pawn by servant, *Biddomoye v. Sittaram*, supra, or wife, *Seagar v. Hukmakessa* [1900] 24 Bom., 458, passes no title. Nor does an unauthorised sale by a gratuitous bailee, *Shankar v. Mohan* [1887] 11 Bom., 704, or a pledge by a person who had obtained jewels from plaintiff on fraudulent representations, *Kartick v. Gopal* [1877] 3 Cal., 264. See also *Greenwood v. Holquette* [1873] 12 B. L. R., 42.

Civil Procedure Code—For form of plaint, see Act V of 1908, App. A (3), No. 39; *Jaldu v. Asiatic Steam Co.*, F. B. (1915) 30 I. C 840, 29 M. L. J., 342. Decree will be executed in the manner provided by *ibid.*, sch. i, Or. 21, r. 32. For the distinction between ss. 10 and 11, S. R. A., see ante, 74-5. For appeal, see Act V of 1908, s. 96.

Measure of damages—where any are awarded, either as additional or substitutional remedy, see ante, 74; Collett, 5th. ed., 134-7; 14 *Cyc.*, 263; Mayne, *Damages*, 437.

Limitation—Act IX of 1908, sch. i, arts. 48, 49; also consider *ibid.*, s. 10, in cases of trust.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(a) *Contracts which may be specifically enforced.*

12. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the court be enforced—

Cases in which specific performance enforceable.

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust ;

Illustration of clause (a)—

A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B, and B may enforce specific performance of this obligation.

Similar Law—S.R.A., s. 11 (a), (b), (c), but the right to recover specific moveable property there is independent of contract, and there is no question of specific performance. Ante, 87.

Otherwise provided—See s. 21, *post*.

Specific performance—See note to s. 4 (b), ante ; also s. 5. (b). Fry, s. 3. Specific performance is ordinarily appropriate to executory contracts, *Ashburner, Eq.*, 533-4 ; ante, 21-2.

Contract—S. 4 (a), ante. Under I. C. A., s. 11, it has been held that a minor cannot contract, *Mohori v. Dharmo* [1903] 30 Cal., 539, P. C. ; but apparently a decree for specific performance may be given against him when it is for his benefit that the contract should be performed, *Khairunnesa v. Lokenath* [1899] 27 Cal., 276 ; ante, 200, 408. Cf. *Re Manilal Hurgovan* [1900] 25 Bom., 353. Where the contract is only voidable by reason of having been made by person under disability, it may be enforced when the disability ceases, *Gregson v. Uday* [1889] 17 Cal., 223, P. C. The section pre-supposes a complete contract, *Koylash v. Tariney* [1884] 10 Cal., 588, the terms of which are before the court, *Maya Ram v. Prag Dat* [1882] 5 All., 44, 51. Ante, 86. A memorandum to deposit the grant of a dockyard and office, as security for advance on a promissory note, was taken as an agreement and enforced, *Currie v. Chatty* [1869] 11 W. R., 520, and a contract was held constituted by a notice issued by the Collector under Act VI of 1857, in a land-acquisition proceeding, requiring the proprietor

to appoint an arbitrator to determine the amount of compensation, and the reply to it intimating the appointment of an arbitrator, *Kharsedji v. Secy. of State* [1868] 5 Bom. H. C. R., O. C., 97. An agreement to transfer upon contingencies which have not happened, cannot be enforced, *Bhobo v. Issur* [1872] 18 W. R., 140.

Consideration—Parties may waive money-consideration, *Nukehad v. Hunooman* [1868] 10 W. R., 69. *Bonâ fide* compromise is good consideration, *Shib Lal v. Collector* [1894] 16 All., 423. Agreement to sell reversionary interest for a price less than the market-value, was enforced in *Gitabai v. Balaji* [1892] 17 Bom., 232.

Discretion—S. 22, *post*. Ante, 31-2, 185-8.

Be enforced—For form of plaint, see Act V of 1908, App. A (3), Nos. 47-8. Ante, 414, *sqq*.

Trust—S. 3, ante; cf. s. 11(a). For relation between trust and contract, see ante, 84. The creation of a trust imposes duties on the trustees which may be enforced too by strangers to the transaction, who may not even have been in existence at its date. Pollock, *Con.*, 230; *Brojo v. Hurro* [1880] 5 Cal., 700 (testamentary trust for religious and charitable purposes, suit by representatives of settlor for due performance of trust).

III.—Repealed wherever I. Tr. A. is in force, Act II of 1882, ss. 1, 2. As to trust of chattels, see ante, 84; *Forrest v. Elwes* [1779] 4 Ves., 497, seems to have suggested the illustration.

(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ;

Illustration of clause (b)—

A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

No standard.—Damages being conjectural, no certain calculation can be made, 2 Story, *Eq.*, s. 722 (a); ante, 87, 119. (i) *Chattels unique or of peculiar value to plaintiff*: “A value of affection is seldom appreciated by third persons. It needs a very enlightened benevolence, and philosophy very uncommon, to sympathise with tastes different from our own: The Dutch florist, who sells tulip bulbs for their weight in gold, laughs at the antiquary who pays a great price for a rusty lamp. Legislators and Judges have too often thought like the vulgar. They have applied gross rules to cases which required a nice

discernment. There are cases in which the offer of money is not a satisfaction, but an insult. Shall a lover take money as the price of his mistress's portrait of which a rival has robbed him?" Bentham, *Legis.*, 290. (ii) *Profits dependent on future events*, ante, 121.

III. —*Falcke v. Gray* [1859] 4 Drew., 458; *Dowling v. Betjemann* [1862] 2 J. & H., 544.

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

Illustrations of clause (c)—

(i) A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him, he paying the purchase-money.

(ii) In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contract with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf, as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.

(iii) A contracts to sell, and B contracts to buy, a certain number of railway-shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not ways to be had in the market; and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

(iv) A contracts with B to paint a picture for B, who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

Adequate relief—"equally efficacious relief," s. 56 (i) *post*; see also s. 21 (a). Damages would be adequate relief, if thereby the plaintiff would be put in a situation as beneficial to him as if the agreement were specifically performed, ante, 155.

III. (i). Ante, 96-7. *Sale*: difficulty in fixing value of minerals no bar to relief. *New B. C. Co. v. Bularam* [1880] 5 Cal., 932, P. C.; nor subsequent transfer to a third party with notice, *Shib v. Abdool* [1865] 3 W. R., 103; *Mathur v. Sheo*, W. R., 1864, 281; nor non-registration of deed of sale, *Ruhmut-oollah v. Shuriutoollah* [1868] 10 W. R., 51, F. B.; *Toolsee v. Mahadeo* [1868] 10 W. R., 483; *Probhooram v. Robinson* [1869] 11 W. R., 398; *Tripoora v. Russick* [1871] 15 W. R., 189; *Footch v. Leelumber* [1871] 16 W. R., 26, P. C.; *Chinna v. Dorasami* [1896] 20 Mad., 19 (plaintiff may enforce execution and registration of fresh deed). *Dedication*: *Shib Dial v. Hira Nand* [1890] P. R., No. 100. *Exchange*: *Nasir v. Govt.* [1868] 3 Agra, 394; *Kishoree v. Jugunnath* [1868] 9 W. R., 269. *Partition*: *Bhowanee v. Thakoor* [1867] 2 Agra, 277; *Nukehad v.*

Hunooman [1868] 10 W. R., 69 (agreement to re-unite in respect of one item of joint property); *Virasami v. Ramasami* [1880] 3 Mad., 87 (agreement for right of pre-emption after partition). *Transfer*, in consideration of financing of litigation, of part of property claimed: *Bhobo v. Issur* [1872] 18 W. R., 140, P. C. (claim compromised by defendant). *Family arrangement*: *Gregory v. Cochrane* [1860] 8 M. L. A., 275 *Mortgage*: *Gregson v. Uday* [1889] 17 Cal., 223, P. C. *Lease*: *Naoroji v. Rogers* [1867] 4 Bom. H. C. R., O. C., 1 (though defendant's wife refused to join); *Pitchakutti v. Kamala* [1863] 1 Mad. H. C. R., 153 (though lease savoured of champerty); *Nemai v. Kokil*, [1880] 6 Cal., 534 (though agreement oral, and there were subsequent lessees, but with notice), *Hurnandun v. Jawad* [1899] 27 Cal., 468. Where a vendee from a mortgagor made a deposit under T. P. A., s. 83, and the mortgagee accepted it upon the depositor agreeing to convey to him part of the mortgaged premises, the mortgagee was given a decree for specific performance of the agreement to convey, *Tatayya v. Pichayya* [1890] 13 Mad., 316.

Agreement to sell—gives a personal right to the obligee against the obligor or his assignee, with notice, to compel the latter, by a suit, to specifically perform his contract; but the obligor has no direct right over the land, *Peer v. Mahomed*, [1904] 29 Bom., 234, 238; *Fateh v. Narsingh* [1912] 16 I.C., 988. T. P. A., s. 54; ante, 280-1.

III. (ii) —*Storer v. G. W. Ry. Co.* [1842] 2 Y. & C. Ch., 48, 53. For this and other railway cases, see ante, 106-13, where the law as to specific enforcement of building contracts is digested.

III. (iii). *Duncuft v. Albrecht* [1841] 12 Sim., 189. *Doloret v. Rothschild* [1824] 1 S. & S. 590. Ante, 90-1.

III. (iv) Picture by a particular artist has a value of its own, as it cannot be reproduced by another. But if the picture here had not been already painted, *B* could not have compelled *A* to paint it, s. 21 (b), *post*.

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Illustration of clause (d)—

A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

Cannot be got—Cl. (b) and (d) comprise the class of

cases where damages are an *impracticable* remedy. Ante, 119-21.

Mitra thinks the Act does not take cognizance of contracts respecting personal acts (S. R. A., 132). But cl.(d) would apply to such contracts, ante, 130. Take an agreement to retire from business, (*Gray v. Smith* [1890] 43 Ch. D., 208), it is *not* probable that pecuniary compensation can be got for the non-performance of the act agreed to be done. Ante, 120.

III. *Watkins v. Maule* [1820] 2 J. & W., 243. The beneficial effect of a decree in damages must depend upon the personal responsibility of the party, *Doloret v. Rothschild*, *supra*; and where the defendant is insolvent, the decree will be worse than bootless, *Parker v. Garrison*, [1871] 61 Ill., 250, 253.

EXPLANATION.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

Shall presume—Cf. I. Ev. A., s. 4. The explanation refers to cl.(c). *Sankata v. Jagat*, [1898] 2 O. C., 24; U. B. R., [1897-1901], 539. For the reason of the distinction drawn between moveable and immoveable property, see ante, 95-8. For instances of contracts relating to chattels, the breach of which cannot be adequately relieved by compensation in money, see ill. (iii) and (iv) of cl.(c); Pomeroy, S. P., s. 15, p. 20; also ante, 90-5. An agreement to grant or renew a lease is not an interest in immoveable property, *Secretary of State v. Ma Dwe* [1914] 24 I.C., 911.

Act V of 1908, s. 47—Where a suit for possession was compromised and dismissed upon the defendant agreeing to execute a *kabuliat* in plaintiff's favour, but no such condition was entered in the decree, the plaintiff's suit for specific performance of the agreement could not be barred by s. 244, C. P. C. (Act V of 1908, s. 47), *Chuni v. Hira* [1902] 7 C. W. N., 158. *A fortiori*, s. 47 cannot bar a suit in respect of a compromise subsequent to a decree and relating to property not affected by it. *Ram v. Madhab* [1865] 3 W. R., 118. Cf. *Tatayya v. Pichayya* [1890] 13 Mad., 316. As to compromise plaintiff did not abide by, see *Srish v. Banomali*, [1904] 31 Cal., 584, P. C.; ante, 321-2.

Act XI of 1859, s. 36—Does not bar suit for specific performance of agreement to convey property purchased at revenue sale made prior to purchase, *Monmotha v. Girish* [1912] 17 C. W. N., 75.

Limitation—Three years from date when performance

became due, Act IX of 1908, Sch. i, art. 113; *Virasami v. Ramasami* [1880] 3 Mad., 87; *Hari v. Raghunath* [1888] 11 All., 27; or plaintiff had notice that defendant refused performance, *Subba v. Hari*, [1902] 5 O. C., 140, 142. This art., and not art. 144, was applied where the claim was for specific performance of an agreement to sell as well as for possession, the right to possess depending upon the right to the other relief, *Muhiuddin v. Majlis* [1881] 6 All., 231; *Charna v. Bans Lal* [1908] 5 A. L. J. R., 529. But see ante, 260-1; *Ghulam v. Narain* [1908] 5 A. L. J. R., 534, 538.

Jurisdiction—A suit for specific performance of a contract for sale or mortgage of land is not 'a suit for land,' *Yashwantrao v. Dadabhai* [1890] 14 Bom., 353, *Land Mortgage Bank v. Sudurudeen* [1892] 19 Cal., 358; cf. *Ramdhone v. Nobeemmony* [1865] Bourke, 218. *Contra*, *Sreenath v. Cally* [1879] 5 Cal., 82. Apparently equity may act *in personam* in India, too, ante, 171. *Ewing v. Orr Ewing* [1883] 9 A. C., 34, 40.

Decree, form and effect of—Decree implies an order for specific performance by all parties, and may be rectified to compel plaintiff to carry out his part of agreement, *Karim v. Rajooma* [1887] 12 Bom., 174. For form of decree, see *Cooper v. Morgan* [1908] 78 L. J., Ch., 195; *Amer v. Nathi* [1910] 7 A. L. J. R., 887.

Contracts of which the subject has partially ceased to exist.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Illustrations.

(a) A contracts to sell a house to B for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money.

(b) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase-money.

Similar Law—I. C. A., s. 56; German Civil Code, ss. 275, 280, 306-8.

Principle—*Res perit domino*. I.C.A., s. 86; T.P.A., s. 55 (5) (c). Where the contract has been *completely made*, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains; subsequent events, therefore, can neither determine the contract nor give either party a right to resist the performance, Fry, s. 914, p. 399; ante, 281.

It is not easy to define the scope and effect of s. 13. It purports to be enacted in the form of a proviso or exception to l. C. A., s. 56, and may perhaps be paraphrased thus: 'A contract to do an act which, after the contract is made, becomes only partially impossible by reason of the loss or destruction of a portion of its subject-matter, does not become void when the act so becomes partially impossible, but may, in the discretion of the Court, be specifically enforced so far as it is still capable of performance.' Ante, 281-2. Judging from the illustrations, the section seems to have been intended to give effect to the English doctrine of equitable conversion, as explained, *e.g.*, in *Seton v. Slade* [1802] 7 Ves., 265, *Harford v. Purrier* [1816] 1 Madd., 538. But the Indian law does not recognise any equitable ownership resulting from a contract for sale, as distinguished from a conveyance, T. P. A., s. 54. Ante, 280-1. It surely seems "against natural justice that any one should pay for a bargain which he cannot have," *Stent v. Bailis* [1692] 2 P. Wms., 217, 219.

Section 56, Indian Contract Act—deals with cases both of antecedent and subsequent impossibility and makes the enforceability of all contracts conditional upon the continued existence of the subject-matter, ante, 275. Where a contract in its inception is expressly conditional upon certain work being done, until this is done, the subject-matter is not the property of the promisee and not at his risk, *Counter v. Macpherson* [1845] 5 Moo. P. C., 83. Ante, 283. Where the whole subject-matter ceases to exist, the contract will become void under l. C. A., s. 56; where only a part is lost, the contract may be cancelled *pro tanto*, *Inder v. Campbell* [1881] 7 Cal., 474.

Not wholly impossible—*i.e.*, substantial performance is still possible, *Bishop, Con.*, s. 605; *Bombay P. S. N. Co. v. Rubattino Co.* [1889] 14 Bom., 147; *Sarat v. Bhuban* [1898] 3 C. W. N., 182. Where impossibility is due to defendant's default, he cannot resist specific performance, *G. W. Ry. Co. v. B. & O. J. Ry. Co.* [1848] 2 Ph., 597, 605; Fry, s. 849.

III. (a).—*Paine v. Meller* [1801] 6 Ves., 349; *Cass v. Ruddle* [1692] 2 Vern., 280 (but on this case, see 1 Bro. Ch., 156 n.); *Budh Singh v. Hardial* [1897] P. R. No. 52. Apparently, the house was not the whole of the subject-matter of the contract, otherwise the illustration goes beyond the section, and cannot be accepted. Ante, 282-3. "When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase-money by the purchaser, and before payment and conveyance the buildings are destroyed by fire without the fault of either party, the loss must fall on the vendor; and if the buildings formed

a material part of the value of the premises, the vendee cannot be compelled to take a deed of the land alone and pay the purchase-money; and if he has paid it, he may recover it back," *Gould v. Murch* [1879] 70 Me., 288, 289. *Hawkes v. Kehoe* [1907] 10 L. R. A., N. S., 125. But see *Eppstein v. Kuhn* [1906] *ibid*, 117, where an abatement of price was allowed. The rule is not applicable where the subject-matter is specific and can be replaced, *Bishop, Con.*, s. 597.

III.(b). *Mortimer v. Capper*, [1782] 1 Bro. Ch., 156. If the life had expired before the contract was made, it would be void by reason of mistake, S. R. A., s. 21(h).

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value; and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Illustrations.

(a) A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A, and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bighas and to make compensation to him for not conveying the two remaining bighas; or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(b) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract, notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Principle—Equity requires substantial, and not literal, fulfilment of engagements. *Seton v. Slade* [1802] 7 Ves., 265; ante, 173. This and the two following sections really formulate three exceptions of the general rule enunciated in s. 17. Ante, 174. It is of the essence of specific performance that part only of an agreement should not be performed, *Cutts v. Brown* [1880] 6 Cal., 328. *Kota v. Matoori* [1911] 9 M. L. T., 318. *Exception 1*: where the *essence* of the contract can be performed, little circumstances which are non-essential may be neglected. Performance therefore may be enforced by either the promisor or the promisee, provided (i) the part which cannot be performed (a) is inconsiderable and (b) may be compensated for in money, and (ii) provided that such compensation is made. The reason

of the inability to perform apparently exists at the time the contract is made, see *ill.*, whereas the inability contemplated by s. 13, *ante*, arises by reason of subsequent events.

Unable to perform—by reason, *e.g.*, of deficiency in quantity of the subject-matter or variance in quality, defect in title, or of some legal prohibition, or even lapse of time.

Small proportion—‘Small’=immaterial; there may have been, *e.g.*, some small mistake or inaccuracy, *Mortlock v. Buller* [1804] 10 Ves., 292, 305; *Halsey v. Grant* [1806] 13 Ves., 73.

Admits of compensation, *i.e.*, (i) there are data for ascertaining a fair and reasonable amount as the money-value of the difference between what can be performed and the express subject-matter of the contract; *ante*, 175, and (ii) there has been no fraud or misrepresentation, *ante*, 177. “In computing compensation for a misdescription, the rough calculations of a jury are unsuitable: the interests of the vendor have to be considered as well as those of the purchaser, and if the compensation does not admit of a pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, the Court will probably refuse to make a rough estimate or an educated guess,” 3 L. Q. R., 57; *ante*, 174-5.

Compensation, *i.e.*, abatement of purchase-money, as distinguished from damages, *ante* 426. The right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation, *Hill v. Buckley* [1811] 17 Ves., 394, 401.

And award compensation—*Ununtoram v. Ramlochun* [1869] 14 W. R., O. C., 15; *Gurusami v. Ganapathia* [1882] 5 Mad., 337.

III.(a). *M’Queen v. Farquhar* [1805] 11 Ves., 467. The vendor, if plaintiff, can recover the purchase-money *minus* compensation; the vendee, if plaintiff, can have the land *plus* compensation. If the 2 bighas were necessary for the use or enjoyment of the 98 bighas, the loss would not admit of compensation in money, and s. 15 would apply; cf. *Perkins v. Ede* [1852] 16 Beav., 193.

III.(b). *Richardson v. Smith*, [1870] 5 Ch., 648. The house and lands form the main object of the contract.

Have the furniture valued,—*ante*, 164-5; *Smith v. Peters*, [1874] 20 Eq., 511.

Specific performance of part of contract where part unperformed is large.

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Illustrations.

(a) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

(b) A contracts to sell to B an estate, with a house and garden, for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation, either for the deficiency or for loss sustained by him through A's neglect or default B is entitled to a decree directing A to convey the house to him on payment of the purchase-money.

Principle.—Exception 2: Where the *essence* of a contract cannot be performed, and a party cannot have the *substantial benefit* of his contract, it cannot be forced upon him by the other party; but the party *not* in default may at his option accept such performance as is practicable, provided he gives up all further right in respect of the contract, *Ponaka v. Vadamadi*, [1910] 20 M. L. J. R., 328. Ante, 182. Note the respective positions of the two parties to the contract: (a) the *party in default* may have specific performance (*minus* compensation) where the part left unperformed is small in value *and* admits of compensation, but he cannot have specific performance where such part is considerable *or* does not admit of compensation; (b) the *party not in default*, however, may have specific performance *with* compensation, in the first case, but specific performance *without* compensation, in the second case. *Semble:* the Act does not empower a vendor in case of essential misdescription, where compensation cannot be assessed, to compel specific performance with an indemnity. 1 Stokes, *A.-I. Codes*, 955; ante, 181.

Party unable to perform, *e.g.*, member of undivided Hindu family, *Inturi v. Ariparala* [1912] 15 I. C., 623, 14 M. L. T., 199; *Dunnar v. Kakuturu* [1915] 16 M. L. T., 370; partial owner, *Salamat v. Tulsi* [1914] 22 I. C., 517.

Considerable, *i.e.*, material and substantial. Some commentators treat ss. 14 and 15 as supplementary to I. C. A., s. 55 (Nelson, 144; Collett, 5th ed., 161-2). Now, where time is of the essence of a contract, a belated performance will not be accepted, though equity leans to the construction that time is not of the essence, *ante*, 269. But it is only by straining of language that we can speak of the stipulation as to the time for performance of a contract (which the promisor has failed to keep) as 'a considerable portion of the whole' contract 'which must be left unperformed.' *Jamshed v. Burjorji* [1916] 30 M. L. J. 186 P. C.

Does not admit of compensation.—See note to s. 14; also *ante*, 174-7. *Narayana v. Alamelu* [1915] 27 I. C. 449.

Or, not 'and,' as in s. 14, *ante*.

Not entitled, *Kota v. Matoori* [1911] 9 M. L. T. 318.

May, court has a discretion, *Govinda v. Apathsahaya* [1912] 22 M. L. J. R., 257.

Other party, *e.g.*, the vendee, as distinguished from the vendor.

Direct party in default—*Naoroji v. Rogers* [1867] 4 Bom. H. C. R., O. C., 1.

So much as he can perform—*Kedar v. Manu* [1914] 16 C. W. N., 247 (widow's interest). Cf. *Kondopaneni v. Gagaru* [1912] M. W. N., 995 (plaint amended).

Provided—This is a deliberate modification of, if not departure from, the rule of English Courts, where the buyer is generally granted partial performance with compensation, Sugden, *V. & P.*, 301. 2 Story, *Eq.*, s. 779. See *ante*, 178 sqq. *Ponaka v. Vadamadi* [1910] 33 Mad., 359; *Gaj Kumar v. Lachman* [1911] 14 C. L. J., 627, 637-8. *Mahmud v. Yawar* [1915] 13 A. L. J., 739. *Srinivasa v. Sivarama* [1908] 32 Mad, 320.

III.(a). *Durham v. Legard* [1865] 34 Beav., 611.

III.(b). Cf. *Peers v. Lambert* [1844] 7 Beav., 546; *Arnold v. Arnold* [1880] 14 Ch. D., 270.

Condition as to compensation—*Ante*, 183.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Specific performance of independent part of contract.

Principle.—Exception 3: Where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts, as can and ought to be performed, may alone be specifically enforced. Such a contract, though nominally one, is actually divisible, and when the Court enforces what is apparently a part, it really enforces an entire and complete contract, *I. C. A.*, ss. 27, 57-8. The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and terms of each individual contract; where it is really indivisible, the Court will not take it upon itself to separate its parts and enforce them piecemeal. *Ryan v. Mutual T. W. C. Assn.* [1893] 1 Ch., 116; *Underwood v. Barker* [1899] 1 Ch., 300, 304; or allow some only of several joint contractors to sue, *Safiur v. Mahramunnisa* [1897] 24 Cal., 832. The Bengal Tenancy Act (VIII of 1885), s. 29, makes an agreement for an enhancement of rent of an occupancy tenant by more than 2 as. per rupee wholly void; no part of such an agreement can be rejected in order to validate the agreement and decree so much of the enhancement as is lawful, *Kristodhone v. Brojo* [1897] 24 Cal., 895.

A contract for sale of a share with cultivating rights in *sir* land could not be specifically enforced in the Central Provinces, *Mansingh v. Rampiare*, 6 N. L. R., 185; 8 I. C. 1184.

Can and ought—The performance is both practicable and proper; not only is there no physical or legal impediment in the way, but the Court, in the exercise of its discretion, thinks fit to enforce it specifically. *S. R. A.*, ss. 12, 21, 22.

Separate and independent footing: to take an *executory* contract of sale, (i) distinct lots may be separately sold, *James v. Shore* [1816] 1 Stark, 426, or (ii) the property may be of two descriptions, *Mestaer v. Gillespie* [1805] 11 Ves., 621, 629 (ship and freight). But one transaction may be dependent on another, *Casamajor v. Strobe* [1833] 2 My. & K., 706, 722, or be subsequently dealt with as one by the parties, *Dykes v. Blake* [1838] 4 Bing., N. C., 463. Fixing of different prices for different lots, *Crosse v. Lawrence* [1852] 9 Hare, 462, or existence of cross contracts, *Croome v. Lediard* [1833] 2 My. & K., 251, is not a certain test. (iii) A contract may also provide for its piecemeal execution, *Wilkinson v. Clements* [1873] 8 Ch., 96, or (iv) there may be two contemporaneous contracts intended by the parties to be separate, *Odessa Tramways Co. v. Mendel* [1878] 8 Ch. D., 235, or (v) the stipulations may be alternative, *Green v. Low* [1856] 22 Beav., 625. The fact that future acts have to be performed will not prevent an enforcement of (vi) a right perfect in itself resulting from past transactions, *Waring*

v. *M. S. & L. Ry., Co.* [1849] 7 Hare, 482, or (vii) an agreement that may be completely performed at the time, *Granville v. Betts* [1848] 18 L. J., Ch., 32. So, where there are (viii) positive and negative covenants, *Lumley v. Wagner* [1851] DeG. M. & G., 604, or (ix) stipulations partly legal and partly honorary, *Carolan v. Brabazon* [1846] 3 J., & Lat., 200, 213, the negative or legal stipulations may be specifically enforced. (x) Where the part of the contract which the Court could not enforce has been already performed, specific execution of the remainder will be decreed, *Hope v. Hope* [1856] 22 Beav., 351. Ante 352, 355-6.

Cannot or ought not—For enforcement, the part should be *both* practicable and proper; for rejection, it is enough that the part is *either* impracticable or improper, it may, *e.g.*, have become either impossible or unlawful.

17. The Court shall not direct the specific performance of a part of a contract, except in cases coming under one or other of the three last preceding sections.

Bar in other cases of specific performance of part of contract.

Principle—Parties when they enter into a contract do not contemplate a partial or lop-sided performance of it; therefore equity requires that if there is to be a specific performance, it should be a specific performance of the contract in its entirety. The Court should abstain from remodelling contracts. A court cannot ask a party to do an act the effect of which would be to compel a third party to bring a suit. *Husain v. Jahan* [1913] 58 P. R. 1913. Ante, 177-8. But the rule has been said not to apply to *executed* contracts, ante, 176, 357.

Part—For Indian cases where partial performance was refused, see *Virdachala v. Ramaswami* [1863] 1 Mad. H. C. R., 341, *Ununto v. Ramlochun* [1869] 14 W. R., O. C., 15, *Nuffur v. Khoodeeram* [1875] 24 W. R., 434, *Cutts v. Brown* [1880] 6 Cal., 328; *Gorinda v. Apathsahaya* [1912] 22 M. L. J. R., 257; *Jadu v. Adal* [1912] 11 I. C., 892; and, where part performance was granted, *Salamat v. Tulshi* [1914] 22 I. C. 517.

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:—

Purchaser's rights against Vendor with imperfect title.

Similar Law—T. P. A., s. 43. As for defect in title see also s. 25, *post*. There is an *absence* of title there, here only an imperfection in title, which may be cured. Cf. also I. C.A., ss. 109, 110, 118; Canadian Code, s. 1488.

Principle—When a person enters into a contract without the full power to perform it, and he subsequently acquires such

power, he is bound to perform the contract. *Sugden, V. & P.*, 355, 298 ; ante, 126.

To sell or let—It is only in cases of contracts of sale and lease that a subsequently accruing interest would be allowed to feed the estoppel. But see *Deolie v. Nirban* [1879] 5 Cal., 253 (mortgage); Ghose, *Mortgage*, 358.

Property—May be either moveable or immoveable, though it generally will be immoveable.

Having—apparently at the date of the contract, but according to *Sarju v. Wazir* [1900] 23 All., 119, the title may have even subsequently, before the sale or lease is actually effected, become imperfect, and that, too, by an act of the vendor or lessor himself.

Imperfect title—*e.g.*, by reason of action taken by Collector in execution of decree against ancestral property (C. P. C.), *Magniram v. Bakubai* [1912] 36 Bom., 510. Where the interest (in immoveable property) sought to be transferred cannot be transferred at all under s. 6, T. P. A. (*e.g.*, an expectancy), this section apparently does not apply, *Sumosuddin v. Abdul* [1906] 31 Bom., 165 ; *Ramasami v. Ramasami* [1907] 30 Mad., 255, 262. But see *Ram v. Prayog* [1881] 8 Cal., 138, 144, which holds that an agreement between Hindu expectants to divide property in a particular way upon the happening of a particular contingency is not void. Also *Ala Bakhsh v. Gulam* [1899] P. R., No. 13. Cf. *Rebati v. Ahmad* [1907] 9 C. L. J., 50 ; *Ram Chandra v. Dharmo* [1871] 7 B. L. R., 341, 345. The English rule is thus stated by Sugden : If „ a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser,” *V. & P.*, 355 ; 1 Wh. & T., 107. But the nature of the estate conveyed has to be looked at. If it is a professedly contingent interest sold for a price fixed with a view to the contingency, no equity arises out of the contract to fasten it upon the new title, 2 Dart, *P. & V.*, 819. Where, therefore, a mother contracted to sell certain property as that of her minor son and not her own, and she subsequently succeeded to the property on the death of that son, this section was held not to be applicable to the agreement, *Rashmoni v. Surja* [1905] 32 Cal., 832. Of course, if the guardian of a minor enters into a contract on his behalf, for legitimate purposes, there being no defect of title in the minor and the contract not being voidable at his instance, the purchaser or lessee may have specific performance against the minor's legal representative, s. 27, *post*. Where there is a legally conveyable title in the vendor, even if the title may be defeated upon claim by a third party, the purchaser may have specific performance,

Gurusami v. Ganapathia [1882] 5 Mad., 337, 341; *Bykuntha v. Shib Das* [1904] 2 C. L. J., 321; *Srinivasa v. Sivarama* [1908] 32 Mad., 320; *Ponaka v. Vadamadi* [1910] 33 Mad., 359.

purchaser or lessee—*Plaintiff* in the cases contemplated by the first three clauses, and *defendant* in the last.

except as otherwise provided—See ss. 21, 22, 24, 26, 28, *post*.

(a) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

vendor or lessor—apparently also the representative or privy of either, s. 27 (b), (c), *post*. The English rule seems to have been different, Sugden, *V. & P.*, 745.

subsequently.—i.e., up to the date of the decree, *Langford v. Pitt* [1731] 2 P. Wms., 630; *ante*, 351.

Any interest.—A, not having a permanent transferable right in a tenure, granted a *zar-i-peshgi* lease of it to B for 21 years; shortly after, the zemindar ejected A, but subsequently granted to him a permanent *mokarrari* lease; *held* that A must make good the *zar-i-peshgi* out of his new interest in the tenure, *Loot v. Chowkee* [1878] 2 C. L. R., 382. One, out of three undivided members of a Mitakshara Hindu family, sold co-parcenary property to plaintiff, without family necessity; during pendency of suit for possession, another member of the family died; *held* that plaintiff was entitled to a moiety of the land sold to him, *Virayya v. Hanumanta* [1891] 14 Mad., 459. For cases of conveyance of property non-existent at the time but subsequently acquired, see *ante*, 364-5 *Baldeo v. Miller* [1904] 31 Cal., 667; *Khobhari v. Ram* [1907] 7 C. L. J., 387.

make good the contract.—*Sheo Prasad v. Udai*, [1880] 2 All., 719; *Pran v. Bajju*, [1879] 4 Bom., 34; *Sooraparaju v. Veerabhadradu* [1907] 17 M. L. J. R., 505, (Boddam, J.); *Sheo Lal v. Goor Narain* [1910] 7 I. C. 218.

(b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

Principle—The vendor or lessor is bound to do all in his power to fulfil his promise.

bound to convey.—e.g., trustees of the legal estate, 2 Dart, *V. & P.*, 1032, Sugden, *V. & P.*, 349; *ante*, 127; *Bain v. Fothergill* [1874] 7 H. L., 158, 209. *Brewer v. Broadwood* [1882] 22 Ch. D., 105. Cf. *Naoroji v. Rogers* [1867] 4 Bom.,

H. C. R., O. C., 1; *Ponaka v. Vadamadi* [1910] 33 Mad., 359; *Mansingh v. Rampiare* [1911] 6 N. L. R., 185.

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee ;

Cl. (c).—is limited to cases of *sale*, and applies where the vendor both *may* and *can* redeem the property sold, ante, 128-9; 2 Dart, *V. & P.*, 1072. Where property is contracted to be sold, subject to a mortgage, but before completion of the sale the mortgagor redeems, he may claim to be subrogated to the security as against the purchaser, Jones, *Mortgage*, s. 879; Ghose, *Mortgage*, 414.

professes—represents expressly or impliedly, ante, 128; there must be a clear declaration, for where the vendor has not been guilty of misrepresentation or fraudulent concealment of incumbrances, the purchaser must bear the consequences of his own negligence, and the rule of *caveat emptor* applies, *Gajapathi v. Alagia* [1885] 9 Mad., 89. Cf. *Re Jones* [1893] 2 Ch., 461, 470. This rule requires the buyer to take care of himself and see that he buys after satisfying himself about the title and being properly indemnified by covenants in the deed of purchase, *Gour v. Chunder* [1875] 25 W. R., 45.

may compel—or under T. P. A., s. 55, subs. 5 (b), the purchaser may pay off the incumbrance himself out of unpaid purchase-money, if any, in his hands. Where he has paid the whole consideration before discovery of the incumbrance, he may sue for damages, *Gajapathi v. Alagia*, [1885] 9 Mad., 89. Where the property sold was subject to an outstanding lease, the purchaser was allowed to deduct from the purchase-price the amount, the premises were depreciated by reason of such lease, *Eppstein v. Kuhn* [1906] 10 L. R. A., N. S., 117.

conveyance—of such interest as he has under the mortgage, ante, 128-9.

Sale of mortgage-decree—A purchaser of a mortgage-decree, free from incumbrances, is entitled to the benefit of this clause, *Rhetsidas v. Shib* [1904] 9 C. W. N., 178.

(d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon,

to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor; in the property agreed to be sold or let.

Principle—If a contract of sale (or lease) falls through by reason of the default or want of title of the vendor or lessor, the opposite party is entitled to have his money back with interest, and to a lien for the amount on the subject-matter of the contract, Sugden, *V. & P.*, 671, *Kishen v. Ram Chunder*, [1865] 3 W. R., 28 (case of award). If the purchaser is at default, he cannot recover the deposit or any part of it, *Bishan v. Radha* [1897] 19 All., 489.

dismissed—*Mahomed v. Musaji* [1891] 15 Bom., 657, 669.

imperfect title—not illegality, 1 Dart, *V. & P.*, 518.

deposit—ante, 425; *Balwanta v. Bira* [1897] 23 Bom., 56.

lien—*ibid*; *Bindeshri v. Jairam Gir* [1887] 9 All., 705, P. C. Cf. T. P. A., s. 55 (6) (b).

19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

Power to
award com-
pensation
in certain
cases.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

EXPLANATION.—The circumstance that the contract has become incapable of specific performance, does not preclude the Court from exercising the jurisdiction conferred by this section.

Illustrations—

of the second paragraph—

A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The Court is of

opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

of the third paragraph—

A contracts with B to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

of the Explanation—

(i) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit, the patent expires. The Court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(ii) A sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A compensation for the non-performance.

Similar Law—This section is taken from Lord Cairns' Act, 21 & 22 Vic., c. 27, ss. 2, 3, 6. (But, as there have not been separate Courts of Law and Equity in India, there is no ground to import into this section the limitations which were placed in England upon the wording of that Act, ante, 415-6). Cf. also Act VIII of 1859, s. 192. Under the German Civil Code, compensation ordinarily means restitution in kind, ss. 249-51; see also s. 286.

Principle—The object of the enactment is to prevent a multiplicity of suits and to do complete justice between the parties; 2 Wh. & T., 8th ed., 455. The plaintiff may pray for specific performance *and* or *or* damages, and when he has once sued for either relief, a second suit for the other will apparently be barred by Act V of 1908, s. 11, and, Sch. I., Or 2, r. 2; ante, 415, 427-S. R. A., ss. 24 (e), 29; unless the causes of action are different. A suit was brought for specific performance of a contract of sale and for damages, the plaintiff alleging dispossession after delivery of possession; sale-deed was subsequently executed by the Court under s. 262, C. P. C.; *held* a second suit for possession on the basis of the sale-deed was not barred either by s. 13 or s. 43, C. P. C., *Nathu v. Budhu* [1893] 18 Bom., 537.

Para. 1. may also ask—not incumbent upon plaintiff to do so; even if no express prayer for damages has been made, the Court should decree damages in a proper case. See para. 2 *infra*; ante, 416. Cf. *Sheo Niwaj v. Gopal*, [1881] 1 A. W. N., 22; *Daropti v. Jaspat Rai* [1905] P. R., No. 49.

compensation for breach—Breach of an agreement is ground for an action for damages or for specific performance,

but not for setting aside the contract or declaring it null and void, *Nogendro v. Kishen* [1873] 19 W. R., 133, P. C. Upon an agreement to repay money within a certain period or execute a bond, upon default in the performance of either alternative, creditor was allowed to sue for recovery of money, *Rohimunnisa v. Mirza* [1881] 10 C. L. R., 103. Lessee failing to get possession may sue either for specific performance or for damages, *Munnee Dutt v. Campbell* [1869] 12 W. R., 149, *Ambica v. Galstaun*, [1909] 13 C. W. N., 326, and a prayer for return of *salami* (fine) paid may be treated as a claim for compensation for breach of contract of lease, *Rajdhur v. Kali* [1882] 8 Cal., 963. Compensation should not be refused because plaintiff does not sue for specific performance, 6 C. P. L. R., 57. A purchaser may be entitled to a refund of the deposit or part of the stipulated consideration paid by him, *Mohun v. Beharee* [1871] 3 N. W. P., 336, even where his suit for specific performance of the contract for sale fails, *Alokeshi v. Hara Chand* [1897] 24 Cal., 897; *Udit v. Muhammad* [1903] 25 All., 618, *affd.* *Amma v. Udit* [1908] 31 All., 68, P. C.; and he should be allowed to amend his plaint to include a claim for such refund, even at a late stage of the case, *Ibrahimhai v. Fletcher* [1896] 21 Bom., 827.

Limitation—from date of decree declaring agreement unenforceable, 1. L. A., Sch. I, art. 97, *Amma v. Udit*, *supra*. As to the deposit, see further, ante, 425-6, 431.

Rehearing—When a person, after obtaining a decree for specific performance, finds judgment-debtor incapable of carrying it out, he may apply for a rehearing and have a decree for damages instead, *Pearisundari v. Hari* [1887] 15 Cal., 211.

Para. 2 ought not—apparently includes ‘cannot’ also. See *ill.*, and cf. s. 21, *infra*. Ante, 78. Where a contract for a usufructuary mortgage could not be specifically enforced, as the property was under attachment and had been taken under the Collector’s management, under C. P. C., s. 326, the mortgagee was allowed compensation instead (*i.e.*, amount advanced *plus* interest from date when possession should have been delivered), *Jaidayal v. Ram* [1889] 17 Cal., 432.

III. See s. 21 (a), *post*. **Proper remedy** is a suit for damages.

Para. 3. not sufficient—“Mere restitution in nature leaves a deficiency of satisfaction proportioned to the amount of enjoyment lost during the continuance of the offence,” Bentham, *Theory Leg.*, 290. Ante, 417.

compensation—not indemnity, 1 Stokes, *A.-I. Codes*, 957. For distinction between this clause and s. 14, *supra*, see ante, 426-7.

III. *Jaques v. Millar* [1877] 6 Ch. D., 153; *Lillie v. Legh* [1858] 3 DeG. & J., 204.

Para. 4. **Assessed**—may be by issue of commission, C. P. C., s. 392. As to reasonable compensation, see *Nait Ram v. Shib Dat* [1882] 5 All., 238; ante, 419-20. Mayne, *Damages*, 211-22; 1 Stokes, *A.-I. Codes*, 957 (as to continuing causes of action, damages should be assessed down to time of assessment).

Explanation. Ante, 418.

has become—impossibility is subsequent to date fixed for performance; otherwise I. C. A., s. 56, and s. 13, *ante*, would apply.

incapable of specific performance, from the default of either party, *e.g.*, sale by vendor to *bonâ fide* purchaser for value, ante, 418-9.

jurisdiction—to award compensation, 1 Stokes, *A.-I. Codes*, 957.

III. (i)—*Davenport v. Rylands* [1866] 1 Eq., 302.

III. (ii)—*Ferguson v. Wilson* [1867] 2 Ch. Ap., 17.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Liquidation of damages not a bar to specific performance.

Illustration.

A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a license necessary to the validity of the under-lease, and that, if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

Similar Law—taken from the New York Code, s. 1892. Cf. I. C. A., s. 74, the Indian law makes no distinction between *penalty* and *liquidated damages*.

Principle—An agreement may be to do a certain act or pay a sum of money, or to do a certain act with a sum specified as payable in the event of default to secure the performance of this very act. A Court of equity looks at the substance, and not the form, of the agreement and generally leans against the construction that it is of an *alternative* nature. Ante, 116-9 2 Story, *Eq.*, s. 715; 2 Wh. & T., 8th. ed., 266. Alternative contracts are not within the scope of this section.

otherwise proper—consider specially ss. 21, 22, *post*. *Hukan v. Nikka* [1908] P. R., No. 15 (contract to sell land).

sum be named—Where defendant agreed to serve a railway company exclusively for four years, under a penalty of

£ 100, he was restrained by injunction from taking other service, *Madras Ry. Co. v. Rust* [1890] 14 Mad., 18.

III. *Long v. Bowring* [1864] 33 Beav., 585.

(b) *Contracts which cannot be specifically enforced.*

21. The following contracts cannot be specifically enforced :—

Contracts
not
specifically
enforceable.

(a) a contract for the non-performance of which compensation in money is an adequate relief ;

Illustrations to (a)—

(i) A contracts to sell, and B contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India :

(ii) A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1,000 per chest :

(iii) In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced ; for, in the first and second, both A and B, and in the third A, would be re-imbursed by compensation in money.

cannot—ante, 77-8. Cf. s. 57, *post*.

Cl. (a)—Reverse of s. 12 (c), ante.

compensation in money—The court refuses specific performance where damages are the proper remedy, *Balgobind v. Lutafat* [1867] 7 W. R., 142 ; *Ashrufoonnisa v. Stewart*, *ibid*, 303 ; *e.g.*, where the subject-matter of the contract is a sum of money, *Sheo v. Injore* [1874] 21 W. R., 433 (assignment of arrears of rent) ; *Anakaran v. Saidamadath* [1879] 2 Mad., 79 (loan on mortgage) ; *Ramanand v. Nakhed* [1904] 8 O. C., 5 ; *Mehdi v. Muhammad* [1908] 11 O. C., 217 ; *Phul Chand v. Chand Mal* [1908] 30 All., 252. Cf. *Maya Ram v. Prag* [1882] 5 All., 44 ; *Rohimunisa v. Mirza* [1881] 10 C. L. R., 103. Distinguish *Sturkey v. Barton*, [1909] 1 Ch. 284 (option for lessee to purchase reversion). So, where the agreement is to execute a charter-party, *Abdul Alla v. Abdul Bacha* [1881] 6 Bom., 5 ; or agreement to lease by some members of a joint Mitakshara family, without the consent of others, *Jadunandan v. Abdul* [1911] 11 I. C. 892. But the contract by the managing member may in proper circumstances bind the minor's interest, and may be specifically enforced, *Krishna v. Shamanna* [1912] 23 M. L. J., 610.

Estoppel—*Muncherji v. Mahomedbhoy* [1893] 17 Bom., 711. Cf. *Paris Chocolate Co. v. Crystal Palace Co.* [1856] 3 Sm. & G., 119 (parties having treated breach of some conditions of a

contract as capable of settlement by compensation, Court awarded damages for breach of the rest).

adequate relief—Ante, 155.

III.(i)—*Cuddee v. Rutter* [1720] 2 Wh. & T., 8th. ed., 422.

III.(ii)—Ante, 156-7.

III.(iii)—*Larios v. Bonany* [1873] 5 P. C., 346.

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms ;

Illustrations to (b)—

- (i) A contracts to render personal service to B :
- (ii) A contracts to employ B on personal service :
- (iii) A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

(iv) A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer ; but before the valuation is made, A instructs his valuer not to proceed :

(v) By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London :

(vi) A lets land to B, and B contracts to cultivate it in a particular manner for three years next after the date of the lease :

(vii) A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery :

(viii) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B, he will paint a picture for B :

(ix) A contracts with B to execute certain works which the Court cannot superintend :

(x) A contracts to supply B with all the goods of a certain class which B may require :

(xi) A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, "if the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

(xii) A contracts to marry B :

The above contracts cannot be specifically enforced.

minute or numerous details—Ante, 165. See *ill.* v-vii, ix, xi above. Where the contract provides for the performance of a series of acts, if it is possible to ascertain once for all after completion of the series whether the result intended has been attained and the order of the Court complied with,

the Court may decree specific performance, *Stewart v. Kennedy* [1890] 15 A. C., 75; *Ashburner, Eq.*, 534-5.

personal qualifications—Ante, 161. See *ills.* iii, viii.
volition—Ante, 161. See *ills.* i, ii, x, xii. A contract of personal service, *Callianji v. Narsi* [1894] 18 Bom., 702, 19 Bom., 764, *Ram v. Rakhal* [1913] 41 Cal., 19, or of agency, *Nusserwanji v. Gordon* [1881] 6 Bom., 266, *Sircar v. Baraboni Coal Concern* [1912] 16 C. W. N., 289, will not be specifically enforced.

from its nature—Ante, 166. See *ills.* iv, ix; the contract may, *e.g.*, be for sale of good-will apart from the business, *Baxter v. Conolly*, [1820] 1 J. & W., 576, or it may relate to a secret manufacture, *Newberry v. James* [1817] 2 Mer., 446, or it may stipulate for satisfaction of a party and not the Court, *Manby v. Gresham L. A. Soc.* [1861] 29 Beav., 439. Ante, 161, 204. *Mansingh v. Rampiare* [1911] 8 I. C., 1184 (sale of *sir* land, not valid without sanction of revenue authorities).

material terms—Cf. s. 27, ante. See also s. 57, *post*. The Court will carry out an agreement framed in general terms when the law will supply the details; but if any details are to be supplied in modes which the Court cannot adopt, there is no concluded agreement capable of enforcement, *Nuffur v. Khoodeeram* [1875] 24 W. R., 434. Ante, 163-4.

III.(i) is converse of **III. (ii)**; ante, 161; cf. s. 57, *ill.* (d), *infra*.

III.(iii).—Ante, 162.

B cannot enforce—Cf. with clause at end of *ill.* xi. As to the doctrine of mutuality, see ante, 347-53. The Indian legislature apparently wanted to eliminate it, 1 Stokes, *A.-I. Codes*, 931, Collett, 5th. ed., 180.

III.(iv).—*Vickers v. Vickers* [1867] 4 Eq., 529. But see *Smith v. Peters* [1875] 20 Eq., 511.

III.(v).—Cf. *Abdul Alla v. Abdul Bacha* [1881] 6 Bom., 5.

III.(vi) (vii)—*Rayner v. Stone* [1762] 2 Eden., 128.

III.(viii)—Ante, 162; cf. s. 12 (c), *ill.* 4, *supra*.

III. (xi)—*Peto Brighton Ry. Co.* [1863] 1 H. & M., 468. As to contracts to build or repair, see ante, 106-9, 165-7; *Ram Chandra v. Ram Chandra* [1896] 22 Bom., 46 (covenant by purchaser to build a temple and secure an annuity to vendor and his wife).

cannot superintend—For a case where Court can superintend, see s. 12 (c), *ill.* II ante, and s. 22, *III, ill.*, *post*.

III. (x).—Cf. s. 22, II, *ill. (k)*, *post*; *Hills v. Croll* [1845] 2 Ph., 60; *Kalu v. Ram* [1909] 13 C. W. N., 388.

III. (xi).—*Taylor v. Portington* [1855] 7 DeG. M. & G., 328.

III. (xii).—Ante, 163; *Bhugun v. Rumjan* [1875] 24 W. R., 380. Cf. West and Buhler, 1090 (agreement to adopt). Where there has been a marriage, and husband and wife live apart, specific relief may be granted by a decree for restitution of conjugal rights, as to the execution of which, see Act V. of 1908, sch. i. Or. 21, r. 32.

(c) a contract the terms of which the Court cannot find with reasonable certainty;

Illustration to (c)—

A, the owner of a refreshment-room, contracts with B to give him accommodation there, for the sale of his goods and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

terms, evidently essential particulars which the law does not imply. Ante, 195. *South Wales Ry. Co. v. Wythes* [1854] 5 DeG. M. and G., 888.

reasonable, having regard to the subject-matter of the contract and the circumstances under which and with regard to which it was entered into. Ante, 289.

certainty—Ante, 288-93. *Douglas v. Baynes* [1908] A.C., 477 (uncertainty as to consideration). *Cleveland v. Martin* [1905] 3 L.R.A., N.S., 629 (contract to produce first-class book from manuscript furnished by author). Where Government stipulated to retain under its control the construction of embankments and excavation of canals in a certain estate and afterwards allowed a canal to silt up, *held* the terms of the stipulation were too vague and general to be specifically enforced, *Chunder v. Collector*, [1878] 3 Cal., 464, 1 C. L. R., 384 (the action of the Government seems also to have been in furtherance of the purpose of the stipulation, which was the health and comfort of the population). Another case under this cl. was *Maya Ram v. Prag* [1882] 5 All., 44. See also *Udit v. Muhammad*, [1903] 25 All., 618, *affd.* *Amma v. Udit*, [1908] 31 All., 68, P. C. But indefinitude is not uncertainty, *New B. C. Co. v. Buloram* [1878] 5 Cal., 175, P. C. (contract to sell land at a "proper rate," no difficulty in ascertaining fair value); *Budhia v. Hari Ram* [1901] 14 C.P.L.R., 117. *Salamat v. Tulsi* [1914] 22 I. C., 517; *Kalidas v. Giribala* [1914]. 23 I. C., 360. (A contract to grant a lease "hereafter" is not bad for uncertainty.)

III.—*Paris Chocolate Co. v. Crystal Palace Co.* [1855] 3 Sm. & G., 119.

(d) a contract which is in its nature revocable ;

Illustration to (d)—

A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either A or B might at once dissolve the partnership.

revocable—Ante, 169-70. A contract of betrothal among Hindus is not irrevocable, ante, 163 ; so in the event of breach there may be a decree for damages, *Umed Kika v. Nagindas* [1870] 7 Bom. H. C. R., O. J., 122, but not specific performance, *Nowbut v. Lad Kooer* [1873] 5 N. W. P., 102

III.—*Scott. v. Rayment* [1869] 7 Eq., 112. Ante, 170. Two cases where agreements to enter into a partnership may be decreed : (1) where parties have agreed to execute some formal instrument conferring rights which otherwise would not exist, (2) where there has been an agreement, since terminated, to carry on a joint adventure, and the decree, declaring the agreement to be valid and specifically enforceable, is made merely as foundation of a decree for account, *Virda v. Ramaswami* [1863] 1 Mad. H. C. R., 341. Even if partnership for a term of years, it would not be for benefit of persons who cannot agree that they should be compelled to do business together, *Karir v. Kollu* [1908] 19 M. L. J. R., 10.

Revocation of authority of agent—Where sale was held by an auctioneer, whose authority had been revoked, but this fact was not communicated to purchaser until after completion of sale, *held* latter could have specific performance, *Bain v. Byrna*, [1874] P. R. No. 63.

(e) a contract made by trustees either in excess of their powers or in breach of their trust ;

Illustrations to (e)—

(i) A is a trustee of land, with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

(ii) The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

(iii) Two trustees, A and B, empowered to sell trust property worth a lakh of rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

(iv) The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the

vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

trustees, defd., s. 3, ante.

in excess of powers—*e.g.*, where the manager of endowed property grants a perpetual lease thereof, *Motee v. Mudhoo* [1864] 1 W. R., 4. A contract of sale made by a father, in a Hindu Mitakshara family, who is joint with his minor sons, without justifying necessity, *Gurusami v. Ganapathia*, [1882] 5 Mad., 337, 341, *Juturi v. Ariparala* [1912] 15 I. C., 623 (manager), or one made by a certificated guardian of a minor, without the permission of the Court, *Narain v. Aukhoy* [1885] 12 Cal., 152, will not be specifically enforced. So a compromise entered into by an administrator acting in excess of his powers under s. 90, Act V of 1881, *Sarbesh v. Hari* [1910] 14 C. W. N., 451; and an agreement by an executor to grant perpetual lease without District Judge's permission, *Satish v. Jnanada* [1909] 1 I. C., 364, or an agreement to lease their undivided share by three out of four brothers, members of a joint Mitakshara family, *Jadu v. Adal* [1912] 11 I. C., 892 (affd. on appeal *Subnom Abdul v. Jadu*, 18 C. L. J., 344), *Sitla v. Thakurdin* [1913] 11 A. L. J. 456, reversed on appeal on finding that both brothers had consented, 12 A. L. J., 56, *Janki v. Jamini* [1914] 22 I. C., 612. Distinguish *Ramachandra v. Sundaramurthi*, [1894] 4 M. L. J. R., 9; *Srinivasa v. Sivarama* [1908] 32 Mad., 320.

breach of trust—Ante, 208-9. *Alagappa v. Sivaramasyndara*, [1895] 19 Mad., 211; *Mahomed v. Nunda* [1913] 16 I. C., 390.

III.(i)—*Harnett v. Yielding* [1805] 2 Sch. & L., 549.

III.(ii)—*Daniel v. Adams* [1764] Amb., 495.

III.(iii)—*Mortlock v. Buller* [1804] 10 Ves., 292.

III.(iv)—*Emma Silver Mining Co. v. Grant* [1879] 11 Ch. D., 918.

(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;

Illustration to (f)—

A company existing for the sole purpose of making and working a railway contracts for the purchase of a piece of land, for the purpose of creating a cotton mill thereon. This contract cannot be specifically enforced.

Similar Law—Cl. (e) above involves breach of a trust-relation as between directors or promoters and share-holders; cl. (f) contemplates a case where no trust-relation is involved, and a question of *ultra vires* arises between a company and a third party.

corporation or public Company—Indian Companies Act (VI of 1882), ss. 3, 226; ante, 204.

created for special purposes—The nature and object of incorporation determine the powers of a corporate body and restrict the *prima facie* right to enter into contracts, *East Anglian Ry. Co. v. E. C. Ry. Co.* [1852] 11 C. B., 775.

promoters—Ante, 207. Contracts made by promoters before formation of company do not ordinarily bind it, nor can be ratified by it, *Imperial Ice Mfg. Co. v. Munchershaw* [1889] 13 Bom., 415.

in excess of its powers: for the doctrine of *ultra vires*, see ante, 204-7, 540-2. A memorandum of association or instrument of incorporation is to be reasonably understood and applied; a company, therefore, in carrying on the trade for which it is constituted, and in whatever may be fairly regarded as incidental to, or consequential upon, that trade, is free to enter into any transaction not expressly prohibited by its memorandum or instrument, *Shamnugger J. F. Co. v. Ramnarain* [1886] 14 Cal., 189. Cf. *Wilson v. Furness Ry. Co.* [1870] 9 Eq., 28 (contract to make carriage road by railway company, enforced).

III.—Agreement *ultra vires*, ante, 204.

(g) a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;

Illustration to (g)—

A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

Similar Law—Cl. (b) above. See esp. *ill.* vi and vii. Damages were allowed for breach of a voluntary agreement in *Daropti v. Jaspat* [1905] P. R., No. 49.

continuous duty—Ante, 168 ; *Callianji v. Narsi* [1884] 18 Bom., 702, 711.

three years—*Emp. v. Muhammad* [1914] 96 P. L. R. (Act XIII of 1859). This limitation is an innovation, ante, 169. If a contract is for a longer period than 3 years, apparently the Court cannot split up the contract and enforce it for the statutory period. Collett, 5th ed., 192.

III.—*Blackett v. Bates* [1866] 1 Ch., 117.

(h) a contract, of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

Illustration to (h)—

A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

Similar Law—I. C. A., s. 20.

material part of subject-matter—The mistake must be as to a material fact, ante, 323, 336, and not a mere matter of expectation, *Babshetti v. Venkataramana* [1879] 3 Bom., 154; *Ranga v. Suba* [1880] 4 Bom., 473; or a point of law, *Vishnu v. Kashinath* [1886] 11 Bom., 174; *Nawab v. Creet* [1905] 27 All., 678. For a compromise void by reason of mistake, see *Solomon v. Abdool* [1881] 6 Cal., 687.

both parties—The mistake must be *mutual*. Ante, 133. Ss. 14-16, ante, and s. 26, post, deal with cases of *unilateral* mistake.

before it has been made—Distinguish s. 13, ante. Where a party has performed a valuable part of an agreement and is in no default for not performing the residue, and he is not in *statu quo* as to the part he has performed, he may claim specific execution of the other part or recover back what he has paid, and so be not a loser. 2 Story, *Eq.*, s. 772; ante, 259.

III.—*Cochrane v. Willis* [1866] 1 Ch., 58; *Goddard v. Jeffreys* [1881] 51 L. J., Ch., 57.

And, save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person, who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Similar Law—17 and 18 Vict., c. 125, s. 11; 52 and 53 Vict., c. 49, s. 4. Act IX of 1899, s. 19; Act V of 1908, Sch. ii, s. 18. Cf. I. C. A., s. 28. *Kirchner v. Gruban* [1908] 78 L. J., Ch., 117 (agreement to refer disputes to foreign tribunal).

Principle—An agreement to refer disputes to arbitration was formerly not enforced, it being deemed against public policy to exclude from the appropriate judicial tribunals of the State any person who, in the ordinary course of things, would have a right to sue there, 2 Story, *Eq.*, s. 1457. The tendency now is not to discourage arbitration, *Ghulam v. Muhammad* [1901] 29 Cal., 167, 183, P. C., but Courts cannot make effective decree if the parties would not name the arbitrator, or if he died or became incapable or refused to act, 1 Stokes *A.-I. Codes*, 959. The object of the proviso is to impose a kind of moral pressure to prevent people who have entered into contracts.

to refer to arbitration from breaking them wilfully and capriciously, ante, 145-7, *Salig v. Jhunna* [1882] 4 All., 546. D. C. Banerjee, *Arb.*, 87-94. *Mulji v. Ransi* [1909] 11 Bom. L. R. 273, 289.

Canon of construction—The clause being restrictive of the right to seek the ordinary remedy by suit, must be interpreted, if possible, favourably to the right to proceed, *Adhibai v. Cursandas* [1886] 11 Bom. 199, 214; *Muhammad v. Ahmad*, [1900] 1 P. L. R., 451.

Code of Civil Procedure—Act V of 1908, Sch. II, s. 17-9.

and the Indian Arbitration Act, 1899—These words were added by Act IX of 1899, s. 21.

contract, must be binding, *Ram v. Kallu* [1899] 22 All., 135 (reference by one partner without special authority, not binding on the firm); and operative, *Tahal v. Bisheshar*, [1885] 8 All., 57 (contract broken up by conduct of all parties); *Jaitum Bi v. Nabi* [1912] 24 M. L. J. R., 15 (two out of three arbitrators refused to act, and there was no provision in the agreement for appointment of other arbitrators). A revoked submission, does not bar a suit, *Randall v. Thompson* [1876] 1 Q. B. D., 748, *Deutsche &c. v. Briscoe* [1887] 20 Q. B. D., 177; nor one which has lapsed by reason of not having been acted upon within a reasonable time, *Atma v. Sheobaran* [1882] 2 A. W. N., 58; or been rescinded by mutual agreement, *Ram Kumar v. Jagmohan* [1910] 33 All. 315, F. B.

contract to refer, i.e., an agreement to refer to arbitration, as distinguished from an actual submission to arbitration which is a full performance of the prior agreement, *Karam v. Ram Das* [1896] P. R., No 19, *Muhammad v. Ahmad*, supra, *Adhibai v. Cursandas* [1886] 11 Bom. 199.

present or future differences—These words were substituted for the words “a controversy” (originally enacted, by Act IX of 1899, s. 21. The agreement may be to refer future differences generally, *Fazulbhoy v. B.P.S.N.Co.* [1895] 20 Bom., 232, F. B.; and even a pending suit, *Sheoamber v. Deodat* [1886] 9 All., 168, *Shib v. Hira* [1888] 8 A. W. N., 133, *Sheo Dat v. Sheo Shankar* [1904] 27 All., 53; *sed quære*. Partnership debt, *Ram v. Krishna* [1913] 17 C. W. N., 351.

specifically enforced—1 Story, *Eq.*, s. 670; but an action may lie for damages for breach of the agreement, *Koegler v. Coringo Oil Co.* [1875] 1 Cal., 42, 466.

but if ... suit—These 37 words do not apply to any submission or arbitration to which the provisions of the Indian Arbitration Act (see Act IX of 1899, s. 3) or the Civil Procedure

Code (see Act V of 1908, Sch. II, s. 22) apply, *Tapessier v. Nasiruddin* [1912] P. R. No. 37.

such a contract—obviously a contract prior to the institution of the suit which the subsistence of this contract is to bar, *Budha v. Haku* [1882] P. R. No. 130; *Fakir v. Jaimal* [1891] P. R. No. 50; *Raza Ali v. Fida Ali* [1900] 4 O.C., 17, 20. The contrary view taken by the Allahabad High Court in *Salig v. Jhunna* [1882] 4 All., 546 and other cases, cited under **present or future differences** above, is doubtful. But see U. B. R. (1897-1901), 541. The agreement did not bar the suit where, from lapse of time and the conduct of parties, the inference was that the agreement had grown inoperative. *Ram Kumar v. Jagan*, [1910] 33All., 315 F. B.

refused to perform—The refusal, which must not have been acquiesced in, *Adhibai v. Cursandas*, supra, and which must be antecedent to the suit, *Crisp v. Adlard* [1896] 23 Cal., 956, must be clearly proved. (Burden on defendant, *Udhe v. Bishen* [1911] P. R. No. 25). Mere institution of suit is not enough, *Koomud v. Chunder* [1879] 5 Cal., 498, 500; *Tahal v. Bisheshar* [1885] 8 All., 53, 57; *Ralli v. Walaiti* [1906] P. R. No. 80. But application for leave to withdraw from arbitration may be evidence of such refusal, *Sheocamber v. Deodat* [1886] 9 All. 168. In *Kashi v. Ram* [1914] 1 A. L. J. R., 257, however, the withdrawal, with leave to bring a fresh suit, under C. P. C., s. 373 (Act V of 1908, Sch. I. Or. 23, r. 2), of a suit in which the Court had made an order of reference to arbitration, was held not to bar a fresh suit.

Construction of submission to arbitration—The cardinal principle to be borne in mind is, says Chandavarkar, J., “that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a court of law. Therefore, it must clearly appear from the terms of the submission that with reference to any point arising that the party has so deprived himself,” *Bombay F. I. Co v. Ahmabhoy* [1908] 34 Bom. 1, 10. A submission violating the doctrine of mutuality was held not vitiated in *Kewalram v. Graham* [1911] 11 I. C., 274.

Suit upon award—A suit on an award to recover money allowed by arbitrator and incidental relief has been held not to be a suit for specific performance, *Fardunji v. Jamsedji* [1903] 28 Bom., 1. But see ante, 103.

(c) Of the Discretion of the Court.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief

merely because it is lawful to do so ; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

Specific performance.

Laches.

Failure of consideration.

Discretionary—Ante, 185-9. *Marshall v. Keach* [1907] 227 Ill. 35. *E.g.*, the Court will not interfere in favour of a plaintiff who has been guilty of laches, ante, 375-81 ; *Lightwood, Time Limit*, 252 sqq. ; *Pureeag v. Kheer* [1867] 8 W. R., 280 ; *Mokund v. Chotay* [1884] 10 Cal., 1061 ; *Mohendra v. Kali* [1902] 30 Cal., 265 ; *Naurab v. Creet* [1905] 27 All., 678. See also *Bindeshri v. Jairam Gir* [1887] 9 All., 705 P. C. ; *Ghulam v. Narain*, [1909] 6 A. L. J., 64 ; *Motee v. Lachmun* [1868] P. R., No. 106. *Laches* is a neglect to do something which by law a man is obliged to do, *Sebag v. Abitol* [1816] 4 M. & S., 462. Delay, therefore, short of the period of limitation, which is not shown to have prejudiced defendant and does not raise an inference of waiver or abandonment on plaintiff's part, is not a bar to suit for specific performance, *Kissen v. Kally* [1905] 33 Cal., 633. Ante, 878-9 ; *Peer v. Mahomed* [1904] 29 Bom., 234, 244-6 ; *Abdur v. Nagasarupu* [1912] M. W. N., 1004 ; 17, l. C. 399 ; *Janardan v. Bhairab* [1915] 30 l. C., 365. See also *Erlanger v. New S. P. Co.* [1878] 3 A. C., 1218, 1230-1 ; *Mitra, Lim.*, 62-73. Where a party to a compromise subsequently attempted, and in a great measure, succeeded in depriving the other party of the benefit of the agreement, the heirs of the former were not granted specific performance of the agreement, *Srish v. Banomali* [1904] 31 Cal., 584, P. C. Ante, 321-2. Where a contract has been made by the guardian of a minor, specific performance will not be decreed unless the Court deems such performance to be for the benefit of the minor, *Krishnasami v. Sundarappayyar* [1894] 18 Mad., 415 ; *Jagul v. Anunda* [1895] 22 Cal., 545 ; *Khairunnisa v. Loke Nath* [1899] 27 Cal., 276 ; *Sarwarjan v. Fakharuddin* [1906] 34 Cal., 163, F. B., *Re Lal Gopal v. Khoroorish Syndicate*, 13 l. C., 673, and other cases cited ante, 200, 408. Where defendant broke his contract (for sale of land) with plaintiff and sold the land to a third party with notice, the fact that refusal of relief to plaintiff would leave such third party in possession, was held not to affect the question as to the propriety of the Court exercising its discretionary power to enforce the contract. *Gurusami v. Ganapathia* [1879] 5 Mad., 337. The fact that any beneficiary under the contract has failed to join in the suit, may determine the exercise of the court's discretion, *Kondopaneni v. Gagaru* [1913] 14 M. L. T. 495.

lawful—Under ss. 12-21, *supra*.

not arbitrary—Ante, 21-2, 185-7. *Gaj v. Lachman* [1911] 10 l. C., 503 ; 14 C. L. J. 629.

judicial principles—*e.g.*, the inconvenience of leaving

parties to successive actions for damages may induce a Court to decree specific performance, *Doherty v. Allman* [1878] 3 A. C., 709, 720-1,

Court of Appeal—Ante, 188. But the appellate Court does not lightly interfere, *Jaipal v. Indar* [1904] 31 I. A., 67, 26 All. 238, 243.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance.

cases—paragraph not exhaustive, but merely illustrative of the general principle embodied in para. 1, *Peer v. Mahomed* [1904] 29 Bom., 234; *Gaj Kumar v. Lachman* [1911] 14 C. L. J., 627.

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations.

(a) A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B.

(b) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact, the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(c) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(d) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

Principle—Equality and fairness are essential to attract the Court's jurisdiction in specific performance, ante, 293-4. *Gobinda v. Nanda* [1914] 18 C. W. N., 689.

circumstances under which the contract is made—The fairness of a contract must be judged of at the time it is entered into or becomes complete, *Ganga v. Jagat* [1895] 23 Cal., 15, 25, P. C. Ante, 301. A family compromise therefore will be tested with reference to the doubt which existed at the time of its making, *Shib Lal v. Collr. of Bareilly* [1894] 16 All., 423, 433; ante, 99-101. *Balla v. Chunni* [1912] 10 A. L. J. R., 498.

unfair advantage—*e.g.*, defendant may have been influenced by the motive of getting rid of a criminal charge brought against him by plaintiff, *Callianji v. Narsi* [1895] 19 Bom., 764. Inadequacy of consideration may afford evidence of unfair advantage, *Jamsetji v. Kashinath* [1901] 26 Bom., 326, 330; *Middleton v. Brown* [1878] 47 L. J., Ch., 411.

no fraud or misrepresentation—for relief where either is present, see ss. 26, 28, 35 (a), *post*. *Fraud* is defined in I. C. A., s. 17, *misrepresentation* in *ibid*, s. 18.

III.(a)—*Ellard v. Landa* [1809] 1 B. & B., 241, 12 R. R., 23. Silence may sometimes be fraudulent, *ante*, 221-9; and, even where not fraudulent, it may create a case of hardship, *ante*, 295-6.

III.(b)—*Smith v. Harrison* [1856] 26 L. J., Ch., 412 (sale was set aside at purchaser's suit).

III.(c)—*Shirely v. Stratton* [1785] 1 Bro. Ch., 440. For cases of 'aggressive deceit,' see *ante*, 220-1.

III.(d)—*Twining v. Morrice* [1788] 2 Bro. Ch., 326. As to 'surprise,' see *ante*, 342-3; as to puffing at auctions, *ante*, 240.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(e) A is entitled to some land under his father's will, on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to C. Here, the enforcement of the contract would operate so harshly on A, that the Court will not compel its specific performance in favour of C.

(f) A and B, trustees, join their beneficiary, C, in a contract to sell the trust estate to D, and personally agree to exonerate the estate from heavy incumbrances, to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(g) A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

(h) A contracts with B to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(i) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take

the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(j) A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(k) A contracts with B to buy from B's manufactory, and not elsewhere, all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods; but if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

Principle—He who seeks equity must do equity. If the bargain is unconscionable, it cannot be equitable to enforce it specifically. Ante, 301 sqq.

hardship—not mere improvidence or inadequacy, *Hara-dhan v. Bharabati* [1914] 19 C. L. J., 420, *Lawrie v. Lees* [1882] 7 A. C., 31, 36; nor, apparently, the becoming impossible at a subsequent stage of the object of a party to the contract, *Babshetti v. Venkataramana* [1879] 3 Bom., 154. Substantial deficiency in area, *Bank of Bengal v. Akhoy* [1901] 6 C. W. N., 365, or even unilateral mistake of defendant may make a case of hardship, *Rudisill v. Whitener* [1907] 15 L. R. A., N. S., 81.

did not foresee—The hardship must not therefore be a result *obviously* flowing from the contract, and must apparently arise from something collateral, concealed and latent, *Pembroke v. Thorp* [1740] 3 Sw., 437, 443n. Ante, 306. No hardship, therefore, where speculative purchase, made with eyes open, is set aside, *Janukdhari v. Gossain* [1909] 13 C. W. N., 710. As a general rule, the question of hardship is to be judged of at the time it is entered into; exception admitted, where events involving hardship have occurred subsequent to the contract, due in some way to the party seeking specific performance, *Peer v. Mahomed* [1904] 29 Bom., 234. Ante, 313-5.

hardship on the plaintiff—Where both parties are in a similar predicament, the plaintiff's equities prevail. He is entitled to be placed in *statu quo*. Ante, 305. But, where only great inconvenience will be caused to the plaintiff, the Court may refuse specific relief, *Wedgwood v. Adams* [1843] 6 Beav., 600. For a case where there was balancing of hardship, see *Mahendra v. Kali* [1092] 30 Cal., 265, 280. Cf. *Gulla v. Chunni* [1912] 10 A.L.J.R., 498. If the contract is onerous, but not unconscionable, and the plaintiff has not taken improper advantage, specific performance may be decreed. *Davis v. Maung* [1911] 38 Cal., 805.

III.(e)—*Faine v. Brown* [1750] 2 Ves. Sr., 307 (cited). Instance of forfeiture.

III.(f)—*Wedgwood v. Adams*, *supra*.

III.(g)—*Baxendale v. Seale* [1855] 19 Beav., 601.

III.(h)—*Peacock v. Penson* [1848] 11 Beav., 353. Ante, 309.

III.(i)—*Talbot v. Ford* [1842] 13 Sim., 173 (injunction to prevent breach of covenant was also refused).

III.(j)—*Denne v. Light* [1857] 26 L. J., Ch., 459.

III.(k)—*Hills v. Croll* [1847] 2 Ph., 60.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A sells land to a railway-company, who contracts to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

Principle—Where an agreement has been performed in part, a Court of equity will even stretch a point to compel its complete performance. Ante, 250-2. *Shib Lal v. Collector*, [1894] 16 All., 423, 436. Where the original claim is excessive, the plaintiff may be allowed to succeed on an alternative claim for a more limited right, *Gajkumar v. Lachman* [1911] 10 I. C., 503.

acts or losses—Question of fact. A causal relation should be established between the contract and the acts or losses, and if any acts are relied upon, they should be of a substantial character. Cf. Ante, 252-3, 258-9. *Mathewson v. Ram* [1909] 9 C. L. J., 523, 548.

capable of specific performance—Agreements referred to in sections 4(a), (c), and 21, supra, are, therefore, excluded.

III.—*Storer v. G. W. Ry. Co.* [1842] 2 Y. and C., Ch., 48. *Herzog v. Atchison T. S. R. Co.* [1908] 17 L. R. A., N. S., 428.

(d) *For whom Contracts may be specifically enforced.*

Object—Second part of the chapter, dealing largely with adjective law. “Hitherto the application of the specific relief has been tested and limited with reference to the contract itself, and now it is to be further tested and limited with reference to the persons affected by the contract,” Collett, 5th. ed., 210.

Who may
obtain
specific per-
formance.

23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(a) any party thereto ;

any party—Cf. I. C. A., s. 37. Ante, 397. The parties to the contract are necessary and sufficient parties to the action, *Safur Rahman v. Maharamumnisa* [1897] 24 Cal., 832 ; therefore one out of several joint promisees cannot sue if the others refuse, *Koripalli v. Sajja* [1912] 13 I. C., 315. An agent contracting as such cannot ordinarily sue, I. C. A., s. 230. A receiver may, with leave of Court, *Wilkinson v. Gangadhar* [1871] 6 B. L. R., 486 ; ante, 564-6. Third parties cannot be brought in in suits for specific performance, *Ahmedbhai v. Petit* [1909] 11 Bom. L. R., 544, 559. Cf. *DeHoghton v. Money* [1866] 2 Ch., 164.

(b) The representative in interest, or the principal, of any party thereto : provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

Scope—Case of succession by transfer to the contract itself, (1) where no personal quality is involved, and (2) where the contract is assignable. Ante, 397-401.

representative in interest—e.g., transferee, executor, administrator, assignee in insolvency, committee in lunacy. Cf. I. C. A., s. 37, para. 2. *Corbet v. Plouden* [1884] 25 Ch. D., 678. As to suits by *benamidars*, see ante, 406*n*. Where a grantee died and the grantor for sometime after treated his heir, who was not in existence at the time of the grant, as entitled thereunder, *held* that no equity arose in favour of this heir to enforce specific performance of the agreement under which the grant was made, *Pudmanund v. Hayes* [1901] 5 C. W. N., 806, P. C. Where land was sold subject to an agreement to repurchase within a certain period, and the vendor died, his representatives enforced specific performance of the contract to resell, though there was no express reservation of the right in their favour, 1 L. B. R., 257.

principal—See I. C. A., s. 226 ; where the principal is undisclosed, see *ibid*, ss. 230 (2), 231, 232.

personal quality—*Mohendra v. Kali* [1902] 30 Cal. 265 (case of lease). 7 *Laws of Eng.*, s. 849.

assigned—As to assignability of contract, see ante, 398-9. 7 *Laws of Eng.*, 495, sqq.

his part—i.e., of the party whose learning, skill, solvency, or any personal quality is a material ingredient in the contract. Ante, 397.

(c) Where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

Scope—An exception to the general rule that only parties to a contract may enforce it. 7 *Laws of Eng.*, s. 705. Ante, 403 ; contract generally executed, and not executory, Fry, s. 202.

settlement—defined, s. 3 ante.

settlement on marriage—Ante, 383-5. 14 C. W. N. 865, P.C.

compromise of doubtful rights—For the law regarding family arrangements, see ante, 100, 404 ; *Kamalkumari v. Narendra* [1907] 9 C. L. J., 19 ; *Sankar v. Bijoy* [1908] 13 C. W. N., 501 ; *Ganesha v. Tuljaram* [1908] 19 M. L. J. R., 4.

person beneficially entitled—i.e., entitled to the benefit of the settlement or compromise, though otherwise a stranger to the agreement, *Avadh v. Sita* [1904] 1 A. L. J. R., 329. Where parties to a deed, whereby a suit for partition was compromised, agreed to pay a certain sum of money to the plaintiff, he became entitled to recover same by suit, though he was no party to either the suit or the compromise, *Protap v. Sarat* [1902] 5 C. W. N., 386.

(d) Where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman ;

Scope—Case where the estate is held for the time being by a limited owner, who represents the estate and is empowered to and does act for its benefit. The remainderman is therefore interested in the fruit of the contract entered into by this owner.

tenant for life—An estate for life gives the tenant the right to hold the lands during his life, but his interest therein ceases at his death, and does not pass to his heirs or other representatives, Williams, *R. P.*, 22nd. ed., 112. In India, a Hindu widow holds an estate to some extent analogous to that held by a life-tenant elsewhere.

due exercise of power—Ante, 403. The object of the power is the better management and enjoyment of the estate, and it is duly exercised when the contract is made on behalf both of the tenant for life and the remainderman.

remainderman—A person taking the remainder, which is an ulterior estate immediately expectant on an estate granted out of a larger one, and created at the same time in favour of a third party by the original owner, 2 Blackstone, *Com.*, 164.

(e) A reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant ;

(f) A reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;

Scope—Cases of covenants running with the land, ante, 385 sqq. *Mathewson v. Ram* [1909] 9 C. L. J., 523, 549-51. The successor may sue to enforce such covenants when he has entered into possession. If he has not done so, the heir expectant may also sue, provided the breach of the covenant is likely to injure the reversion materially. Ante, 401-2. Relief asked for will generally be preventive, by way of injunction, s. 54, *post*.

reversioner--Expression used loosely to signify the owner of any estate in expectancy, and to include a remainderman and an assignee, ante, 401 ; Collett, 5th. ed., 217 ; Nelson, 23rd., 225-6 ; Desai, 91-2. A *reversion* strictly is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him, 2 Blackstone, *Com.*, 175.

in possession, as distinguished from **in remainder** in cl. (f). Both expressions are inaccurate. What is intended by the first is a person who had an estate in expectancy when the covenant was made in favour of the owner for the time being, but has since entered into possession and is the owner now. The second expression means the owner of an estate in expectancy who has not yet come into possession.

covenant—‘An agreement, convention or promise of two or more parties, by deed in writing, signed, sealed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done or stipulates for the truth of certain facts. No particular technical words are requisite, for any words or form of expression which import an agreement or act will suffice.’ Wharton, 216. The agreement may not be under seal, *Hayne v. Cummings* [1864] 16 C. B., N. S., 421. Brown, *Cov.*, 1.

benefit—Ante, 389.

material injury—The present owner in possession is

the proper party to enforce the covenant; and, if any other person seeks to do so, he has to show (1) that it runs with the land, and (2) its breach will materially injure him. Ante, 401-2.

(g) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

Scope—A particular case of assignment of contracts, ante, 402; Fry, s. 239. For the liability of the amalgamated company, see s. 27 (d), *post*.

new company—is a representative in interest of the two old companies which have become amalgamated.

(h) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of incorporation, the company.

Scope—Case of succession to benefit of contract which is within the scope of the purposes of the company. Ante, 402-3. Cf. s. 21 (f) ante, and s. 27 (e), *post*.

contract for the purposes of the company—i.e., agreements for the working purposes of the company, and not for taking shares in it, *Imperial Ice Co. v. Wadia* [1889] 13 Bom., 415.

warranted by the terms of incorporation—i.e., *intra vires*; *Shrewsbury v. North S. Ry. Co.* [1865] 1 Eq., 593, 615; ante, 207. Cf. s. 21 (f) ante.

(e) *For whom Contracts cannot be specifically enforced.*

Scope—S. 24 deals not with objections derived from the nature of a contract, but with objections personal to the plaintiff, ante, 407; *Shib Dial v. Hira Nand* [1890] P. R., No. 100. Collett, 5th. ed., 225, 226.

24. Specific performance of a contract cannot be enforced in favour of a person—

(a) who could not recover compensation for its breach;

Personal
bars to the
relief.

Illustration to clause (a)—

A, in the character of agent for B, enters into an agreement with C to buy C's house. A is in reality acting not as agent for B, but on his own account. A cannot enforce specific performance of this contract.

could not—there is a legal bar to the recovery, or it is inequitable that the plaintiff should be allowed to recover. *E.g.*, the plaintiff may be guilty of fraud on the defendant, *McPherson v. Watt* [1878] 3 A. C., 254, or on the public, *Post v. Marsh*

[1881] 16 Ch. D., 406. Collett paraphrases *could* as 'ought,' *S. R.*, 5th. ed., 225.

compensation for breach—I. C. A., s. 73.

III.—I. C. A., s. 236; *Philips v. Bucks* [1683] 1 Vern., 227.

(b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;

Illustrations to clause (b)—

(i) A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale, at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

(ii) A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A, without B's consent, fells the trees. A cannot enforce specific performance of the contract.

(iii) A, holding land under a contract with B for a lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

(iv) A contracts to let, and B contracts to take, an unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner : he cannot enforce the contract specifically, though A and B may sue each other for compensation for breach of it.

incapable of performing—Incapacity may be mental, physical or legal, ante, 407.

violates—"Acts in fraud or contravention of the contract, or at variance with it, or tending to its rescission and the subversion of the relation established by it," Fry, s. 957. *Srikrishan v. P. N. Bank* [1913] 18 I. C., 911. A subsequent mortgage by a vendor of immoveable property does not disentitle him to specific performance, if he is able and willing to give a title free from incumbrances, *Meghraj v. Chunilal* [1905] 1 N. L. R., 190.

essential term—Cf. ss. 14-15, ante. Small breaches of good faith do not bar specific relief, but may affect the costs, Fry, s. 981. As to a condition precedent, see ante, 268. A substantial performance of the covenants of a lease is a condition precedent to the exercise of the right of renewal, *Bastin v. Bidwell* [1881] 18 Ch. D., 238, and a notice before expiry of term may also be essential, *Nicholson v. Smith* [1883] 22 Ch. D., 640. In a contract for sale of land, delay in payment of the purchase-money beyond the time fixed by the purchaser, who had wrongly insisted on an absolute warranty of title, was held to have disentitled him to specific performance, *Bindeshri v. Jairam* [1887] 9 All. 705, P. C. Cf. *Fakir v. Abdulla* [1887] 12 Bom., 658 and *Janardan v. Bhairab* [1915] 30 I. C., 365. Where the vendor contracted to sell an estate not in his possession, in consideration

of advances to enable him to sue for its recovery, which the purchaser failed to make, the latter's suit for specific performance and delivery of the recovered estate on tendering the balance of the purchase-money, was dismissed, *Frahlad v. Budhu* [1869] 2 B. L. R., 111, P. C. As to when time is of the essence of the contract, see ante, 269-74. *Jamshed v. Burjorji* [1916] 30 M. L. J., 186 P. C.

remains to be performed—The default may be in respect of acts which ought to have been performed in the past or which have to be performed in future, Collett, 5th, ed., 226. In a suit for specific performance of a contract to sell, the plaintiff, if he has not previously tendered the money to the defendant, is bound to pay it into Court, *Mahadoo v. Hubeebool* [1871] 15 W. R., 44. Cf. ante, 414.

Ill. (i)—*Lord v. Stephens* [1835] 1 Y. & C., Ex., 228, 41 R. R., 249. Ante, 371.

Ill. (ii)—*Magennis v. Fallon* [1829] 2 Molloy, 561; ante, 368.

Ill. (iii)—Fry, s. 959; ante, 368. This and ill.(ii) refer to acts destructive of the purpose of the contract committed by either party.

Ill. (iv)—*Tildesley v. Clarkson* [1862] 30 Beav., 419; *Lamare v. Dixon* [1873] 6 H. L., 423.

(c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; or

Illustration to clause (c)—

A contracts to let, and B contracts to take, a house for a specified term at, a specified rent. B refuses to perform the contract. A thereupon sues for and obtains, compensation for the breach. A cannot obtain specific performance of the contract.

Principal—*Nemo debet bis vexari pro una et eadem causa*. Ante, 407-8.

remedy—s. 19, ante. I. C. A., s. 73.

obtained satisfaction—A decree for damages, even if unexecuted, will bar a subsequent suit for specific performance, for the decree-holder should execute his decree.

Ill.—*Sainter v. Ferguson* [1849] 1 Mac. & G., 286.

(d) who previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

Scope—*Passive* protection afforded to executed voluntary settlements as against transferee with notice. Cf. s. 54, ill.(g); also s. 25 (c), *post*. As to *active* enforcement of settlements in

favour of beneficiaries, whether volunteers or not, the Act is silent. Ante, 384. The English rule has been stated to be that a contract to sell a settled estate to a person, with full notice of the voluntary settlement, will be enforced at the suit of the purchaser, Sugden, V. & P., 714. Here we have a more equitable rule. Ante, App. B.

notice—Cf. definition, T. P. A., s. 3.

settlement—defined, s. 3 ante. As to voluntary settlements see ante, 383-4.

valuable—*i.e.*, money or money's worth, or marriage, 1 Story, *Eq.*, s. 354.

consideration—defined, I. C. A., s. 2 (*d*).

had been made—*i.e.*, the settlement is executed, not executory, ante, 384.

in force—*i.e.*, valid and subsisting, though the beneficiaries may not then be in actual enjoyment of the benefits, Collett, 5th, ed. 227.

Contracts to sell property by one who has no title, or who is a voluntary settlor.

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

(a) who knowing himself not to have any title to the property, has contracted to sell or let the same ;

Illustration.

(a) A, without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

Scope—As distinguished from s. 18 ante, s. 25 deals with cases of vendors or lessors, who by reason of their personal default, have no title at all to the property conveyed, and come into Court as plaintiffs. In cases dealt with by s. 18, the purchaser or lessee is the plaintiff and the defendant has or had an *imperfect* title, capable of subsequent rectification. Where the imperfection is not capable of rectification, ss. 14 and 15, *supra*, may be in point. Ante, 358. Stokes thinks the intention of the legislature was to lay down a rule in accordance with the view apparently held by Knight Bruce, V. C., in *Adams v. Broke* [1842] 1 Y. & C., Ch., 627, 630, and subsequent acquisition of title, will not entitle the vendor to enforce specific performance, even though the time fixed for completion has not passed, 1 A.-I. Codes, 967. But *query*; see ante, 359 : Collett, 5th. ed. 229 ; 4 Pomeroy, *Eq. J.*, 2772 *n*.

sale—defined, I. C. A., s. 77.

property, moveable or immoveable—defined, General Clauses Act (X of 1897), s. 3.

any title - In himself or in those whom he has a legal or equitable right to require to join in the conveyance, Fry, s. 378. The purchaser may have damages for loss of bargain or dis-possession, *Amanoollah v. Mahomed* [1874] 22 W. R., 442; *Gajapathi v. Alagia* [1885] 9 Mad. 89.

III. (a)—*Noel v. Hoy* [1820], cited in Sugden, V. & P., 217; ante, 359.

(b) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties, or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

Illustrations.

(b) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt.

(c) A, being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

Scope—Cl.(b) differs from cl.(a), in so far that, in cases under the latter, the plaintiff *knows* that he has no title; and, in cases under the former, he *believes* that he has a good title, but cannot make it out. Ante, 359-69.

Free from reasonable doubt—i.e., a marketable holding title, good in a business man's point of view, though possibly bad in a technical conveyancing point of view, *Re Scott & Alvarez' Contract* [1895] 2 Ch., 603, 613. Ante, 359-60. In the absence of a contract providing that the plaintiff should show only such title as he could give, or some other special contract as to title, the contract cannot be specifically enforced in his favour, unless he can show a good title, *Mahomed v. Musaji* [1891] 15 Bom., 657. The question whether there is room for *reasonable* doubt, must be determined with reference to the facts of each individual case as they exist at the time when the suit is brought, *Ahmedbhoy v. Petit* [1909] 11 Bom. L. R., 545, 565. See Fry, ss. 890-1, for titles which have been held to be doubtful or otherwise, in England. As to what a plaintiff must prove to establish a 'marketable' title *Treacher & Co., v. Mahamad Ali* [1910] 12 Ban. L. R. 597.

III.(b)—*Sykes v. Sheard* [1863] 2 DeG. J. & S., 6; *Mullings v. Trindar* [1870] 10 Eq., 449. But see *Jeffreys v.*

Marshall [1870] 23 L. T., 548. Ante, 368. Here the doubt is as to a question of law.

III.(c)—Ante, 362. Here the doubt is as to a question of fact.

(c) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustration.

(d) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it.

Scope—*Passive* enforcement of a voluntary settlement against settlor, ante, 384. “The Court will not allow a voluntary settlor to force on an unwilling purchaser a title depending on the invalidity of the settlement” Fry, s. 890. Cf. s. 24 (d), ante.

III.—*Johnson v. Legard* [1822] T. R., 281, 294; *Peter v. Nicolls* [1871] 11 Eq., 391 (defendant willing purchaser).

(f) *For whom Contracts cannot be specifically enforced, except with a Variation.*

Non-enforcement, except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely):

Scope—Case of defendant resisting specific performance of a contract in writing *partially* (S. 28 *post* deals with the cases where he resists specific performance *as a whole*). *Rectification* of a contract by way of defence; Ch. III, *post*, deals with rectification actively by a plaintiff. The defendant may prove by evidence, parol or otherwise, that something has to be added to or altered in the written contract, and then, if the plaintiff seeks specific performance, the latter has to submit to the variation, 2 Dart, V. & P., Ch. XVII, (5). In cls. (a) and (b), the matter objected to by the defendant is embodied in the document itself; in the other clauses, the matter of defence is extrinsic to the document. Ante, 244-8, 344-6. See s. 34 *post* for specific performance after rectification.

plaintiff seeks specific performance—If the plaintiff seeks some other remedy, *e.g.*, damages, no question of variation need arise. S. 4 (b), ante. But if he elects to sue for damages, he cannot seek this remedy in a subsequent suit, but

must ask specific performance in the alternative in the suit for damages. See ss. 19 and 29. Ante, 427. Cf. *Ganesh v. Mohesh* [1909] 13 C. W. N., 669 (mesne profits cannot be subsequently claimed).

a contract—i.e., a real and complete contract. “The section assumes that the parties are agreed as to the existence of the contract, but not agreed as to specific terms.... There is no provision of law which entitles the plaintiff to claim a variation in the terms of his contract when he finds that the contract itself cannot be carried out,” *Narain v. Aukhoy* [1885] 12 Cal., 152, 155.

in writing—either by the agreement of the parties or under some statutory requirement.

sets up—and may prove by parol evidence, I. Ev. Act, s. 92, prov. 1; ante, 248-1. Cf. *Ambica v. Galstaun* [1909] 13 C. W. N., 326.

Variation.—*Roimoni v. Mathura* [1912] 39 Cal., 1016 (lessee's land by mutual mistake included in a lease).

(a) where, by fraud or mistake of fact, the contract of which performance is sought, is in terms different from that which the defendant supposed it to be when he entered into it ;

Illustration.

(a) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D to make A, B and C separately liable each to the extent of Rs. 1,000, they prove that the word “each” was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. D can obtain the performance sought only with the variation thus set up.

Scope—Difference in terms between the actual agreement and the written contract, ante, 246.

fraud—Defined, I. C. A., s. 17. *Qy.* if innocent misrepresentation (I. C. A., s. 18) is included. Collett thinks it is, *S. R.*, 5th, ed. 237.

mistake of fact—I. C. A., ss. 20, 22.

in terms different—The defendant is ignorant of the addition, alteration, omission or variation made in the terms of the contract by the plaintiff, and this ignorance may be due to the plaintiff's conduct, *viz.*, fraud, or to himself alone.

III.(a)—*Gordon v. Hertford* [1817] 2 Madd., 106. Ante, 244.

(b) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable mis-

apprehension as to its effect as between himself and the plaintiff ;

Illustration.

(b) A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

Scope—Under cl. (a) the error is one of fact, as to the *terms* of the document, and may be due to fraud or mistake ; under cl. (b) the error may be one of law, as to the *effect* of the document, and it may be due to fraud, mistake or surprise, and must be of a reasonable character. Under cl.(b) there is no difference about the terms, but they are ambiguous and the defendant has misunderstood them. Ante, 346, 345.

surprise—Is nothing else than the want of mature deliberation, Pollock, *Con.*, 634 ; ante, 342-3 ; 1 Story, *Eq.*, s. 251n. Fry, s. 752. An innocent misrepresentation may also lead to *surprise*, and make the defendant's consent a delusion, 1 Story, *Eq.*, 222, 251. The word is now very seldom used, and Pollock takes its use here to be no more than a piece of abundant caution, *F. M. M.*, 74. "The surprise must have been induced by some faulty conduct of the plaintiff not amounting to actual fraud," 1 Stokes, *A.-I. Codes*, 968.

reasonable—Not arbitrary or trivial, but such as a man of ordinary capacity, using ordinary caution, might in the circumstances have fallen into. *Higginson v. Clowes* [1808] 15 Ves., 516. This limitation does not occur in (a) ; the reasonableness or otherwise of the blunder is therefore of value only as evidence of the fact of the blunder, Collett, 5th, ed. 237. Ante, 342. Every misapprehension does not vitiate a document, Fry, s. 765.

misapprehension—For the ambiguity either party may be responsible.

III.(a)—*Moxey v. Bigwood*, [1862] 8 Jur., N. S., 803.

(c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil ;

Illustration.

(c) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

Scope—The matter relied upon by the defendant is outside the written contract, but is a parol addition contemporaneous with it. Ante, 247; Pollock, *F. M. M.*, 127-8. *Semble* that the doctrine of *Irnham v. Child* [1781] 1 Bro. Ch., 92 (see Sugden, *V. & P.*, 173; 1 Story, *Eq.*, s. 113), that where parties omit, any provision from a deed, upon the supposition of its being illegal and trust to each other's honour, they must rely upon that and cannot require the defect to be supplied by oral evidence, has been modified by this clause. Collett, 5th, ed., 239-40.

misrepresentation—I. C. A., s. 18; does not here exclude *fraud*, which generally is misrepresentation made with intent to deceive, either actual or presumed. Collett, 238.

relying upon—It is this *reliance* upon the plaintiff's statement or promise which creates an equity in favour of the defendant.

Stipulation—Where property was sold under "certain conditions as agreed upon," the defendant was permitted to prove by oral evidence, contemporaneous parol agreement adding to the terms of the written agreement, *Cutts v. Brown*, [1880] 6 Cal. 328.

III.(c)—*Clarke v. Grant*, [1807] 14 Ves., 519.

(d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

Illustration.

(d) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

Scope—Case where neither party is to blame; both were agreed as to their object, *viz.*, some legal result; but by reason of error in drafting, they are both balked of their purpose; ante, 346. The error may be either of fact or law; but where the parties have agreed upon the law, there can be no relief, I. C. A., s. 21, ill.(z); ante, 339-40. Cf. *Groome v. Lediard* [1834] 2 My. & K., 251; Sugden, *V. & P.* 161-3.

as framed—Difference between the real agreement and its expression in writing, excludes consent to the contract as so expressed, and the Court will enforce only what the parties have actually agreed to.

III.(d)—Cf. s. 31, *infra*. Consider I. Ev. A., ss. 91, 92. Ante, 346-7.

(e) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustration.

(e) A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B's consent, A pulls it down and erects a new house in its place, B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

Scope—Case of addition or alteration subsequent to the written contract, which does not amount to an abandonment of it. I. C. A., s. 62. The variation may be by parol, and need not have been induced by fraud, misrepresentation or mistake. Ante, 266-7.

contracted—Entered into an agreement for consideration enforceable at law, I. C. A., s. 2 (e), (h).

vary, not to substitute another contract, *Moore v. Marable* [1866] 1 Ch., 217.

III.(e)—*Clarke v. Moore*, [1844] 1 Jon. & L., 723, 58 R. R., 368; *Ramiah v. Ambalam* [1915] 29 I. C. 449.

(g) *Against whom Contracts may be specifically enforced.*

27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

Scope—S. 27 indicates the parties who may be impleaded as defendants to a suit for specific performance.

Similar Law—New York Civil Code, s. 1898; 2 Dart, V. & P., 1030, sqq.

contract, executory, *e.g.*, an agreement to sell and not an actual sale, *Akbar v. Prem Singh* [1885] P. R. No. 2. Ante, 21, 382.

(a) either party thereto ;

Scope—This clause enounces the general rule that a stranger to a contract is not a proper defendant to a suit to enforce it, Fry, s. 205; the remaining clauses give the exceptions to this rule.

party—The liability of a Hindu son to fulfil the obligations of his father and his contract may be determined, *Tiruvenkatachariar v. Venakatachariar* [1914] 26 M. L. J. 218. *Kosuri v. Ivalury* [1902] 26 Mad., 74 (decree made against member of Hindu joint family who had made the contract); *Srinivasa v. Sivarama* [1908] 32 Mad., 320; *Ponaka v. Vadamadi* [1910] 33 Mad., 359; *Kedar v. Manu* [1911] 16 C. W. N. 247. Distinguish *Alagappa v. Sivaramasundara* [1895] 19 Mad., 211 (decree against minor member of joint family, though not party to the agreement for partition sought to be enforced). A minor may be sued by his guardian, when contract made by the latter

Relief
against
parties and
persons
claiming
under them
by subse-
quent title.

for a necessary and beneficial purpose, *Krishnasami v. Sundarappayyar* [1894] 18 Mad., 415; *Khairunnessa v. Lokenath* [1899] 27 Cal., 276; ante, 200, 408n. Cf. *Krishna v. Shamanna* [1912] 23 M. L. J. R., 610. In *Janki v. Yahia* [1912] 16 C. L. J., 119, a contract for sale was not enforced against a *parda* lady, where her assent to all its terms was not proved nor the authority of her husband (the actual executant) to bind her. Where contract was made on behalf of a disabled person, specific performance could be decreed against him after removal of disability, *Gregson v. Uday* [1889] 17 Cal., 223, P. C. Suit against stranger improper, *Luckumsey v. Fazulla* [1880] 5 Bom., 177; *Mokund v. Chotay* [1884] 10 Cal., 1061.

(b) any other person claiming under him by title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

Illustrations to clause (b)—

(i) A contracts to convey certain land to B by a particular day. A dies intestate before that day, without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

(ii) A contracts to sell certain land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

(iii) A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

(iv) A contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

(v) A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.

Scope—The first exception contemplates representatives who are legally or equitably bound by the contract. Ante, 408. *Chota v. Purna* [1914] 21 C. L. J., 144, 152 (heir of transferor bound under s. 18, ante.)

Principle—Equity regards as done what is agreed to be and ought to be done. *Re Anstis* [1886] 31 Ch. D., 596.

title, may be under compromise decree, *Fateh v. Narsingh* [1913] 16 I. C., 988.

arising subsequently to the contract—and therefore subject to the promisor's pre-existing contractual obligation, which can be displaced only by a *bona fide* purchaser for value without notice, *Kannan v. Krishnan* [1890] 13 Mad., 324, 329.

Cf. 1 L. B. R., 252, 253. *Thakur v. Seetla* [1914] 12 A. L. J. R., 52. If property is subject of *lis pendens*, transferee will be bound by decree, *Mati v. Preo* [1908] 13 C. W. N., 226. The transferor may be estopped from making the subsequent transfer, *Hari v. Ram* [1912] 14 I. C., 28.

without notice—It lies upon the party seeking to defeat a prior contract to adduce *primâ facie* evidence that he is *bonâ fide* transferee for value without notice, *Hira v. Narain* [1896] 10 C. P. L. R., 107, 111; *Gopal v. Ganpat* [1900] 13 C. P. L. R., 172; *Thiruvengkata v. Venkatachariar* [1914] 26 M. L. J. R., 218. *Himatlal v. Vasudeo* [1912] 36 Bom. 446.

notice—defined, T. P. A., s. 3; *Bacuram v. Madhab* [1913] 40 Cal. 565 (constructive notice). See also I. C. A., s. 229 (notice to agents); *Rampal v. Balbhaddar* [1902] 25 All. 1, P. C. A *bonâ fide* contract, whether oral or written, will prevail against a subsequent registered conveyance, under which possession has been obtained if the transferee had notice of the prior contract, *Chunder v. Krishna* [1884] 10 Cal., 710; *Nemai v. Kokil* [1880] 6 Cal., 534; *Waman v. Dhondiba* [1879] 4 Bom., 126; *Gaffur v. Bhikaji* [1901] 26 Bom., 159; *Hurnundan v. Jawad* [1899] 27 Cal., 468; *Himatlal v. Vasudeo* [1912] 36 Bom., 446 (notice may be before actual payment of whole purchase-money, although secured, or actual execution of conveyance, and after contract). Cf. *Kannan v. Krishnan*, *supra*; *Namasivayam v. Nellayappa* [1894] 18 Mad., 43; *Hukan v. Nikka* [1908] P. R., No. 15; *Baldeo v. Prag* [1913] 11 A. L. J. 137. See also Indian Trusts Act, s. 91. Cf. also 28 All. 315. But notice to some transferees, Mitakshara co-parceners, who are not entitled to represent the others, is insufficient, *Janki v. Yahia* [1912] 16 C. L. J., 119

original contract—which should not contain unenforceable covenants, *Ramchandra v. Ramchandra* [1896] 22 Bom., 46, and should be notified as an existing obligation, *Ramasami v. Chinnan* [1901] 24 Mad. 449. Where the subsequent transferee had a right of pre-emption, notice of the prior contract was held not to affect his position, 2 L. B. R., 108.

Is subsequent transferee a necessary party? Yes, *Subramanian v. Perumal* [1895] 18 Mad., 454. No, *Abdul v. Boida*, [1902] 6 C. W. N., 314. If he is impleaded, suit will not be bad for misjoinder of parties and of causes of action, *Gumani v. Ram* [1878] 1 All., 555; and if he is not impleaded in the first suit for specific performance against, say, the vendor, a subsequent suit against him for recovery of possession will not be barred by Act V of 1908, s. 11, or Sch. I. Or. 2, r. 2, *Gaffur v. Bhikaji*, *supra*.

Ills.(i) and (iv)—are cases of the death of the contractor;

(v) illustrates a case of his subsequent disability ; (ii) and (iii) illustrate notice on the part of a subsequent transferee.

III.(i)—Fry, s. 211. The heir may be under disability but that will not prevent a decree for specific performance, inasmuch as the contract is of his predecessor in title, unless some question of personal quality is involved.

III.(ii)—*Daniels v. Davison* [1809] 16 Ves., 249. Case of actual notice, cf. s. 3, ill.(g), ante. As to whether registration is notice, the High Courts in India are divided in opinion, the Allahabad and Bombay Courts supporting the affirmative view, and the Calcutta and the Madras Courts the negative view ; ante, 409. See *Dēbendra v. Ramtaran* [1903] 30 Cal., 599, 607 (Maclean, C. J.) ; *Monindra v. Troylakho* [1896] 1 C. W. N., 750 (Jenkins, J.)

III.(iii)—Case of constructive notice, cf. s. 3. ill.(h), ante. 1 Story, *Eq.*, s. 400. *Doorya v. Baney* [1881] 7 Cal., 199, defines limits of doctrine of constructive notice. Cf. St. 45 & 46 Vict., c. 39, s. 3 ; *Re Cousins* [1886] 31 Ch. D., 671. As to possession being notice, see *Le Neve v. Le Neve* [1747] 2 Wh. & T., 8th. ed., 228 ; *Hakeem v. Beejoy* [1874] 22 W. R., 8 ; *Massim v. Sham*, ibid, 189 ; *Mancharji v. Kongseoo* [1869] 6 Bom. H. C., O. C., 59 ; *Santaya v. Narayan* [1883] 8 Bom., 182 ; *Ahmedbhoy v. Balakrishna* [1894] 19 Bom., 391 ; *Kondiba v. Nana* [1903] 27 Bom., 408 ; *Sharfudin v. Govind*, ibid, 452 ; *Bhikhi v. Udit* [1903] 25 All., 366 ; *Nandi v. Trimmakka* [1913] 14 M. L. T., 477.

III.(iv)—Ante, 85. *Prag Dat v. Chote Singh* [1906] 9 O. C., 55. Cf. *Appa Row v. Venkayamma* [1909] 19 M. L. J. R., 106.

III.(v)—Dart V. & P., 1030 ; *Re Pagani* [1892] 1 Ch., 236. Act XXXIV of 1858, s. 20. As to assignee in bankruptcy, see ante, 410 ; Wace, *Bankruptcy*, 195.

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant ;

Illustrations to clause (c)—

(i) A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.

(ii) A and B are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

Scope—Case where suit is not brought against the contracting party, but against another whose title has been

displaced by the former. Where a title is liable to be so displaced, it is immaterial that the title is antecedent to the contract and the plaintiff had notice of it. The contractual title prevails over the prior title *ex lege*, and the case therefore, strictly speaking, is not of specific performance, Collett, 5th. ed., 44. Equity regards as done what is agreed to be done. Ante, 410-1V. Dart, & P., 1031.

contract—must not be defective or unenforceable against the original party, if alive. *Williams v. Walker* [1882] 9 Q. B. D., 581.

displaced—A person who has a prior title and gets in the subsequent estate which, to his knowledge, is affected by the contract, cannot defeat specific performance on the strength of his elder title, *Smith v. Phillips* [1837] 1 Ke., 694; Fry, s. 243.

defendant—Slip for 'the other party to the contract.' The person actually impleaded as *defendant* was no party to the contract. Ante, 411n.

III. (i)—*Shannon v. Bradstreet* [1803] 1 Sch. & L., 52.

III. (ii)—Case of severance of joint tenancy, *Hinton v. Hinton* [1755] 2 Ves., Sr., 631, 634; *Brown v. Raindle* [1796] 3 Ves., 257. Such cases may arise among Hindu joint families in Bombay and Madras Presidencies, Mayne, *H. L.*, ss. 356-62; Trevelyan, *H. F. L.*, 299.

(d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company, which arises out of the amalgamation;

Scope—Converse case to s. 23 (g), ante.

Principle—The amalgamated company is not allowed to exercise powers acquired by means of agreements with its component companies, except upon the terms of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by, if it had entered into them. 1 Lindley, *Comp.*, 369; *Lindsey v. G. N. Ry. Co.* [1853] 10 Hare, 664.

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

Scope—Converse case to s. 23 (h), ante. 1 Lindley, *Comp.*, 789; Palmer, *Comp. Law*, 249.

contract—for the working purposes of the company, and not for taking shares, *Imperial Ice Mf. Co. v. Munchershaw* [1889] 13 Bom., 415.

ratified and adopted—*Shrewsbury v. N. S. Ry. Co.* [1865] 1 Eq., 614; *Spiller v. Paris S. Co.* [1878] 7 Ch. D., 368. Mere acting on, or taking benefit of, pre-incorporation contract does not bind company to fulfil its obligations, *Hardoon v. Belilios* [1901] A. C., 118; *Re Rotherham Alum Co.* [1884] 25 Ch. D., 103; cf. *Clinton's Claim* [1908] 2 Ch., 515. Strictly speaking, there can be no ratification, ante, 207, though there is nothing to prevent a transfer of the contract, *Werderman v. S. G. d'Electricite*, [1882] 19 Ch. D., 246, or a new contract, *Re Empress Eng. Co.* [1881] 16 Ch. D., 128. Company cannot be compelled to adopt promoters' contract, *Preston v. Liverpool M. Ry. Co.* [1856] 5 H. L. C., 605.

warranted, i.e., is *intra vires*; ante, 207. *Mann v. Edinburgh N. T. Co.*, [1893] A. C., 69.

(h) *Against whom Contracts cannot be specifically enforced.*

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:—

What parties cannot be compelled to perform.

Scope—Avoidance of a contract by way of defence; Ch. IV *post* deals with avoidance at the instance of the plaintiff. The defence here affects the *whole* contract, and not only a *part*, as under s. 26 ante. The defence is personal to the defendant and is independent of the nature of the contract. It arises out of faulty conduct on the part of the plaintiff in cases within cls.(a) and (b), though not necessarily in cases within cl.(c).

Note—in this section, with the object evidently of leaving the jurisdiction unfettered, the Legislature has used non-technical words and has omitted to qualify 'mistake of fact' as regarding 'a matter essential to the agreement' (as in I. C. A., s. 20), or 'misapprehension' as 'reasonable' (as in s. 26, ante). But it is apprehended that the Court will not deny relief on trivial and unsubstantial grounds. Ante, 342-3.

contract—Where the alleged agreement is void, e.g., one made by a minor or under mutual mistake, there can be no question of specific performance, ante, 76-7, 199-200.

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;

Principle—Inadequacy of consideration on either side is *per se* no ground for defeating a contract into which a person has willingly and wittingly entered, although it may amount to great hardship. Ante, 317; 1 Story, *Eq.*, ss. 245, 251. It is material only as *evidence* of fraud or inequitable conduct on the part of the plaintiff, Pomeroy, *S. P.*, ss. 193-4; *Gitabai v. Balaji*, [1892] 17 Bom., 232, 234; ante, 318.

consideration—defined, I. C. A., s. 2. (d)

grossly inadequate—as to involve the conclusion that he either did not understand what he was about, or was the victim of some imposition, *Admr.-Gen. of Bengal v. Juggeswar*, [1877] 3 Cal., 192, P. C. Ante, 319.

things existing at the date of the contract—and not subsequent events, *Ganga v. Jagat* [1895] 23 Cal., 15, P. C., ante, 318.

coupled with other circumstances—*e.g.*, of indebtedness and ignorance, *Bhimbhat v. Yeshwant* [1900] 25 Bom., 126; or concealment of material facts, *Turnbull v. Duval* [1902] 6 C. W. N., 809, P. C., Fry, s. 440.

evidence—*Gitabai v. Balaji*, supra; *Ramchandra v. Sundaramurthi* [1893] 4 M. L. J. R., 9, 12.

fraud—defined, I. C. A., s. 17.

undue advantage—Cf. s. 22 (I), ante. Non-technical expression deliberately used to include coercion (I. C. A., s. 15), undue influence (I. C. A., s. 16), and all other acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another, 1 Story, *Eq.*, s. 187. Pollock, *F. M. M.*, 74.

Burden of proof—Undue advantage must be negated where position of standing or temporary authority and control is shown, I. C. A., s. 16 (3); I. Ev. A., s. 111; *Sital v. Parbhu* [1888] 10 All., 535; *Venkatagiri v. Chinna* [1909] 5 M. L. T., 204.

(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

Scope—Case of a contract otherwise proper, but to which the defendant was induced to agree by improper conduct, extraneous to the contract, on the part of the plaintiff. Ante, 298, 302, 371-5. Defence personal, not open to an assignee, *Smith v. Clarke* [1806] 12 Ves., 477, 484.

obtained—The wrong complained of must have been a material, if not the sole, inducement to the contract. Ante, 233-9. Cf. I. C. A., s. 19, expln. But if a statement would naturally act as an inducement, in the absence of evidence to the contrary, the inference is permissible that it did so act, *Redgrave v. Hurd* [1882] 20 Ch. D., 22; *Smith v. Chadwick* [1884] 9 A.C., 187, 201.

misrepresentation—defined, I. C. A., s. 18. Ante, 241.

wilful—may be fraudulent, I. C. A., s. 17. Where one party induces another to contract on the faith of representations, any one of which is untrue, the whole contract is to be considered as having been obtained fraudulently, *Pertap v. Mohendra* [1889] 17 Cal., 291, P. C. Ante, 242-3.

concealment—whether active or passive, may also be fraudulent. As to when silence is fraudulent, see ante, 221-9. "It is unconscientious for a person to avail himself of the legal advantages which he has obtained by his misrepresentation or concealment," *Torrance v. Bolton* [1872] 8 Ch. Ap., 118, 124 (James, L. J.). Cf. I. C. A., s. 19, exc.; *Currie v. Rennick* [1886] P. R., No. 41; *Morgan v. Govt. of Haidarabad* [1888] 11 Mad., 419, 435. Cf. *Kala Mea v. Harperink* [1908] 36 Cal., 323, P. C.

circumvention—another non-technical word, which together with the others used along with it, was intended to extend the Court's power of equitable interposition to all cases of fraud, actual or constructive.

unfair practices—apparently include coercion (I. C. A., s. 15), undue influence (I. C. A., s. 16), also silence which is not fraudulent but creates a case of such hardship as to prevent the interference of the Court in specific performance (s. 22, I, ill. (a), ante), Fry, s. 402. *Ellard v. Llandaff* [1810] 1 Ba. & Be., 241; ante, 226. *O'Rourke v. Percival* [1811] 2 Ba. & Be., 58, 62, 12 R. R., 68.

any party—or his agent or assignee, but not a stranger or a person unauthorised. *Mullens v. Miller* [1883] 22 Ch. D., 194.

any promise—extraneous to, but contemporary with, the contract. Cf. s. 26(c), ante; distinguish s. 24(b). May be proved by *parol evidence*, *Cutts v. Brown* [1880] 6 Cal., 328.

not substantially fulfilled—*Myers v. Watson* [1851] 1 Sim., N. S., 523.

Clause for compensation—will not save a contract vitiated by misrepresentation, *Fawcett v. Holmes* [1889] 42 Ch. D., 150 (rescission). As to measure of compensation for misdescription where there is such a clause, see *Chifferiel v. Watson*, [1888] 40 Ch. D., 45.

(c) if his assent was given under the influence of mistake of fact, misapprehension or surprise ; provided that when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Illustrations to clause (c)

(i) A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed.

(ii) A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement.

Scope—Case where the plaintiff is or may be innocent, and the defendant has been mistaken or careless.

assent—Equity requires a consent which is “an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side,” 1 Story, *Eq.*, ss. 222, 251.

given—as distinguished from ‘obtained’ in cl. (b), implies that the plaintiff was personally passive in respect of the causes mentioned, but these operated upon the defendant personally and induced his assent, Collett, 5th. ed., 254.

mistake of fact—I. C. A., s. 20. The defendant's mistake may not be shared in by the plaintiff ; *Malins v. Freeman* [1837] 2 Ke., 25, and other cases cited, ante, 325-32 ; though the Courts are now reluctant to refuse specific performance on the ground of *unilateral mistake*, unless the defendant proves further that a hardship, amounting to injustice, would be inflicted upon him by holding him to his bargain, *Hunsraj v. Runchordas* [1905] 7 Bom. L. R., 319. Ante, 333. *Roimoni v. Mathura* [1912] 39 Cal., 1016 (mutual mistake as to ownership of land leased).

misapprehension—mistake in regard to the effect of a contract as distinguished from its terms, Nelson, 236 ; Collett, 5th. ed., 256. See *Dagdu v. Bhana* [1904] 28 Bom., 420. May be a mistake as to law, for the scope of this provision is obviously wider than that of I. C. A., ss. 21-2 ; ante, 342.

surprise—ante, 342. *Cox v. Smith* [1898] 19 L. T., 517 (intoxication of defendant).

Proviso—read along with S. R. A., ss. 14-5, ante. The proviso is founded on Draft New York Civil Code, s. 1894.

compensation—Ante, 183 ; 2 L. Q. R., 414.

mistake within the scope of provision—A condition for compensation for 'error in the description of the property' applies to misdescription of the corporeal property and not of the title, *Re Beyfus' Contract* [1888] 39 Ch. D., 110. *Tomlin v. Luce* [1890] 43 Ch. D., 191 (misdescription about roads being kerbed).

if proper to be so enforced—S. R. A., ss. 12, 14, 16, ante.

III.(i)—*Sneesby v. Thorne* [1855] 7 DeG. M. & G., 299. Cf. Ind. Suc. Act., s. 271.

III.(ii)—*Manser v. Back* [1848] 6 Hare, 443; *Bain v. Byrne* [1874] P. R., No. 63. Cf. I. C. A., s. 208.

(i) *The Effect of Dismissing a Suit for Specific Performance.*

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

Bar of suit
for breach
after dis-
missal.

Principle—Where the Court is once properly seised of the subject-matter of litigation, it should dispose of it in its entirety once for all. Collett, 5th. ed., 257.

Similar Law, s. 19, ante. Cf. C. P. C., s. 43.; Act V. of 1908, Sch. I, Or. 2, r. 2.

shall bar—Where a case for damages is therefore disclosed, damages should be awarded or an enquiry as to damages directed, *Callianji v. Narsi* [1895] 19 Bom., 764; *Kallian v. Tulsi* [1899] 23 Bom., 786; ante, 416.

sue for compensation—but not for refund of deposit, ante, 426; But see *Hall v. Burnell* [1911] 2 Ch. 551; *Ibrahimbhai v. Fletcher* [1896] 21 Bom., 827, F. B.; *Alokeshi v. Hara* [1897] 24 Cal., 897; *Venkatarama v. Venkata* [1899] 24 Mad., 27; *Parangodan v. Perumtoduka* [1903] 27 Mad., 380. Cf. *Raghu v. Chandra* [1912] 17 C. W. N., 100.

for the breach—but not in respect of a collateral or independent matter, *Kashi v. Channu* [1908] 5 A. L. J., 247.

Inability to sue for specific performance—precludes a party from setting up the contract in answer to a suit for ejectment, *Jeyram v. Ganapati* [1904] 17 C. P. L. R., 19.

Res-judicata—If in a suit involving a contract a party sets up that it is rescinded and the case goes to judgment on such theory, he cannot in any subsequent litigation with the same party claim the right to carry it out as still operative, Bishop, *Con.*, s. 273. Cf. 2 Black, *Judgments*, s. 632.

Decree for specific performance—Where followed by execution by Court of a sale-deed under Act V of 1908, Sch. I, Or 21, r. 34, does not bar a suit upon the sale-deed for recovery of possession, *Nathu v. Budhu* [1893] 18 Bom., 537. Cf. *Chinna v. Doraswamy*, [1902] 12 M. L. J. R., 71; *Abdul v. Boidanath*, [1902] 6 C. W. N., 314. Decree for damages may be given in substitution upon review of judgment where plaintiff decree-holder discovers that it is out of defendant judgment-debtor's power to specifically perform his contract, *Peari v. Hari* [1887] 15 Cal., 211.

Application of preceding sections to awards and testamentary directions to execute settlements.

(j) *Awards and Directions to execute Settlement.*

30. The provisions of this Chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

Awards: *Principle*—The jurisdiction of the Court in enforcing the specific performance of the provisions of an award rests on the ground that the award is the outcome of a contract to refer to arbitration, *Sornavali v. Muthayya* [1900] 23 Mad., 593, 596. Ante 103, 105, 382. D. C. Banerjee, *Arb.*, 287.

Similar Law—C. P. C., ss. 525-6; Act V of 1908, Sch. II, §§ 20, 21.

Specific performance—Suit will lie for, irrespective of the provisions of Act V of 1908, Sch. II, s. 20, *Gopi v. Mahanandi*, [1891] 15 Mad., 99; *Subbaraya v. Sadasiva* [1897] 20 Mad., 490; *Jafri v. Ali Raza* [1901] 23 All., 383 P. C. Ante, 104. D. C. Banerjee, *Arb.*, 283. Even a bad award will be enforced if the defendant has performed some of its terms, *Brij v. Shiam* [1901] 24 All., 164. A stranger to the arbitration, who is not bound by the award, cannot enforce any benefit or right under it, *Hira v. Ganga* [1883] 11 I. A., 20, 6 All., 322. Where the plaintiff sued, in the alternative, on an award and on the promissory notes, which had formed the subject-matter of the reference to arbitration, and the award was found to be unenforceable, he was not permitted to abandon the award and claim a decree on the merits, *Narasayya v. Ramabadra* [1892] 15 Mad., 474.

Discretion—The Court has to exercise its judicial discretion under s. 22, ante, and to consider objections as may be raised under Act V of 1908, Sch. II, §§ 14-5, *Brij v. Shiam* [1901] 24 All., 164. It will abstain from interfering if the contract contained in the *submission* is too unreasonable, unfair or imprudent to be specifically enforced, or if the *award* is excessive, defective or uncertain, *Makund v. Salig* [1894] 21 Bom., 590. Ante, 104, 382-3.

Limitation—An award springs from a contract and is not

itself a contract; a suit founded on an award therefore is not a suit for the specific performance of a contract, *Dalsing v. Saraswati* [1902] 15 C. P. L. R., 115, 116; unless the award provides for execution of instruments and does not pass property, *Talewar v. Bahore* [1904] 26 All., 497. The limitation, therefore, is not that prescribed by Act IX of 1908, Sch. I, art. 113, but what is appropriate to the subject-matter of the claim, *Sheo v. Bishunath* [1904] 7 O. C., 369, 370; ante, 261. A suit to enforce an award, so far as it is operative, with an allegation that part of it is *ultra vires*, is not a suit to cancel or set aside a document within the meaning of art. 91, Lim. Act, *Jafri v. Ali Raza*, supra.

directions to execute—*i.e.*, an executory settlement, which may be enforced under s. 12 (a), ante. Where the settlement is executed, it may be enforced as an ordinary trust-deed. Collett, 5th. ed., 263 ante, 384.

settlement—defined, s. 3, supra; ante, 383.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

When instrument may be rectified.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Illustrations.

(a) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which through B's fraud all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

(b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Principle—Defect in expression should not be allowed to defeat the intentions of parties, if they are agreed as to these. Ante, 25-6, 436.

Similar Law—Draft New York Civil Code, ss. 1899-1902. Cf. s. 26, ante, the defendant there is the plaintiff under s. 31.

fraud—defined, I. C. A., s. 17. *Anarullah v. Koylash* [1881] 8 Cal., 118 (contract of tenancy); *Dronan v. Chundri* [1911] 12 I. C., 119 (misdescription of property in mortgage-deed, plaint amended). In *Amanat v. Lachman* [1886] 14 Cal., 308, P. C., neither fraud nor mutual mistake was proved.

mutual—not unilateral, *Jawahir v. Arjun* [1904] 8 O. C., 1; *Radhe v. Angne* [1913] 160. C., 213. *Ewing v. Hanbury* [1900] 16 T. L. R., 140; ante, 440-2. 2 Page, *Con.*, 1905. Where, by

mistake the name of a third party had been entered into a document instead of that of the plaintiff, the latter was allowed to prove by *oral evidence* that the contract was really between him and the defendant, and to maintain an action of damages for breach ; there being no *mutual* mistake, there could be no rectification, nor was this necessary as the suit was not for specific performance, *Mahomed v. Chutterput* [1893] 20 Cal., 854. Where each party to a deed misunderstood the understanding of the other in regard to land which was agreed to be conveyed, this was a common mistake as to the subject matter of the contract, and not a mutual mistake in inserting in the deed the description of the land, *Page v. Higgins* [1889] 5 L. R. A., 152.

mistake—may be either of fact or law, ante, 434-5. Where, in a suit to recover possession of property, on the basis of a conveyance the defendant proved that the land in suit had been included in it by a mutual mistake of fact, the Court interfered to have the conveyance rectified, so that the real intention of the parties might be carried into effect, and did not drive the defendant to a separate suit for rectification of the instrument, *Mahendra v. Jogendra* [1897] 2 C. W. N., 260.

Where allegation of fraud or mutual mistake is wanting, no suit lies under this section, *Asiat v. Sadat* [1915] 26 I. C., 368.

contract—*i e.*, document embodying the contract. "What is rectified is not the agreement, but the mistaken expression of it." *Dagdu v. Bhana* [1904] 28 Bom., 421 ; *Jiwraj v. Norwich Ass. Co.* [1903] 5 Bom., L. R., 853 ; ante, 437. A prior and valid agreement is essential, s. 32, post ; ante, 438.

other instrument—*e.g.*, a will, *Vaughan v. Clerk*, [1902] 87 L. T., 144, or a document executed in pursuance of a power, but apparently not an instrument, like articles of association, which have only statutory effect, *Evans v. Chapman* [1902] 86 L. T., 381. Cf. Ind. Stamp Act (II of 1899), s. 2, cl. 14 : "*Instrument* includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished, or recorded." A decree was amended in *Balaprasad v. Kanoo* [1912] 14 I. C., 407.

intention—s. 33, post. Cf. 1 Story, *Eq.*, s. 168.

representative in interest—"In all cases of mistake in written instruments, Courts of equity will interfere only as between the original parties, or those claiming under them in privity ; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment-creditors, or purchasers from them with notice of the facts," 1 Story, *Eq.*, s. 165.

rectified—*Anarullah v. Koylash*, supra (an entire contract like a lease cannot be partially repudiated, but must be avoided *in toto*).

clearly—as to the nature of the evidence required, see ante, 444-6. Parol evidence is admissible, I. Ev. A., s. 92, prov. 1, ss. 95, 96, *Radhe v. Angne* [1913] 160 O. C., 213, but may not be accepted where the original instructions in writing are forthcoming, *Jiwraj v. Norwich Ass. Co.*, supra.

proved—The plaintiff must establish that the alleged intention to which he desires the document to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also set forth precisely the form to which the deed ought to be brought, *Madhavji v. Ramnath* [1906] 8 Bom., L. R., 354.

mistake in framing the instrument—not a deliberate *omission*, for what is done on purpose is obviously not done by mistake, *Lachman v. Ganpat* [1906] 2 N. L. R., 49; ante, 25, 438.

discretion—s. 22, ante; see also ante, 31-2, 185-9.

rectify—For form of decree, see Act V of 1908, App. D, No. 12. But there is no case for rectification where the question is one of construction of an ambiguous document, *Ghulam v. Fateh* [1910] 130 P. L. R.

third persons in good faith and for value—See ill.(a); ante, 449.

III.(a)—Case of fraud; rights subsequently acquired for value by *bonâ fide* transferees not touched. Based on the Law Commissioner's sixth Report, cl. 12. In case of misdescription, the vendee can claim rectification, *Rangasawmi v. Sowri* [1915] 29 I. C., 588.

III.(b)—Case of mutual mistake regarding effect of terms used. *Pearce v. Verbeke* [1840] 2 Beav., 333.

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principle—He who comes into equity must come with clean hands. The Court will not go through the useless formality of rectifying the written expression of a contract which it will not enforce specifically. But see Pollock, *F. M. M.*, 123.

contract in writing—*not* any other instrument.

agreement—defined, I. C. A., s. 2 (e). The fundamental assumption is that there exists in truth between the parties a complete and perfectly unobjectionable contract, Collett, 5th. ed., 264.

Presumption
as to intent
of parties.

33. In rectifying a written instrument the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Principles of rectification.

Principle—What the Court seeks to get at is the *substance* of the agreement, and not its *form*. Ante, 436; *Walker v. Armstrong* [1856] 8 De G. M. & G., 531.

intended to mean—Equity will reform an instrument only when, after reformation, it will express the understanding of both parties at the time, *Wilkinson v. Nelson* [1861] 7 Jur. N. S., 480; ante, 437, 444. *Mahendra v. Jogendra*, supra.

legal consequences—Cf. s. 26 (d), ante.

language—The parties may have agreed as to the language, but this is immaterial, if the effect and result of the document differ from what the parties aimed at. Ante, 435. Rectification may be necessary where the parties had acted differently before the document was drawn up, and it does not carry out the final agreement between the parties, *Steam Herring Fleet v. Richards* [1901] 17 T. L. R., 731.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

Specific enforcement of rectified contract.

Illustration.

A contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

Principle—Avoidance of multiplicity of action. This is in accord with the American practice. The English practice does not yet seem to be uniform, ante, 449-50.

the Court thinks fit—S. 34 is permissive and not compulsory; s. 22, ante.

III.—*Stedman v. Collett* [1854] 17 Beav., 608.

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

Scope.—This species of specific relief is the reverse of specific performance; the one grants relief by enforcing the performance of a contract which binds a party, the other by discharging him when it is not just to bind him. Ante, 24 450.

Similar Law.—Draft New York Civil Code, ss. 1903-5. Cf. Ch. V post, where the relief is not confined to contracts or to documents which but for rescission might be operative. Collett, 5th ed., 273.

When
rescission
may be
adjudged.

35. Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :—

Principle.—The general rule is that a contract cannot ordinarily be rescinded by one party without the consent of the other, I. C. A., s. 62, but it admits of exceptions, Fry, s. 1045, especially with reference to the conduct of this party in relation to the contract, and these exceptions are here set forth. *Inder v. Campbell* [1881] 7 Cal., 474.

any person interested—*e.g.*, member of a Hindu joint family defrauded by contract between manager and third party, *Ravji v. Gangadhar* [1879] 4 Bom., 29.

in writing—words repealed wherever the Transfer of Property Act is in force. See Act IV of 1882, ss. 1-2.

sue—For *form* of plaint, see C. P. C., Sch. IV, No. 99; Act V. of 1908, Sh. I, App. A, No. 34. Ground for relief must be alleged in plaint and established, *Azimudin v. Ziaulnisa*, [1882] 6 Bom., 309.

Court fee—Rs. 10, Act VII of 1870, Sch. II, cl. vi, No. 17.

Limitation—3 years after the facts entitling the plaintiff to have the contract rescinded, first become known to him, Act IX of 1908, Sch. I, art. 114; *Mohun v. Gungaji Cotton Mills Co.* [1900] 4 C. W. N., 369. Ante, 474-5. Distinguish *Budda v. Khan* [1882] P. R. No. 141.

Omission to sue—There is no positive rule of law that when, after a voidable contract has been fulfilled, one of the parties

subsequently discovers facts, which, if known at an earlier stage, would have entitled him to rescind the contract without instituting legal proceedings, the only mode, in which such party can obtain relief, is by a formal adjudication of rescission through a Court, *Sant v. Hussaini* (1882) P. R. No. 60.

It—i.e., the whole contract, and not a part of it, *Inder v. Campbell*, supra.

rescinded—Ante, 451.

may be adjudged—Relief discretionary, and may be refused where rights of third parties acquired for value have intervened or the position of the parties has been so altered as to make restoration impracticable. Ante, 460, 471; Fry, ss. 736-46; *Taleb v. Ameer* (1874) 22 W. R., 529. Cf. ss. 36, 38, post.

(a) Where the contract is voidable or terminable by the plaintiff;

Illustration to (a)—

A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

voidable—Ante, 453, I. C. A., s. 2 (i). A contract may be voidable at its inception, I. C. A., s. 19, or may become so by reason of a party's subsequent act or default, I. C. A., ss. 39, 53, 55, 67, 153; *Sooltan v. Schiller* (1878) 4 Cal., 252; *Subba v. Devu* (1894) 18 Mad., 126, 127; *Rash Behari v. Nrittya* (1906) 33 Cal., 477. Agreements which are void by reason of mistake are evidently included, s. 36 post; ante, 461. and mistake may be the result of mere forgetfulness, *Hood v. Mackinnon* (1909) 78 L. J., Ch., 300; but *query* as to agreements void, for illegality or impossibility, cf. cl.(b), also s. 39 post. Collett, 5th. ed., 276. For cases of contracts set aside for fraud, undue influence or coercion, see *Pushong v. Moonia* (1868) 10 W. R., 128; *Rajender v. Bhoobun* (1864) W. R., 65; *Sadashiv v. Dhakubai* [1880] 5 Bom., 450; *Sital v. Parbhu* [1888] 10 All., 535; *Bhim-bhat v. Yeshwant* [1900] 25 Bom., 126; *Gobardhan v. Jaikishen* [1900] 22 All., 224.

terminable—liable by agreement to be put an end to (i) at the option of a party upon certain terms, or (ii) by the occurrence of a certain specified event (condition subsequent), or (iii) by the non-fulfilment of a specified term (e.g., a warranty); ante, 452. Upon an agreement to purchase immoveable property 'subject to the approval of the purchaser's solicitors,' if these solicitors disapprove of the title, the purchaser is entitled to rescind the contract and recover earnest-money and costs, and the agreement need not be registered, *Sreegopal v. Ram*

[1882] 8 Cal., 856. Distinguish *Cohen v. Sutherland* [1890] 17 Cal., 919. Repudiation by joint promisor may give promisee a right to rescind, *Chokkalingam v. Srinivasa* [1908] 19 M. L. J. R., 28.

III.—Ante, 220, 228-9, 453-4.

(b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff ;

Illustration to (b)—

A, an attorney, induces his client, B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

Scope—Relief may be granted to a party who has entered into an illegal contract, but is not *in pari delicto* with the defendant, ante, 465-8.

unlawful.—I. C. A., s. 23 ; T. P. A., s. 6 (*h*). A covenant in a lease which would result in the extinction of rights of occupancy in the U. P., is opposed to the policy of the rent law, *Kauri v. Ganga* [1888] 10 All., 615. An agreement in writing by the plaintiff and her mother, purporting to divest them of their entire *illom* property and vest it in the defendant in consideration of his promising to marry and raise up heirs to the *illom* and to maintain the executants till death, is against public policy and defeats the Government's right of escheat, *T. Sivithri v. M. Vasudevan* [1881] 3 Mad., 215.

not apparent—If the illegality is manifest, the plaintiff cannot claim the sympathy of the Court. *Simpson v. Howden* [1837] 3 My. & Cr., 97 ; *Gray v. Mathias* [1800] 5 Ves., 286, 294.

defendant is more to blame—*Hari v. Naro* [1893] 18 Bom., 342. If the parties are *in pari delicto*, no relief can be given under this section, *Sivithri v. Vasudevan*, supra. *Williams v. Bayley* [1866] 1 H. L., 200, 216.

III. Cf. T. P. A., s. 53. The parties stand in a fiduciary relation, hence not *in pari delicto*. *Ford v. Harrington*, 16 N. Y., 285. 1 Page, *Con.*, s. 525, p. 816.

(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the

vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Scope—Relief for judgment-debtor where decree-holder after obtaining a decree for specific performance fails to fulfil his part of the contract, or *vice versa*. Limited to cases of contracts for sale and for lease. Ante, 468-70. For the English practice, see 3 Seton, *Judgments*, 1900-1; cases cited ante, 468; Fry, ss. 1173-4.

a decree...has been made and the purchaser or lessee makes default—*Stone v. Smith* [1887] 35 Ch. D., 188. The purchaser or lessee may have been the defendant and may have failed to comply with the judgment against him, *Olde v. Olde* [1904] 1 Ch., 35.

may also order him—in the suit for rescission.

received—*i.e.*, actually received, and not such as, but for wilful default, might have been received, Collett, 5th. ed., 282.

as such possessor—*Clark v. Wallis* [1866] 35 Beav., 460. Where a sale of land is set aside for fraud, the purchaser cannot claim any allowance for repairs or lasting improvements, *Sadashiv v. Dhakubai* [1880] 5 Bom., 450, 462.

Costs—plaintiff would retain the benefit of any direction as to costs of the former action, and be entitled to the costs of obtaining the order for rescission, *Hutchings v. Humphrey* [1885] 54 L. J., Ch., 650.

in the same case—*i.e.*, where the purchaser or lessee is in wrongful possession. Collett, 5th. ed. 282.

the decree—for specific performance.

as the justice of the case may require—The discretion of the Court will be guided by reference to all the circumstances of the case, and, if *unjust*, an order for the rescission of the *entire* contract will not be passed.

36. Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

Rescission
for mistake.

Principle—Mistake *per se* will not justify a decree for rescission, unless the parties can be restored to *status quo ante*. *Dagdu v. Bhana* [1904] 28 Bom., 420.

in writing—repealed where the Transfer of Property Act is in force, ante, 452.

mere mistake—*i.e.*, without any other vitiating circumstance. As to *mistake of law*, see ante, 338 sqq., 461-3.

restored to the same position—Ante, 591-6. *Muhammad v. Ottagil* [1863] 1 Mad. H. C. R., 390. Where restoration impossible, suit for damages is the proper remedy, *Taleb v. Ameer* [1874] 22 W. R., 529. Moncrieff, *Fraud*, 159.

substantially—Ante, 472. Literal *restitutio in integrum* is not essential, *e.g.*, in the case of immoveables, restoration of the property together with *mesne profits* and allowance for deterioration, will be enough. *Sutherland v. Heathcote* [1892] 1 Ch., 475.

Alternative
prayer for
rescission
in suit for
specific per-
formance.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Scope—Matter of practice. Limited to suits for specific performance of contracts embodied in written instruments. Alternative prayer—if contract cannot be specifically enforced, it may be set aside. *Mosely v. Virgin* [1796] 3 Ves., 184. Plaintiff seeks merely to wholly enforce or wholly set aside the contract, and the alternative relief is based on the same state of facts, though with different conclusions as to law, Fry, s. 1058, p. 457, Ante, 427.

a suit for specific performance—*Semble* a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise, cannot be sustained, *Panama Telegraph Co. v. India Rubber Co.* [1875] 10 Ch., 515; ante, 428. Cf. *Cook v. Andrews* [1897] 1 Ch., 266, 270.

may direct—The Court has a discretion to exercise.

Court may
require
party res-
cinding to
do equity.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Principle—He who seeks equity must do equity. If plaintiff does not return benefits, he would be awarding himself damages under cover of suit for rescission, though as a matter of law he may not be entitled to any damages, Moncrieff, *Fraud*, 216.

Scope—General provision, of which s. 36 ante is a special

case. Restoration is essential to rescission, but, where relief is sought merely on the ground of mistake, it must be of a more complete character than in other cases, it need be. *Ante*, 473.

In England and America rescission of insurance contracts has sometimes been allowed without restitution. *Kettelwell v. Refuge Ass. Co.* [1908] 1 K. B., 545, but *query*, 22 Harv. L. R., 134-5.

Similar Law—I. C. A., ss. 64, 65.

may require—relief discretionary, *Brohmo v. Dharmo* [1898] 26 Cal., 381, *s. n.*, *Mohori v. Dharmodas* [1903] 30 Cal., 539, P. C.

party, where a minor, see *Paran v. Karunamayi* [1871] 7 B. L. R., 90; *Dayal v. Ram Buddun* [1872] 17 W. R., 454; *Muthoora v. Kanoo* [1874] 21 W. R., 287; *Sohee v. Mahomed*, [1874] 6 N. W. P. H. C., 268; *Pana v. Sadik* [1875] 7 ibid., 201; *Makundi v. Sarabsukh*, [1884] 6 All., 417. In *Girraj v. Hamid* [1886] 9 All. 340, and *Sinaya v. Munisami* [1899] 22 Mad., 289, the mortgage-deed sought to be set aside was executed by the minor's certificated guardian, without District Judge's sanction.

any, *ante*, 473-4.

compensation, by way of restitution of benefits received, see cases cited under **party**. *Holbrook v. Sharpey* [1812] 19 Ves., 131. *Fairbanks M. & Co. v. Walker* [1907] 17 L. R. A., N. S., 558. In *Sadasiv v. Dhakubai* [1880] 5 Bom., 450, a sale was set aside on the ground of fraud, but portion of purchase-money, advanced for justifiable purposes, was declared a charge on the property. Restitution means return of benefits *plus* indemnity, *Adam v. Newbigging* [1886] 34 Ch. D., 583, (on appeal, H. L. did not deal with the point, 13 A. C., 308).

which justice may require—"A Court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person, the legislature has declared to be void," *Thurstan v. Nottingham P. B. Soc.* [1902] 1 Ch., 1, 13 [1903] A. C., 6; *Mohori v. Dharmodas*, *supra*, 549 (money-lender advanced money to minor, knowing him to be such), *expld.* in *Dattaram v. Vinayak* [1903] 28 Bom., 181; *Indar v. Narindar* [1904] P. R. No. 33, *Monosseh v. Shapurji* [1908] 10 Bom. L. R., 1004 (lunatic). No restitution ordered where money applied in payment of mother's debts, who claimed adversely to her minor adopted son, *Nathu v. Balwantrao* [1903] 27 Bom., 390. *Contra*, where loan taken for minor's benefit and necessities, *Allah v. Budha* [1904] P. R. No. 52.

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

Similar Law—Draft New York Civil Code, ss. 1906-8. Cf. ch. IV, esp. s. 37 ante ; not much practical difference between the forms of relief granted under ss. 35 and 39, respectively ; division of the two subjects, however, systematic and convenient, Collett, 5th. ed., 273. Ante, 476.

When cancellation may be ordered.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable ; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered ; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Illustrations.

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(c) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument, dated the 1st January, 1877. Soon after that day, A fraudulently grants to C a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

(d) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

Principle—This form of relief is founded upon the administration of protective justice for fear (*quia timet*). *Chhaganlal v. Dhondur* [1903] 27 Bom., 607 ; ante, 477-80.

Scope—This relief is in some respects wider than that of rescission, it is not limited to contracts, and is available to

persons other than parties to a document and in respect of a void instrument also, provided there is reasonable apprehension of serious injury, if the document be left outstanding; ante, 477. This form of relief is also to be distinguished from a declaration; the right to come to Court to have a document cancelled is indeed a right to a consequential relief sufficient to sustain a declaratory decree, *Sheo Singh v. Dakho* [1878] 1 All., 688, P. C., but the relief given by the Court in pursuance of that right is a substantial relief independent of the declaration, *Rampal v. Balbhadra* [1902] 25 All., 1, P. C.; *Ram v. Rugho* [1876] 1 Cal., 457; *Parbatibai v. Visvanath* [1904] 29 Bom., 207 (contra, *Karam v. Daryai* [1883] 5 All., 331, F. B.) Ordinarily, however, a plaintiff out of possession and not in a position to claim a decree for possession, should not be given a decree for cancellation of an instrument which, if genuine, disproves his title, *Shanker v. Sarup* [1911] 34 All., 140. Contra, *Kedar v. Bhagwanti* [1911] 8 A. L. J., 462. For s. 39 generally, see *Vulley v. Dattubhoy* [1900] 25 Bom., 10.

any person—may be other than a party to the instrument, ante, 478, e.g., a Hindu reversioner, *Chutter v. Wooma* [1867] 8 W. R., 273; a creditor, *Ishvar v. Devar* [1902] 27 Bom., 146 (suit under T. P. A., s. 53); or a person in possession whose title is affected by the document, *Nufisa v. Mahomed*, [1875] 24 W. R., 336. Distinguish *Narendra v. Basudeo* [1912] 14 I. C., 81 (deed by owner). Cf. ill.(b) and (c); also *Roghoobur Bhekdharee* [1869] 11 W. R., 455.

against whom—A vendor of land after sale may have no interest left in the property to entitle him to sue for cancellation of a fraudulent mortgage-deed affecting the property, *Jhana v. Beni* [1887] 9 All., 439. But there is no rule that in no case can a man, who has parted with property, in respect of which a void or voidable instrument exists, sue to have such instrument cancelled. If the instrument, left outstanding, may injure him, he has the right to have it adjudged void, *Kotrabassappya v. Chenvirappaya* [1898] 23 Bom., 375. Ante, 482n.

written instrument—e.g., a will, *Jadu Nath v. Bhagwant* [1892] 1 O. C. (Sup.), 4; a receipt, *Venkata v. Kadambi* [1910] 7 M. L. T., 270; an award, *Lu Tha v. Ma Shere Me*, 3 L. B. R., 4; 34 C., 853, 859, *Vulley v. Dattubhoy*, supra; entry of a balance binding as acknowledgment, *Gansa v. Ganga Ram* [1890] P. R. No. 12; a compromise, *Manram v. Bhola* [1909] 6 A. L. J. R., 561. Cf. *Sarbesh v. Hari* [1910]. As to an *anumati-patra*, see *Hurri v. Upendra* [1896] 24 Cal., 1 P. C., 14 C. W. N. 451 (compromise decree.) A judgment obtained by fraud may be set aside, *Venkatappa v. Subba* [1905] 29 Mad.,

179. Cf. *Khagendra v. Pran Nath* [1902] 29 Cal., 395, P. C. But no suit will lie to set aside a decree where fraud is neither alleged nor proved and no other specific relief is asked for, *Banarsi v. Ram Narain* [1907] 30 All., 105.

void—‘void agreement,’ I. C. A., s. 2 (g), ‘void contract,’ ibid, s. 2 (j). Ante, 24. *Pollock, Con.*, 9. *Peake v. Highfield* [1826] 1 Rus., 559 (forged deed.) Where a party had denied execution of a document upon the allegation that it was forged, before the registering officers, he might sue to have it adjudged void, *Mohima v. Jugul* [1881] 7 Cal., 736; *Fukeer v. Thakoor* [1871] 15 W. R. 421; *Prosunno v. Mothoora*, [1870] 15 W. R., 487. *Contra, Watson v. Neel* [1868] 10 W. R., 330.

voidable—in case of contract, see I. C. A., ss. 2 (i), 19; ante, 476; *Brooking v. Moudslay* [1888] 38 Ch. D., 643; 2 Story, *Eq.*, s. 695 (fraud classified.) *E. g.* a deed of gift obtained by a spiritual adviser by fraud and undue influence, *Mannu v. Umadat* [1890] 12 All., 523; *Sital v. Prabhu* [1888] 10 All., 535 (onus on donee); *Ogilvie v. Jeaffreson* [1860] 2 Giff., 353 (fraud); *Willan v. Willan* [1810] 16 Ves., 72 (surprise.) Non-payment of consideration money within the time agreed does not avoid a sale-deed, *Kilaru v. Polavarapu* [1913] M. W. N., 637, *Banne v. Rajab* [1879] P. R. No 85. Cf. *Baijnath v. Pattu* [1908] 30 All., 125; *Gobindasamy v. Ramasawmy* [1908] 32 Mad., 72; *Noggendro v. Kishen* [1873] 19 W. R., 133, P. C.

reasonable apprehension—to be determined with reference to the circumstances of each case, *Kotrabassappaya v. Chenvirappaya* [1898] 23 Bom., 375, and, in the case of a sham sale-deed, will only arise when a title by ownership is claimed under it, *Singarappa v. Talari* [1904] 28 Mad., 349. There is no ground for equitable interposition where the instrument cannot legally be used for the purpose which is apprehended, *Shib v. Hira* [1878] 1 All., 622, or where the plea which is the basis of suit may be urged as defence in a previous suit, *Chhaganlal v. Dhondu* [1903] 27 Bom., 607, or where the recital objected to in a bond is no evidence of the fact recited, *Sunkur v. Juddoobuns* [1868] 9 W. R. 285. So also where the instrument is a nullity, *Umrao v. Jan Ali* [1898] 20 All., 465 (deed of gift between Mahomedans, inoperative for lack of delivery of possession); *Banku v. Krishto* [1902] 30 Cal., 433 (document not signed on all pages); (but see ante, 480-1); or even has been fraudulently antedated, *Nurdin v. Alavudin* [1888] 12 Mad., 134; or where the suit is premature, *Oomur v. Luckhee* [1868] 10 W. R. 47. A deed of gift executed and registered by a Hindu lady is valid, though possession has not been delivered, and throws a cloud on the rights of reversioners, *Balbhadra v. Bhawani* [1907] 34 Cal., 853.

serious injury—*Chhaganlal v. Dhondu*, supra.

may sue—A previous suit for possession, under s. 9 ante, does not bar a subsequent suit for cancellation of a deed of gift, *Jai v. Lalit* [1903] 26 All., 236. Plaintiff may sue merely for declaration, *Amin v. Sant* [1913] P. R. No. 18.

Court fee, Rs. 10, Court Fees Act, Sch. II, art. 17 (iii), *Karam v. Daryai* [1883] 5 All. 331, F. B.; *Durga Bakhsh v. Mohammad* [1898] 1 O. C. 123; *ad valorem* under ibid, s. (iv), cl.(c), *Parvatibai v. Vishvanath* [1904] 29 Bom., 207; *Samiya v. Minammal* [1899] 23 Mad. 490; *Chet v. Mul Singh* [1871] P. R. No. 10; *Chuni Lal v. Boder Mal* [1886] P. R. No. 2. Cf. *Gopal v. Laluram*, ibid, No. 69.

Jurisdiction of Court, determined by plaintiff's valuation, *Naraina v. Aya Putter* [1874] 7 Mad. H. C. R. 372.

Limitation—3 years from when the facts entitling the plaintiff to have the instrument cancelled become known to him, I. Lim. Act, Sch. I, art. 91; *Bakatram v. Kharsetji* [1903] 27 Bom., 560; *Fakharuddin v. Official Trustee* [1881] 8 Cal., 178, P. C.; *Mahabir v. Hurrihur* [1892] 19 Cal., 629; *Sham v. Amarendro* [1895] 23 Cal., 460; *Chanvirapa v. Danava* [1894] 19 Bom., 593; *Hasan v. Nazo* [1889] 11 All., 456; *Safdar v. Akbar* [1910] 5 I. C., 497; *Rallia Ram v. Sundar* [1883] P. R. No. 83; *Amir v. Attarunnissa* [1896] P. R. No. 75. But, where cancellation is merely ancillary, limitation will have to be determined with reference to the substantive relief prayed, *Sikher v. Dulputty* [1879] 5 Cal., 363; *Raghubar v. Bhikya* [1885] 12 Cal., 69; *Hurri v. Upendra* [1896] 24 Cal., 1 P. C.; *Beni v. Dudhnath* [1899] 27 Cal., 156, P. C.; *Banku v. Krishto* [1902] 30 Cal., 433; *Harihar v. Dasarathi* [1905] 33 Cal., 257, 265-6; *Sobha v. Sahodra* [1883] 5 All., 322; *Jinatboo v. Sha Nagar* [1886] 11 Bom., 78; *Abdul v. Kirparam* [1891] 16 Bom., 186; *Alamkhan v. Yasinkhan* [1892] 17 Bom., 755; *Unni v. Kunchi* [1890] 14 Mad., 26; *Karim v. Begam* [1895] P. R. No. 52; *Bijoy v. Krishna* [1907] 34 Cal., 329, P. C.; *Petherpermal v. Muniandi* [1908] 12 C. W. N. 562, P. C.; *Balabhadar v. Jawahir* [1908] 9 O. C. 346; *Jagardeo v. Phuljhari* [1908] 30 All., 375 (declaration that transaction embodied in a deed is sham). Ante, 484-5.

Onus—*Mahadeo v. Vithoba* [1913] 18 I. C., 853, 9 N. L. R. 8.

adjudged void or voidable—not for return of the bond-paper, *Miraj v. Mahomed* [1869] P. R. No. 8; or for a declaration that a registered deed is void, *Ramchand v. Muhammad* [1888] P. R. No. 135; *Matu v. Hirde* [1894] P. R. No. 44.

may in its discretion, with reference to all the circumstances of the case, and the conduct of the parties, *Vulley v. Dattubhoy* [1900] 25 Bom., 10. Ante, 480 sqq.

if the instrument has been registered—*Mohima v. Jugul* [1881] 7 Cal., 736, Ante, 480-2.

III. (a)—*Thornton v. Knight* [1849] 16 Sim., 509, 510 (Shadwell, V. C.).

III. (b)—*Masters v. Braban* [1735] 1 Rus., 560n. Cf. *Venkata v. Kadambi* [1910] 7 M. L. T. 270.

III. (c)—*Pierce v. Webb* [1792] 3 Bro. Ch., 16n.

III. (d)—*Anglo-Danubian Co. v. Rogerson* [1867] 4 Eq., 3.

What instruments may be partially cancelled.

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

Illustration.

A draws a bill on B, who endorses it to C, by whom it appears to be endorsed to D, who endorses it to E. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

Principle—Justice may not always require the cancellation of a document in its entirety, and the Court will exercise its discretion. Ante, 482-3.

right—"a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others," Holland, *Jur.*, 79. Ante, 3-4.

obligation—defined, s. 3, ante.

proper case—The invalid and valid part must be severable, *Davlatsing v. Pandu* [1884] 9 Bom., 176; *Kristodhone v. Brojo* [1897] 24 Cal., 895, 896; *Khub Singh v. Jhau Lal* [1898] 12 C. P. L. R., 13; and inconsistent pleas should not be joined, *Mahomed v. Hosseini* [1888] 15 Cal., 684, P. C.; *Iyyappa v. Ramalakshamma* [1890] 13 Mad., 549, 551. But see *Narayanasami v. Ramasami* [1890] 14 Mad., 172; *Jino v. Manon* [1895] 18 All. 125. Ante, 427-8, 483-4.

cancel in part—*Inder v. Campbell* [1881] 7 Cal., 474; *Khuda Baksh v. Budhar Mal* [1882] P. R. No. 186.

III.—Draft New York Civil Code, s. 1908 n.

Power to require party for whom instrument is cancelled to make compensation.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Principle—He who seeks equity must do equity.

Scope—Applies where the Court is exercising its jurisdiction to cancel an instrument, *Kanhai v. Babu* [1911] 8 A. L. J. R., 1058.

Similar Law—Ss. 36, 38, ante; I. C. A., ss. 64, 65.

may require—relief discretionary, *Brohmo v. Dharmo* [1898] 26 Cal., 381. Plea not allowed, where not taken in first Court, *Gokul v. Karan* [1911] 8 I. C., 782.

compensation—including repayment of money received by the plaintiff personally or through a duly authorised manager, *Ajit v. Bijai* [1884] 11 Cal., 61 P. C.; *Sultan v. Hashmat* [1915] 29 I. C., 804, together with interest, *Guthrie v. Abool* [1871] 14 M. I. A., 53, 7 B. L. R., 630 (case of coercion). Where Hindu widow sells for necessity, reversioner cannot get sale set aside, even on payment of entire sale price, *Raghubar v. Akhtar* [1908] 5 A. L. J. R., 366.

which justice may require—*Dattaram v. Vinayak* [1903] 28 Bom., 181, explg. *Mohori v. Dharmodas* [1903] 30 Cal., 539, 549, P. C. Ante, 485-6. *Jagar Nath v. Lalta* [1908] 31 All., 21. *Holbrook v. Sharpey* [1812] 19 Ves., 131. *Monosseh v. Sharpurji* [1908] 10 Bom. L. R., 1004 (agreement by lunatic). Distinguish *Manilal v. Kavasji* [1911] 9 I. C., 124; *Choghatta v. Asa* [1913] P. R. No. 30 (enjoyment of usufruct by defendant mortgage-deed executed by minor plaintiff is void, and the latter should not be put upon terms: *Gaya v Sarfaraz* [1915] 29 I. C. 972.

CHAPTER VI.

OF DECLARATORY DECREES.

Discretion
of Court as
to declara-
tion of
status or
right.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Bar to such
declaration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

EXPLANATION.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustrations.

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(b) A bequeaths his property to B, C and D, “to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.” No such children are in existence. In a suit against A's executor, the Court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(d) A alienates to B property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is so entitled.

(e) The widow of a sonless Hindu, alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(g) A is in possession of certain property. B, alleging that he is the

owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(h) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but, if B die without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

Scope—Ante, 489-92. It does not sanction every form of declaration, but declaration limited to specific legal character or right to property. *Ramdas v. Secretary of State* [1912] 17 C. L. J., 75. *Barkat v. Jagat* [1912] 249 P. W. R., 1912; 17 I. C., 379. *Kunhiamma v. Kunhunni* [1892] 16 Mad., 140. Removal of cloud from title and perpetuation of testimony regarding title or status, *Govinda v. Thayammal* [1904] 28 Mad., 57; *Gandla v. Sivanappa* [1915] 27 M. L. J., 520. *Qy.* as to a suit to have the true construction of a statute declared and an act done in contravention of the statute, rightly understood, pronounced null and void, *Fischer v. Secy. of State* [1898] 22 Mad., 270, 282, P. C. A suit cannot be brought to obtain a declaration on a mere question of law, *Hira v. Jai Singh* [1887] 2 C. P. L. R., 156; nor apparently for a declaration that a decree does not bind strangers or minors not represented in the suit, *Partab v. Bhabuti* [1913] 35 All., 487, P. C.

Similar Law—Action of declarator in Scotland; bills of peace, to perpetuate testimony or take it *de bene esse*, bills *quia timet*, and 15 & 16 Vict., cap. 86, s. 50, in England; also Rules of Supreme Court, Or. 25, r. 5; *Ellis v. Bedford* [1899] 1 Ch., 494, 514; *Chapman v. Michaelson* [1908] 78 L. J., Ch., 272. Ante, 487, 489. Cf. C. P. C., Sch. i. Or. 21, r. 63; *Moti v. Kaunsilla* [1894] 16 All., 308, F. B.; *Wamanrao v. Rustomji* [1896] 21 Bom., 701; *Ponappa v. Pappuvayyengar* [1881] 4 Mad., 1, F. B.; *Kristnam v. Pathma* [1905] 29 Mad., 151, F. B.; *Allagappa v. Nazamat* [1908] 4 L. B. R., 263; *Pitche v. Maung* [1910] 8 I. C., 608; cf. *Chathu v. Kunhamed* [1887] 11 Mad., 280 (surplus sale-proceeds attached) *Chath v. Kalath* [1912] M. W. N., 401 (question under C. P. C., 247), *Miran v. Atra* [1900] P. R., No. 111, *Kallu v. Shamsuddin* [1912] 269, P. W. R.; Agra Tenancy Act, s. 198 (Act XII of 1881, s. 148); *Sabt v. Bashir* [1885] 5 A. W. N., 194; *Mahadeo v. Bachu* [1888] 11 All., 224. U. P. Land Rev. Act, s. 111, *Ram Charan v. Ram* [1908] 5 A. L. J. R., 614. Punjab Land Revenue Act (XVII of 1887), s. 45, *Sajawal v. Sodagar* [1913] P. R. No. 2, rev. (also s. 158, and Act XVI of 1887, s. 77 (3)); s. 117, *Lachmi v. Hondi* [1913] P. R., No. 100. Cf. also s. 39 ante, *Gomti v. Darab*, [1902] 22 A. W. N., 187; *Ram v. Nakehed*, [1882] 4 All., 261, 264. *Nasir v. Aman* [1913] 17 C. L. J., 118 (Assam Reg. I of 1886, s. 154).

Old Law—Act VI of 1854, s. 29 ; Act VIII of 1859, s. 15. Declaratory decree not granted where plaintiff had no right to consequential relief or could not make the declaration the foundation of relief in another Court, ante, 488 ; *Lekhraj v. Barcha* [1879] P. R., No. 94 ; exception in favour of Hindu reversioner or person in analogous position, *Ishri Dutt v. Hansbutti* [1883] 10 Cal., 324, P. C. ; *Kanh Singh v. Dasaundha* [1876] P. R., No. 112 ; ante, 500. Cf. *Anyaba v. Daji*, [1895] 20 Bom., 202.

any person—who under the law may be the plaintiff (cf. *Natha v. Gurbaksh* [1882] P. R., No. 10, or the defendant in a suit, e.g., a minor or a lunatic or a corporation. All persons in whom the right to the relief claimed is alleged to exist must join as plaintiffs, *Chedi v. Dy. Commr. of Bahraich* [1894] 3 O. C., 351, and a daughter and her son may join to question an alienation made by a Hindu widow, *Narayana v. Chengalamma* [1885] 10 Mad., 1.

entitled—not a stranger to the title or status in dispute, *Sohel Singh v. Shadi* [1888] P. R. No. 99 ; 1 P. L. R., 97. Cf. *Ram v. Rukmin* [1885] 7 All., 884 ; *Wajid v. Dianatullah* [1885] 8 All., 31 ; *Muniswamy v. Murugappa* [1910] 7 M. L. T., 45. May be the lessor, where the lessee's title has been denied, *Birj v. Collector of Allahabad* [1881] 4 All., 102, or mortgagor, though mortgagee is in possession, *Akasi v. Jutagir* [1910] 6 I. C., 166. An executant of a sale-deed must get it set aside, before he can get a declaration of title to property sold, *Panna v. Habiba* [1910] 6 I. C., 891.

legal character—position recognised by law, *Hiralal v. Gulab* [1896] 10 C. P. L. R., 1 ; *Maharaj Narain v. Shashi* [1915] 13 A. L. J., 455 ; *Channu v. Babu* [1909] 32 All., 527, ante, 490-1 ; e.g., the plaintiff's status as a Rajput, *Tasadduq v. Wazir* [1906] P. L. R., No. 9 ; or as the legitimate, *Qamar Ara v. Peare* [1898] 2 O. C., 57, 58, (qy., *Jai Singh v. Uttam* [1884] P. R. No. 148, *Mantota v. Mohan* [1897] 11 C.P. L. R., 72, or adopted son of a certain person, *Bhagat v. Shiv* [1894] P. R., No. 141 ; U. B. R. [1892-6] 623, 627 ; or as his daughter's son and sharer in cultivation, *Mohendra v. Kedar* [1912] 9 A. L. J. R., 788 ; or, as not the husband of the defendant, *Waryam v. Phemon* [1901] P. R., No. 50, *Jaskuar v. Mahtab* [1903] P. R., No. 26, or his father, *Shrivaktuba v. Agarsingji* [1910] 34 Bom., 676, *Kailasa v. Raghubar* [1914] 17 O. C., 331 ; or, as the priest of a temple, *Limba v. Rama* [1888] 13 Bom., 548, *Kalidas v. Parjaram* [1890] 15 Bom., 309 ; or, as the member of a society, *Sudharam v. Sudharam* [1869] 3 B. L. R., A. C., 91. *Bhupendra v. Ranajit* [1913] 20 I. C., 676, was a suit for a declaration that the election of defendant, as member of Imperial Council, was void.

any right—recognised and enforced by law, ante 491-505,

(but not of an abstract right, *Muhammad v. Mangra*, 7 I. C., 318). *Subbaraya v. Vedantachariar* [1904] 28 Mad., 23, *Basdeo v. Damodaranund* [1904] 1 A. L. J. R., 44 ; and subsisting at the date of decree, *Nobokishore v. Ramkishen* [1868] 9 W. R., 131 ; may be vested or contingent, ante, 498-503, *Kutubuddin v. Umri* [1887] P. R., No. 18, *Prem v. Ramon* [1888] P. R., No. 11 ; but not merely the possibility of a right, *Samarendra v. Birendra* [1908] 35 Cal., 777, 794, *Budh v. Dhan* [1898] P. R., No. 57 ; ante, 505. A right to come to the Court to have a document or act which obstructs the title or enjoyment of property set aside, or for an injunction against such obstruction, is sufficient to sustain a declaratory decree, *Sheo v. Dakho* [1878] 1 All., 688, P. C. *Rights declared* : proprietor, *Bissessuri v. Baroda* [1884] 10 Cal., 1976 ; *Chuni v. Ram* [1888] 15 Cal., 460, F. B., *Chinnasami v. Ambalavana* [1905] 29 Mad., 48 ; *Megha v. Shadi* [1892] P. R., No. 34, F. B., *Ekhar v. Anu* [1910] 6 I. C., 46 (Magistrate's order under Cr. P. C., s. 133) ; co-owner, *Panchanada v. Nilakantha* [1883] 7 Mad., 191 ; *Ram v. Narinjan* [1883] P. R., No. 182, (qy. *Mehdee v. Ajud* [1874] 6 N. W. P. H. C. 259) ; beneficial owner, *Aghore v. Ram* [1896] 23 Cal., 805 ; *Gour v. Dinonath* [1897] 25 Cal., 49 ; *Lobo v. Brito* [1897] 21 Mad., 231 ; zamindar entitled to cesses, *Akbar v. Sheoratan* [1877] 1 All., 373, or *pattidar* to village dues ; *Kamira v. Lalu* [1912] P. R., No. 110 ; landlord, *Somkali v. Bhairo* [1882] 5 All., 55 ; vendee, *Goberdhan v. Munnoo* [1871] 15 W. R., 95, *Dad v. Suba* [1877] P. R., No. 68, *Abbas Ali v. Pirbuksh* [1879] P. R. No. 132 ; cf. *McCullough v. Connelly* [1907] 15 L. R. A., N. S., 823 (*bonâ fide* purchase for value) ; mortgagee, *Gobind v. Udai* [1870] 6 B. L. R., 320, *Sheonath v. Manohar* [1903] 6 O. C., 324, *Pokhar v. Ram* [1887] 7 A. W. N., 231, *Mahabala v. Kunhanna* [1898] 21 Mad., 373 (mortgagee's heirs) ; partner, *Launkra v. Moher* [1884] P. R., No. 93 ; reversioner, *Sheoratan v. Lappu* [1881] 1 A. W. N., 160, *Sant v. Deo Saran* [1886] 8 All., 365 ; remainderman, *Anant v. Raghunath* [1882] 8 Cal., 769, P. C. ; *lakhiraj* title, *Abhoy v. Kally* [1880] 5 Cal., 949 ; lawful possession, *Ismail v. Mahomed* [1893] 20 Cal., 833, P. C. (qy. *Badr-ud-din v. Abdul* [1888] P. R., No. 12) ; self-acquisition, *Chabildas v. Ramdas* [1909] 11 Bom. L. R., 606 ; right to office, *Ramanuja v. Devanayka* [1885] 8 Mad., 361, *Koondo v. Dheer* [1873] 20 W. R., 345 ; right to perform or get performed religious ceremonies, *Trimbak v. Krishnarao* [1909] 33 Bom., 387 ; right to receive offerings, *Limba v. Rama*, supra, *Badri v. Mulloo* [1905] 8 O. C., 339 ; right to family *birt*, *Bhagat v. Shiv* [1894] P. R., No. 141 ; right to mutation of names in the Collector's books, *Bhrikaji v. Pandu* [1893] 19 Bom., 43 ; right to maintenance, *Nistarini v. Makhan* [1872] 9 B. L. R., 11 ; equity of redemption, *Bhawani v. Kallu* [1895] 17 All., 537,

F. B., *Nathu v. Gumani* [1896] 18 All., 320 ; right to hold *haut*, *Gopi v. Taramoni* [1879] 5 Cal., 7, F. B. ; easement, *Ilahi v. Din* [1897] P. R., No. 14 ; right to erect fish-trap, *Makhan v. Gokul* [1885] P. R., No. 32 ; right to reside in village *abadi* free of payment of fees, *Rala Ram v. Bir Singh* [1887] P. R., No. 48 ; non-liability to assessment by municipality, *Dwarka v. Addya* [1894] 21 Cal., 319, 324, *Kameshwar v. Bha'nua Municipality* [1900] 27 Cal., 849 ; non-liability to pay *kamiana* dues, *Muhammad v. Habib* [1905] P. L. R., No. 113. *Seemle*, claim to discharge an obligation in a particular manner is not a claim to a right, *Muhammad v. Abdulla* [1891] P. R., No. 77. Right to perform worship on behalf of an indeterminate class of persons on property belonging to third parties, not established, *Sonu v. Daryai* [1896] P. R., No. 4. English cases seem to require in the plaintiff a present vested estate, though ever so minute or remote, 2 Story, *Eq.*, s. 1511.

Hindu reversioner may sue to avoid (1) alienation made by female heir, ante, 501, *Rup Narain v. Gopal* [1909] 6 A. L. J. R., 567, P. C., *Narayana v. Changalama* [1886] 10 Mad., 1, *Nur Buksh v. Fajjo* [1876] P. R., No. 121, *Gami v. Khio* [1889] P. R., No. 205, *Nur Khanam v. Bani* [1894] P. R., No. 90, *Lahori v. Radho* [1906] P. R., No. 72, *Sahib v. Achhru* [1910] 5 I. C., 587 (declaration regarding validity made, where uncertain whether widow alive or dead), unless made with the consent of the next reversioners, *Nobo v. Hari* [1884] 10 Cal., 1102, F. B., *Bajrangi v. Manokarnika* [1907] 30 All., 1, P. C., ante, 501 *n* ; (2) surrender by same, where the whole estate does not at once vest in the next heir, *Behari v. Madho* [1891] 19 Cal., 236, P. C., or part of the lady's life estate is converted into absolute estate in her hands, *Hem v. Sarnamoyi* [1894] 22 Cal., 354, *Rangappa v. Kamti* [1908] 18 M. L. J. R., 309, F. B. ; ante, 508 *n* ; (3) adoption pretended or made by her without legal authority, ante, 501, *Thayammal v. Venkatarama* [1884] 7 Mad., 401, *Chiruvolu v. Chiruvolu* [1906] 29 Mad., 390, F. B., ; or (4) testamentary declaration made by the widow, *Kalian v. Sanwal* [1884] 7 All., 163, *Sheraji v. Ram Das* [1911] 8 A. L. J. R., 454. But see *Jaipal v. Inder* [1904] 26 All., 238, P. C. He may also sue, after the death of the widow of a testator, for a construction of the latter's will and declaration of his reversionary rights, *Chukkun v. Lolit* [1894] 20 Cal., 906, when some immediate necessity for the construction is established, *Srinibash v. Monmohini* [1906] 3 C. L. J., 224. As a general rule, the next presumptive reversioner must sue, unless he is in collusion with the widow or has waived his rights, ante, 501-2 ; *Anyaba v. Daji* [1895] 20 Bom., 202, *Sheomurat v. Ram* [1888] 8 A. W. N., 178, *Sheo'arat v. Bhagwati* [1895] 17 All., 523, *Chandres v. Nand* [1894] 3 O. C., 336, *Sheopal v. Bundoo* [1905] 8 O. C., 81,

Sikandar v. Bahadur [1876] P. R., No. 39 ; or is an infant, *Mahtab v. Mahtab* [1877] P. R., No. 24 ; or she is only the holder of a life estate, ante, 501-2, *Abdulla v. Muhammadu* [1895] P. R., No. 14, *Sant v. Deo* [1886] 8 All., 365. But the rule varies with the facts of the case. See *Baldeo v. Shamsher* [1914] 23, I. C., 809, 8 A. L. J. R., 454. But there is no presumption of collusion, [1900] 1 P. L. R., 229. Separate nephews have no *locus standi* where widow, daughter and daughter's son are in existence, *Barkat v. Jagat* [1912] 19 I. C., 379, F. B. For a suit by a Jat reversioner, see *Ram v. Kishen* [1890] P. R., No. 4.

any property, in *posse*, i.e., not such as is non-existent at the time the right is asserted and may or may not ever come into existence, *Ramdial v. Budha* [1883] P. R., No. 115 (Rattigan and Elsmie, J.J., Smyth, J., dissenting). The performance of village services may not be 'property,' *ibid* ; but damages clearly are (*qy.*, *Kishoree v. Gobind* [1872] 4 N. W. P. H. C., 70 A). *Secus* right to *birt* or priestly offerings, *Gur Das v. Bhag* [1911] 11 I. C., 231. *Qy.* right to kill cows for sacrifice or other purposes, *Gri v. Muhammad* [1914] 17 O. C., 354, 359. There may be property in a word, *Ramanuja v. Rama* [1898] 22 Mad., 189 ; distinguish *Gadigeya v. Basaya* [1910] 12 Bom. L. R., 358 ; and in monastery land given as *poggalika* gift, *Mra Paw v. U. Pyin* [1908] 14 Bur. L. R., 277.

Title for declaration that plaintiff is entitled to subscribe to a *Kuri* fund is not a right to declare a title contemplated by this section, *Ramkrishna v. Narayana* [1915] 27 M. L. J., 634.

Suit.—**Pleadings**—The plaint must, on its face, show not only the existence of the alleged right, but also the circumstances necessitating prayer for declaratory decree, *Khadim v. Nazeer* [1871] 3 N. W. P. H. C., 262 ; *Sital v. Jagdat* [1875] 7 *ibid*, 254. If an adoption is impeached, the plaint must dispute its fact or validity and contain a prayer for a declaration regarding the fact or validity, *Kusum v. Satya* [1900] 5 C. W. N. 162. For the essentials for maintaining suit, see ante, 492-3, *Man Kuar v. Tara* [1885] 7 All., 583, 585. *Res judicata* will bar suit, *Ramandan v. Sheoparsan* [1910] 11 C. L. J., 623 (decision of Probate Court on contested application) ; *Thamballa v. Thamballa* [1910] 5 I. C., 119 ; *Nanji v. Umatul* [1912] 13 I. C., 40 ; *Ram v. Bindesri*, [1911] 8 A. L. J. R., 940.

Court-fee—Rs. 10, Court Fees Act, Sch. ii, art. 17 (3) *Kalova v. Padapa* [1876] 1 Bom., 248 *Dhondo v. Govind* [1884] 9 Bom., 20, *Vithal v. Balkrishna* [1886] 10 Bom., 610 F. B., *Sagaji v. Smith* [1895] 20 Bom., 736, *Zinnatunnessa v. Girindra* [1903] 30 Cal., 788, *Bakshish v. Narain* [1877] P. R., No. 70, *Shah Alum v. Mahmud* [1889] P. R. No. 2, *Hakim v. Mahtab* [1893] P. R. No. 109, *Dial v. Beli* [1897] P. R. No. 51 ; cf. *Rup v. Fateh* [1911]

8 A. L. J. R. 821 ; unless consequential relief is also asked for, in which case, *ibid*, s. 7, cl. iv (c) will apply, *Dinabandhu v. Rajmohini* [1871] 8 B. L. R., Ap. 32, *Ram v. Sukh Dai* [1880] 2 All., 720, F. B. (*contra*, *Dhondo v. Govind*, *supra*), *Ostoche v. Hari* [1880] *ibid*, 869, *Jogal v. Tale* [1882] 4 All. 320, F. B., *Raghunath v. Gangadhar* [1885] 10 Bom., 60, *Samiya v. Minammal* [1899] 23 Mad., 490, *Gunesha v. Darobuti* [1875] P. R., No. 20, *Mulkunessa v. Munl. Com. Delhi* [1904] P. L. R., No. 118. Otherwise if alleged consequential relief mere surplusage, *Ganeshi v. Beni* [1911] P. R., No. 1. But Court must accept value of relief in plaint, both for purposes of court-fee and jurisdiction, *Vachhani v. Vachhani* [1908] 11 Bom. L. R. 30. Where consequential relief, e.g., injunction, is also asked for, value of relief is that of disputed property, *Krishna v. Hari* [1911] 14 C. L. J., 47, and value for purposes of jurisdiction determines that for payment of court-fee, *Raj krishna v. Bepin* [1912] 40 Cal., 245 ; *Harihar v. Shyam* [1913] *ibid*, 615, *Mohendra v. Thinandi* [1914] 19 C. L. J., 15. As to valuation; see also *Shib v. Narinjan* [1912] 226 P. L. R., *Sardar v. Mehr* [1913] 82 P. R., *Harnam v. Ram* [1913] 311 P. L. R. To a suit under Act V of 1908, Sch. I, Or. 21, r. 63 art. 17 (1), Sch. II, Court Fees Act, applies, even though the plaintiff asks for both a declaration and an injunction, *Phul v. Ghanshyam* [1907] 35 Cal., 202, *P. C. Fisher v. Arunachella* [1907] 19 M. L. J. R., 236. The device to evade court-fee by casting the prayer into a declaratory shape, should not be encouraged, *Deokali v. Kedar* [1912] 39 Cal., 704.

Jurisdiction of Court—will depend on the value of the plaintiff's interest under cloud, *Dwarka v. Kameshar*, [1894] 17 All., 69 ; *Dhan v. Zamurrad* [1905] 27 All., 440 ; *Modhusudun v. Rakhal* [1887] 15 Cal., 104 ; *Krishnasami v. Somasundraram* [1907] 30 Mad., 335, F. B. ; *Phul v. Ghanshyam*, [1907] 35 Cal., 202, 207, P. C. ; *Harnam v. Bhagwan* [1890] P. R., No. 50 ; *Maya Mal v. Bela*, *ibid* No. 121 ; *Bishnu v. Dal Singh* [1906] P. R., No. 55 ; *Jiwan v. Santok* [1886] P. R., No. 98 (appeal). Not taken away because, along with a declaration of title to land, a declaration regarding erroneous entries in the record of rights is also claimed, *Latafat v. Kamalanand* [1913] 16 I. C., 586.

Limitation—6 years from when the cause of action accrues, I. Lim. A., Sch. i, art. 120, ante, 507 ; *Mahomed v. Phul Kuar* [1910] 5 I. C., 115. *Pachamuthu v. Chinnappan* [1887] 10 Mad., 213, *Bhikaji v. Pandu* [1893] 19 Bom., 43, *Raoji v. Shakuji* [1910] 34 Bom., 321, *Ashik v. Mazhar* [1899] 2 O. C., 79, 83, *Chhatardhari v. Bhagwan* [1904] 7 O. C., 187, *Futteh v. Kharak* [1882] P. R., No. 88, *Mangal v. Buta* [1883] P. R., No. 19, *Chaith v. Jivan* [1884] P. R., No. 111, *Ram v. Muhammad* [1888] P. R., No. 135, *Dheru v. Sidhu* [1903] P. R., No. 56,

F. B.; unless an adoption is in dispute, when art. 118 or 119 may apply, *Ramchandra v. Narayan* [1903] 27 Bom., 614, *Ratnamasari v. Akilandammal* [1902] 26 Mad., 291. *Begam v. Nur Bibi* [1892] P. R., No. 45, *Hem Raj v. Sahiba* [1901] P. R., No. 116, *Ram v. Maharaj* [1904] P. R., No. 3; or the suit is brought under Act V of 1908, Sch. I, Or. 21, r. 63, when art. 11 may apply, *Sant Ram v. Ganga Ram* [1904] 4 P. L. R., 122. Cf. *Sankarappa v. Secy. of State* [1910] 20 M. L. J. R., 977 (s. 59, Act II of 1864, Madras). Where the suit concerns a forged instrument, arts. 92 and 93 may be in point; and where it concerns an alienation by a Hindu or Mahomedan female, art. 125 will be in point, *Bappanna v. Bappanna* [1910] 6 I. C., 443. Art. 129 will apply where the suit is in respect of a Hindu's right to maintenance. Where the plaintiff is in possession and sues for correction of the Settlement record, and, upon the defendant disputing it, proves his title, he is entitled to a declaratory decree, though his claim for correction of the record is barred by time, *Nathu v. Buta* [1881] P. R., No. 27. *Sarju v. Gaya* [1911] 10 I. C., 11. Cf. *Sheopher v. Deonarain* [1912] 10 A. L. J. R., 413. *Tara v. Boti* [1913] 19 I. C., 751 (*Sed query*). *Lachmi v. Bankey* [1913] 19 I. C., 463; *Chimnai v. Adal* [1913] 11 P. W. R., *contra*, *Tirumal v. Kadekar* [1914] M. W. N., 197. But see 11 C. W. N., 186. Mutation of names is a more or less equivocal act, *Sheoraji v. Ramjas* [1911] 33 All., 430. A suit for declaratory relief cannot be held barred, so long as the right to the property, in respect of which the declaration is sought, is a subsisting right, *Chukkun v. Lolit* [1893] 20 Cal., 906, 925, *Ragubar v. Mahesh* [1913] 20 I. C., 147; but when the right is extinguished, there can be no declaration of title, *Bishambhar v. Nadiar* [1913] 18 C. L. J., 601.

Burden of proof—on the plaintiff, *Kumholen v. Thirumulpad* [1875] 8 Mad., H. C. R., 17, 21, *Kenaram v. Dinonath* [1868] 9 W. R., 325, *Chitta v. Debidin* [1901] 24 All., 170, *Bhagwan v. Kamta* [1893] 6 O. C., 119, *Dy. Commr. v. Mahesh* [1903] *ibid*, 142, *Indra v. Chandika* [1911] 14 O. C., 170; unless the defence is adverse possession, and the plaintiff has proved a *prima facie* title, *Khuidad v. Alamgir* [1900] P. R., No. 116; cf. *Innasi-muttu v. Upakarath* [1899] 23 Mad., 10, P. C.; *Paras v. Muham-mad* [1912] 13 I. C., 953 (co-sharers). Plaintiff's possession may shift *onus* of proving subsisting title on defendant, *Krishna v. Secy. of State* [1910] 33 Mad., 173.

person denying—Where a Magistrate orders the removal of a construction under Cr. P. C., the person who set him in motion cannot be sued, *Madhab v. Kamala* [1871] 6 B. L. R., 643; but see *Megha v. Shadi* [1892] P. R., No. 34, F. B., *Ekhar v. Anu* [1910] 6 I. C., 46. Where title to property is in dispute, the Court of Wards holds in trust for person legally entitled

and is not a necessary party, *Jagannath v. Tirguna Nand* [1915] 13 A. L. J. R., 252.

denying—denial of the plaintiff's right gives him a cause of action, *Chintaman v. Mahadev* [1904] 6 Bom. L. R., 283, *Bachun v. Dewan* [1869] 11 W. R., 376 *Amjad v. Kunku*, [1872] 9 B. L. R., Ap. 28, and not acts done in consequence of such denial, *Thirumala v. Kodlekar* [1914] M. W. N. 197; and this must be either an invasion of his right or an obstacle or impediment in the way of his full enjoyment of this right, *Jan v. Khonkar* [1870] 6 B. L. R., 154; a hostile or adverse act intended and calculated to prejudice his title, *Karyan v. Doddali* [1871] 6 Mad., H. C. R., 307, *Ram v. Oudh* [1873] 21 W. R., 101, *Saminatha v. Rangathammal* [1889] 12 Mad., 285; *Shri Vaktuba v. Agarsingji* [1910] 34 Bom., 676 (assertion by plaintiff's wife that she had borne a son to him); antecedent to the filing of the plaint, *Mahomed v. Mangru* [1910] 7 I. C., 318, ante, 507, and not a mere wish to interfere with his rights, *Jesmanee v. Debee* [1871] 3 N. W. P. H. C., 137, or mere slander of title, *Sini v. Sangili* [1876] 1 Mad., 65, or even threat, *ibid*, or a possibility of a future claim, *Bholai v. Kali* [1885] 8 All., 70, *Pirthi v. Guman* [1890] 17 Cal., 933, P. C., *Baijnath v. Sashirama* [1910] 12 C. L. J., 183 (declaration claimed was that if defendant took certain legal steps they would not be justified in law). See also *Maheshar v. Muhammed* [1904] 7 O. C., 372. Cf. *Dinshaw v. Jamsetji*, [1908] 11 Bom. L. R., 85, 101-3. Mere execution and registration of deeds between third persons, *Sooruj v. Mohieput* [1871] 16 W. R., 18 (but see *Nufisa v. Mahomed* [1875] 24 W. R. 336), or the preparation of an incorrect survey map, *Jardine Skinner v. Shurno Moyee* [1875] 24 *ibid*, 215, or the registration of the name of the *karta* alone in respect of (Hindu) joint property, *Gopee v. Bhugwan* [1869] 12 W. R., 7, may not afford a cause of action for a declaratory suit, where the plaintiff's possession is not disturbed or title is not impugned; cf. *Bijoi v. Gobind* [1890] 10 A. W. N., 195; *Rampal v. Dalthamman* [1898] 2 O. C., 35. Otherwise, where the Collector has declared the title in favour of the opposite party, *Sheo v. Shunkur* [1871] 16 W. R., 190, *Agin v. Mohan* [1902] 7 C. W. N., 314, *Chhatardhari v. Bhagwan* [1904] 7 O. C., 187; or the latter has carried on *thakbust* proceedings in collusion with a co-sharer and in fraud of the plaintiff, *Brommo Moyee v. Koomodinee* [1872] 17 W. R., 466. See also *Natha v. Sadiq* [1900] P. R., No. 20 (adverse entry made in revenue register unknown to plaintiff or defendant); *Mahomed v. Kanizuk* [1874] 6 N. W. P. H. C., 231, F. B. (entry obtained by fraud); *Obhoya v. Mohesh* [1874] 23 W. R., 22. An abstract right (*e.g.*, to bathe at a *ghat*) cannot be declared, where no act of trespass on the defendant's part is alleged, *Shah Muhammad v. Kashi* [1884] 7

All., 199; *Mahomed v. Mangru* [1910] 7 I. C., 318 (Mahomedan's title to slaughter cows), *Ori v. Mohammad* [1914] 17 O. C., 354. So, where the mother of a Mahomedan girl has not infringed an uncle's rights as guardian, he cannot get a declaration of a right to dispose of the girl in marriage, *Jamnet v. Nowranga* [1876] P. R., No 42; nor a Hindu widow of her right to transfer property for necessary purposes, where the reversioners had not overtly disputed such right, *Manna Singh v. Bai Jan* [1904] 5 P. L. R., No. 76; nor a reversioner of his right to succeed a widow who has not done any act prejudicial to the plaintiff's right, *Muhammadi v. Jiwani* [1898] P. R., No. 42. Cf. *Raggu v. Itragulu* [1913] 17 I. C., 375. Distinguish *Kesho Ram v. Ram Kuar*, [1910] 7 A. L. J. R., 311 (widow's application for succession certificate opposed by reversioners). See also *Surat Municipality v. Chunilal* [1906] 30 Bom., 409.

interested to deny—Ante, 508; Government, where the plaintiff has been ordered under Cr. P.C., s. 133, to remove an alleged obstruction to a public way, *Secy. of State v. Jethabai* [1892] 17 Bom., 293; the Collector, where the plaintiff's title to revenue registry is in question, *Kalabariga v. Ravikanty* [1902] 19 M. L. J. R., 331; a purchaser at auction, in execution of a decree against a third party, of the plaintiff's property, *Shivram v. Jivu* [1888] 13 Bom., 34; a person who in proceedings to which the plaintiff was no party, has obtained a declaration that property claimed by the plaintiff belongs to him, *Govind v. Udai* [1870] 6 B. L. R., 320; or one who alleges a right to levy *mahsul* or *batai*, the liability to pay which the plaintiff disputes, *Bahadur v. Jiwan* [1899] P. R., No. 27. See also *Expln.*, post. *Digambar v. Secy. of State* [1912] 16 C. L. J., 381. The cloud in these cases may be only threatened, ante, 528. A zemindar who has obtained a decree for rent against plaintiff is not interested to deny that latter is tenant of land in dispute, *Nanji v. Umatul* [1912] 13 I. C., 40.

the Court—i.e., the Civil Court, unless its jurisdiction is taken away by some statute, expressly or impliedly, Act V of 1908, s. 9. *Rampal v. Balbhaddar* [1902] 25 All., 1, P. C. (Oudh Rent Act, 1886, s. 108, cl. 4); *Narasimma v. Suryanaraina* [1889] 12 Mad., 481 (Madras Rent Recovery Act, VIII of 1865); *Kalup v. Ramdein* [1888] 16 Cal., 117 (*butwara*, Act VIII of 1876, B. C.). *Uman v. Bhagwan* [1910] 7 A. L. J. R., 1064 (exclusive jurisdiction of Revenue Court). Where a tenancy is admitted, the Revenue Courts in the U. P. have exclusive jurisdiction to determine the nature of the tenancy, *Ajudhia v. Parmeshar* [1896] 18 All., 340, F. B., *Janki v. Salig* [1899] 2 O. C., 96, 99, *Bhawani v. Rup* [1899] 3 O. C., 87 (*contra*, *Sarabjit v. Madho*, [1898] 4 O. C., 180); otherwise, they have no such exclusive jurisdiction to decide as to the existence of a relation

of tenancy, *Raghubar v. Rampal* [1900] 3 O. C., 365, 370. Consider Agra Tenancy Act, s. 202. See also *Brij v. Durga* [1898] 20 All., 258 (rights *inter se* of Hindu co-parceners, tenants at fixed rates); *Mohammed v. Maheshur* [1901] 5 O. C., 118 (interpretation of decree under which a tenant holds). So the Civil Court cannot entertain a suit the object of which is to impugn the correctness of a partition made by Revenue authorities, *Gulab v. Sukhan* [1900] P. R., No. 104; or, their decision as Civil Court, *Rup Narain v. Badri* [1909] 12 O. C., 225. Cf. *Churaman v. Anup* [1882] 11 C. L. R., 533. In Bengal, persons recorded as tenure-holders without fixity of rent, may sue for declaration that record is wrong and they are *raiyats* with fixed rent, *Rameshar v. Raghunandan* [1910] 5 I. C., 266.

may--There is no absolute right to a declaration, *Puree v. Bykunt* [1868] 9 W. R., 380. It will be refused where a more convenient and regular mode of redress is open to the plaintiff, *Chandan v. Ram* [1885] 5 A. W. N., 293, *Poran v. Parbutty* [1878] 3 Cal., 612, *e.g.*, by way of proceedings in the execution department, *Jhari v. Ganga* [1885] 5 A. W. N., 215, *Mathewson v. Gobardhan* [1900] 28 Cal., 492; or, in the Rent Court, *Mahesh v. Chandar* [1889] 13 All., 17, F. B., *Maharaja of Benares v. Ramji* [1904] 1 A. L. J. R., 512, 27 All., 138, *Kanh Singh v. Dasaundha* [1876] P. R., No. 111; or, under the Indian Divorce Act, *Gasper v. Gonsalves* [1874] 13 B. L. R., 109; or, of an injunction, *Kunhamed v. Kutti* [1891] 14 Mad., 167. Ante, 526-7. So also where the plaintiff's object is to evade the stamp laws or eject or achieve some other purpose, under colour of a mere declaration of title, ante, 523-4; or, where the plaintiff's right is not definitely established, *Maina v. Brijomohun* [1890] 12 All., 587, P. C., or, is of a doubtful or speculative character, *Bhujendra v. Tirgunanath* [1882] 8 Cal., 761, 764, *Naipal v. Bachani* [1886] 6 A. W. N., 140, or, is too remote, *Anant v. Raghunath* [1882] 8 Cal., 769, P. C., *Manik v. Ganpata* [1880] 6 A. W. N., 22, *Lacho v. Asanand* [1882] P. R., No. 144, *Tara v. Chandi* [1908] P. L. R., No. 51. So also where an alleged customary right is uncertain or unreasonable, *Sonu v. Daryai*, [1896] P. R., No. 4, *Nur v. Mawaz* [1899] 1 P. L. R., 214, or, immoral, *Chinna v. Tegarai* [1876] 1 Mad., 168; or, the transaction complained of is, upon the plaintiff's own allegations, but a *brutum fulmen*, *Vijasamy v. Sasivarma* [1905] 28 Mad., 560, ante, 524, *e.g.*, a will by a limited owner, *Jaipal v. Indar* [1904] 26 All., 238, P. C., or, by a testator who may revoke it during his life-time, *Premdeo v. Gobind* [1873] P. R., No. 58. Mere apprehension that complications may arise in future, is not a proper ground for granting a declaratory decree, *Jamna v. Jagdeo* [1908] 6 A. L. J. R., 11; *Rajasingh v. Jhingrao* [1892] 6 C. P. L. R.,

51; and a declaration about a mere truism in law will be refused, *Narendra v. Basudeo* [1912] 14 I. C., 81. So also one about what is not in accordance with facts, *Dronan v. Chundri* [1911] 2 M. W. N. 174.

discretion—Ante, 519-22; s. 22, supra. In every cause, the Court must exercise a sound judgment as to whether it is reasonable under all the circumstances of the case to grant a declaration, *Noggendro v. Kishen Soondory* [1873] 19 W. R., 133, P. C., *Kotamarti v. Kotamarti* [1874] 7 Mad. H. C. R., 351, 356; and will grant it where it is in the interests of both parties that the declaration asked for should be made, *Bombay B. T. Corp. v. Smith* [1892] 17 Bom., 197. In fact, a strong case of inexpediency should be shown for refusing declaratory relief to classes of persons expressly recognised by the law as suitors for such relief, *Chandres v. Nand* [1894] 3 O. C., 336, 338; and the difficulties of the questions raised, the expense of the litigation, *Isri Dut v. Hansbutti* [1883] 10 Cal., 324, P. C. (not affg. 5 Cal., 512, 518), the improbability of the plaintiff's succeeding to the estate for many years to come, or the perishable nature of part of the property in dispute, are not in themselves sufficient grounds, *Upendra v. Gopee* [1883] 9 Cal., 817. But see *Doorga v. Doorga* [1878] 4 Cal., 190 (plaintiff's claim contingent on surviving defendant); *Bhupal v. Lachma* [1888] 11 All., 253 (gift by Hindu widow to her married daughter capable of bearing son). Mere lapse of time, short of limitation, is no ground for refusing a declaratory decree, *Athikarath v. Erathanikat* [1897] 21 Mad., 42, nor apparently the fact that the plaintiff has put forward an excessive claim; *Shewak v. Mohammad*, [1869] 3 B. L. R., A. C., 196, *Chinga v. Mangat* [1898] P. R., No. 3 (Rev.). Distinguish *Maina v. Brijmohan* [1890] 12 All., 587, P. C. The plaint should not be rejected without going into the question of plaintiff's possession and other merits of the cause, *Maluk v. Dasaundha* [1910] 129 P. L. R. For declaration in a suit for possession, see *Sant v. Deo* [1886] 8 All., 365; *Kali v. Golam* [1886] 13 Cal., 3, *Ghulam v. Muhammad* [1909] 31 All., 271; and for enhancement of rent, *Gunnes v. Rampria* [1879] 5 Cal., 53.

Appeal—The discretion exercised by a lower Court will not be lightly interfered with on appeal, ante, 530, *Pitche v. Maung* [1910] 8 I. C., 608, *Muhammad v. Munna* [1913] 17 I. C., 315, unless it has been exercised wholly arbitrarily and in a manner grossly inconsistent with judicial principles, *Sant v. Deo* [1886] 8 All., 365; *Muhammad v. Khuda* [1887] 9 All., 622, or the Court has abstained from going into the merits of case, *Jhanda v. Ramji* [1895] 15 A. W. N., 148, or has decided them wrongly, *Ramanand v. Raghunath* [1882] 8 Cal., 769, P. C. Where first Court granted declaration, appellate Court refused

to interfere, merely because from the plaint, apart from the written statement, no hostility on defendant's part was shown, *Sailendra v. Karali* [1905] 2 C. L. J., 534. Where a defendant confessed judgment and did not appeal, appellate court did not interfere at the instance of other defendants, *Malik v. Fateh* [1913] 80 P. L. R.

make a declaration—Not a decree for possession where not claimed, *Fazal v. Amir* [1911] 199 P. L. R. Suit dismissed where proper parties not impleaded, *Manindar v. Annoda* [1912] 15 I. C., 586 (Putni Reg. VIII of 1859). A declaratory decree is not executable, ante, 534, it merely confirms a pre-existing title, ante, 26, *Amrit v. Roop* [1870] 2 N. W. P. H. C., 459; and possession cannot be obtained under it, *Jeorakhan v. Thakooree* [1870] *ibid*, 303. Cf. *Lakshmi v. Marudevi* [1911] 21 M. L. J. R., 1063; *Fateh v. Menghi* [1913] 109 P. R. (lien created by decree). The existence of a declaratory decree will not bar a subsequent suit for injunction founded on a later act or obstruction, *Ghulam v. Sher* [1882] P. R., No. 111. See also *Kalidhun v. Shiba* [1882] 8 Cal., 483, F. B. (second suit for accounts).

He—that is, plaintiff, to ascertain whose rights defendant's right may be enquired into, but the latter cannot get a declaration, *Katala v. Katala* [1910] 8 I. C., 567.

so entitled—A declaration cannot be given on a title neither stated in the plaint nor raised on the issues, *Somasundaram v. Vadivelu* [1908] 31 Mad., 531; *Shiro v. Govind* [1877] 2 Cal., 418.

ask for any further relief—A plaintiff alleging title and possession may not ask for a declaration as to his possession only, there being a further dispute between the parties as to the title, *Muta Ali v. Mehtab* [1892] P. R., No. 48. But person dispossessed of land, ought to sue for declaration of title and recovery of possession with *mesne profits*, and not merely for *mesne profits*, *Giri v. Modhu* [1913] 17 C. W. N., 324.

Proviso : Principle—To avoid a multiplicity of suits, a plaintiff entitled to an executory decree should ask directly for one, ante 509. *Allagappa v. Nazamat* [1908] 4 L. B. R., 263.

Scope—*Deokali v. Kedar* [1912] 39 Cal., 704. The proviso does not apply where the suit is not brought under s. 42; e.g., where it is one under Act V of 1908, s. 92, *Neti v. Venkatacharulu* [1902] 26 Mad., 450, or *ibid*, Sch. I, Or. 21, r. 63; see cases cited under *Similar Law*, supra; *Sahib v. Lajpat* [1912] P. R., No. 12 (Civ.); L. B. R. (1893-1900), 410, 480. *Baktawar v. Bhuban* [1913] 17 C. L. J., 468, (s. 83, Act XVIII of 1881, C. P.) So where the suit is for specific performance of an award, *Sheodin v. Godhi*

[1908] 4 N. L. R., 14. Distinguish *Mankuar v. Tara* [1885] 7 All., 583; *Tulsha v. Mahadeo* [1898] 1 O. C., 272, 280; *Sadhu v. Ram* [1892] 16 Bom., 608; *Fulkumari v. Ghanshyam* [1903] 31 Cal. 511. See also *Kalova v. Padapa* [1876] 1 Bom., 248 (suit to set aside adoption); *Raghunath v. Saroshkama* [1898] 23 Bom., 266 (release of goods wrongfully seized). Suit not barred, where real object not merely to get a declaration, but also to protect present interest of plaintiff, *Ramnandan v. Sheoparsan* [1910] 11 C. L. J., 623.

shall make any such declaration—The Court is not authorised to dismiss the suit altogether, *Kunj v. Keshavlal* [1904] 28 Bom., 567, but may grant other relief, *Sakharam v. Secy. of State* *ibid*, 332; ante, 512-3; or permit amendment of the plaint, ante, 530; *Ganga v. Ganga* [1909] 6 A. L. J., 43. The dismissal of a suit under the proviso does not raise the bar of C. P. C., Sch. I, Or. 2, r. 2, ante, 532, *Tulsi v. Ganga* [1876] 1 All., 252; *Jibunti v. Shib* [1882] 8 Cal., 819; *Nonoo v. Anand* [1885] 12 Cal., 291; *Mohan v. Bilaso* [1892] 14 All., 512; *Narayan v. Bhimaji*, [1910] 6 I. C., 926; *Bande v. Gokul* [1912] 34 All., 172 (principle applied, where prior suit for injunction having been dismissed by reason of plaintiff not being in possession, subsequent suit for possession was held not barred, *sed quare*). Cf. *Kalidhun v. Shiba* [1882] 8 Cal., 483, F. B.; *Abid v. Asuda* [1910] 6 I. C., 696; *Siliman v. Bontala* [1913] 25 M. L. J. R., 125. Distinguish *Anli v. Thatha* [1887] 10 Mad., 347 (partition after declaration.)

being able—at the date of the institution of the suit, *Govinda v. Perumdevi* [1888] 12 Mad., 136, *Wamanrao v. Rustamji* [1896] 21 Bom., 701; *Surjan v. Baldeo* [1900] 20 A. W. N., 172, *Ram v. Ram* [1903] 26 All., 215; and in the Court where it is instituted, ante, 510-11, *Gopal v. Shewag* [1899] P. R., No. 12; *Rugunath v. Rahiman* [1912] 14 I. C., 776 (s. 53, Act XVI of 1887, Punjab); *Raghubar v. Mahesh* [1913] 20 I. C., 147. Cf. *Chandu v. Chatta*, [1878] 1 Mad., 381; *Kali v. Golam* [1886] 13 Cal., 3, 11. The inability, or impossibility, of obtaining further relief is no bar to a suit for a mere declaration, *Chedi v. Dy. Comr.*, *Bahraich* [1894] 3 O. C., 351; *Birangi v. Ram* [1887] 7 A. W. N., 103; *Satish v. Satya* [1910] 14 C. W. N., 576. Otherwise, when the plaintiff is in a position to sue for consequential relief, *Darbo v. Kesho* [1879] 2 All., 356, F. B., *Chakka v. Mad-dali* [1905] 29 Mad., 298; *Appu v. Perumal* [1912] 23 M. L. J. R., 118 (plaintiff entitled to possession only in alternate years).

further relief—appropriate to and consequent on the right or character asserted, ante, 510, *Aisa v. Bidhu* [1913] 17 C. L. J., 30, *Erfan v. Samiruddin* [1912] 15 I. C., 552; *Amin v. Sant* [1913] 18 P. R., [1913]; and obtainable as against the

defendant in the suit, ante, 509 ; *Ramaswami v. Muniandy* [1910] 5 I. C., 343, *Malaiya v. Tirumalaperumal* [1911] 21 M. L. J. R., 1022, *Jagannath v. Tirguna* [1915] 13 A. L. J., 252 not alternative, *Jodha v. Budha* [1890] P. R., No. 35, or auxiliary, equitable, relief, which is optional with, *Kannan v. Krishnan* [1890] 13 Mad., 324, 331, *Ganga v. Tapesbri* [1904] 26 All., 606, *Amin v. Sant* [1913] P. R., No. 18 (cancellation of deed), or not necessary for, the plaintiff to claim, *Gour v. Dinonath* [1897] 25 Cal., 49, *Chinnappa v. Thulasi* [1904] 15 M. L. J. R., 399, *Sunder v. Ram* [1906] 3 A. L. J. R., 316 ; ante, 510-11, *Kamira v. Lalu* [1912] P. R., No. 110. Cf. *Bhujawan v. Nanha* [1882] 2 A. W. N., 73, *Rameharen v. Durga* [1884] 4 A. W. N., 78 (mortgagor not compelled to sue for redemption) ; *Fischer v. Secretary of State* [1898] 22 Mad., 270, P. C. (declaration that an order of Government was *ultra vires* was sufficient to maintain the original order of a Collector under Madras Act 1 of 1876). *Maung v. Ma Lun*, [1912] 11 I. C., 855 (owner need not sue for cancellation of mortgage by person in possession). A person in possession need not ask for maintenance of possession, *Bholai v. Raghubans* [1881] 1 A. W. N., 60, *Narasimma v. Raghupati* [1883] 6 Mad., 176, and if his possession is wrongfully disturbed, an injunction may be sufficient to meet the case, *Ismail v. Mahomed* [1893] 20 Cal., 834, P. C., *Hari v. Lachmi* [1882] P. R., No. 1, unless there has been an ouster, when recovery of possession must also be prayed for, ante, 516-9 ; *Harnam v. Sundar* [1881] P. R., No. 73, *Baikunt v. Hukam* [1877] P. R., No. 53. But order under s. 145, C. P. C., does not necessarily result in actual dispossession. *Jhuman v. Debu* [1913] 16 I. C., 898. The plaintiff's possession may be constructive, and not physical, e.g., the property may be in the actual possession of all the co-parceners in a Hindu joint family, *Bhagwan v. Mitturjeet* [1872] 17 W. R., 169, or of the *karnavan* of a Malabar *tarwad*, *Padamma v. Themana* [1894] 17 Mad., 232, or of mortgagees and tenants, *Abdul v. Sahib* [1908] P. R., No. 5, or of tenants, *Abdul v. Sahib* [1912] 13 I. C., 947, *Murdin v. Asha* [1913] 20 I. C., 660, ante, 513 (but see *Radha v. Juggernath* [1870] 14 W. R., 183, *Narayana v. Shankunni*, [1891] 15 Mad., 255, or of a servant, *Jenardana v. Badava* [1899] 23 Mad., 385, or in *custodia legis*, ante, 515. Attachment is not tantamount to dispossession, *Narayanrao v. Balkrishna* [1880] 4 Bom., 529, F. B., but the delivery of symbolical or formal possession operates as a complete transfer of possession, *Krishnabhupati v. Ramamurti* [1894] 18 Mad., 405, ante, 41-2. A second negative declaration is not relief consequential on the first, *Jagat v. Secretary of State* [1908] 13 C. W. N., lviii. Further relief that the plaintiff may and ought to ask for : possession, ante, 516-8, *Ishwari v. Narain* [1914] 36A, 314 ; *Ara v. Puthen* [1891] 1 M. L. J. R., 227, *Nataraja v. Kolandavelu*,

[1905] 15 *ibid*, 456 (joint possession), *Deivasikamani v. Subbiah* [1909] 5 M. L. T., 224, *Rathnasabapathy v. Ramasami* [1910] 33 Mad., 452 (joint possession); injunction, *Deokali v. Kedar* [1912] 39 Cal., 704. *Ramanadhan v. Annamalai* [1915] 29 I. C., 132 ante, 518-9, *Ghulam v. Abiden* [1886] P. R., No. 125; [1903] 2 L. B. R., 124, *Muniswamy v. Murugappa* [1910] 7 M. L. T., 45. [But no relief beyond a declaration of title can be obtained in suit for determination of title arising out of partition proceedings under Punjab Land Revenue Act, *Lachmi v. Hondi* [1913] 100 P. R., 1913]; partition, ante, 518, *Bairjnath v. Lachman* [1885] 7 All., 888, 20 M. L. J. R., 759; *Ramchand v. Radha* [1882] P. R., No. 63; decree for sale of mortgaged property, *Lekhraj v. Abdul* [1894] 14 A. W. N., 205, *Narna v. Rudravaram* [1912] M. W. N., 414; rendition of accounts, *Bai Anope v. Mulchand* [1885] 9 Bom., 355; decree for money, ante, 518-9, *Launkra v. Moher* [1884] P. R., No. 93. (but not for arrears of rent, *Somkali v. Bhairo* [1882] 5 All., 55, ante, 515). *Bhan Pratab v. Bisheshar* [1906] 9 O. C., 232 (arrears of revenue). A prayer for confirmation of possession is a prayer for consequential relief, *Jhuman v. Debu* [1912] 16 I. C., 898. A plaintiff asking for a declaration that a decree was obtained by fraud, should also ask for the setting aside of the decree or an injunction against its execution, *Thakur v. Punkal* [1907] 8 C. L. J., 485; distinguish *Umrao v. Hardeo* [1907] 29 All., 418. Cf. *Phulwa v. Jaimal* [1909] 6 A. L. J., 103, *Nanji v. Umatul* [1912] 13 I. C., 40.

Practice: Amendment of plaint, ante, 530; where dis-possession *pendente lite*, *Ananda v. Daje* [1909] 36 Cal., 726. Plaintiff not allowed to vary cause of action. *Re Velappa* [1912] M. W. N. 196; but relief may be amended, *Dronan v. Chundri* [1911] 2 M. W. N., 174 (rectification for declaration). *Appeal*, a plea based on the proviso should be raised in the first Court, and will not be entertained if taken for the first time in a Court of first, *Limba v. Rama* [1888] 13 Bom., 548, *Chomu v. Umma* [1890] 14 Mad., 46, or second appeal, *Sarasuti v. Mannu* [1879] 2 All., 134, *Harnandan v. Bhupendar* [1901] 4 O. C., 207, 209, *Baikunt v. Hukam* [1877] P. R., No. 55; Nor should an Appellate Court raise the plea *suo motu*, *Rugunath v. Rahiman* [1912] P. R., No. 23 (Civ.). Amendment was allowed in second appeal in *Thakur v. Punkal*, *supra*. It was refused in *Appu v. Perumal* [1912] 23 M. L. J., 118. Original Court should decide whether plaintiff should be allowed an opportunity to amend [1911] P. R., No. 1.

omits to do so—*Bikuthi v. Kalendan* [1890] 14 Mad., 267; ante, 512.

trustee—Ante, 504.

III.(a)--Exercise of the alleged easement is present detriment to A's right. Cf. *Chuni v. Ram* [1888] 15 Cal., 460, F. B.; *Megha v. Shadi* [1890] P. R., No. 34, F. B.; *Mahomed v. Dilbar* [1902] 5 C. W. N., 285; *Rajnaraian v. Ehadasi* [1899] 27 Cal., 793.

III.(b)--*Fletcher v. Rogers*, [1853] 10 Hare, Ap. xiii. Cf. *Srinibash v. Monmohini* [1906] 3 C. L. J., 224.

III.(c)--Cf. I. C. A., s. 29. *Fyfe v. Arbuthnot* [1857] 1 DeG. & J., 406.

III.(d)--Ante, 498, 634; *Hira v. Dhana* [1876] P. R., No. 112. Where there is fraud, the reversioner may also have the property reduced into possession of the life-tenant, *Sachit v. Budhua* [1886] 8 All., 429, *Adi Deo v. Dukharan* [1883] 5 All., 532.

III.(e)--Ante, 500-1; *Kashar v. Rathore* [1883] 7 Bom., 289, 291; the right of suit is not limited to the presumptive reversioner alone, *Govinda v. Thayammal* [1904] 28 Mad., 57; but the Court may refuse a declaration, when the plaintiff's title is remote, *Ramabai v. Rangrav* [1894] 19 Bom., 614, or doubtful, *Chhotu v. Sheobarte* [1901] 5 C. W. N., 445.

legal necessity--Sarkar, *Hindu Law*, 304-5.

void beyond the widow's lifetime--Mayne, *H. L.*, s. 651.

III.(f)--Question of status. Ante, 500-1, 639, 508; *Kalova v. Padapa* [1876] 1 Bom., 248. But a stranger cannot sue, *Brojo v. Sreenath* [1868] 9 W. R., 463.

III.(g)--Cf. *Narasimma v. Raghupathy* [1883] 6 Mad., 176; *Ramanuja v. Devanayka* [1885] 8 Mad., 361, 364.

III.(h)--Question of status. Evidence may be lost. Cf. *Qamar Ara v. Peare* [1898] 2 O. C., 57, 58, *Jagat Singh v. Jit Singh* [1876] P. R., No. 41. For the English law, Stokes refers to 21 & 22 Vict., c. 93; 22 & 23 Vict., c. 61, s. 7; 44 & 45 Vict., c. 68, s. 9, 1 A.-L. Codes, 980.

Effect of
declaration.

43. A declaration made under this Chapter is binding only on the parties to the suit persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Illustration.

A, a Hindu, in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized, and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

Principle—In an action to quiet title, all matters affecting the title of the parties to the action may be litigated and determined, and the judgment therein is final and conclusive, 2 Black, *Judgments*, s. 664, but the doctrine of *res judicata* holds only in respect of judgments *inter partes*, under the conditions formulated in Act V of 1908, s. 11. Ante, 520-2. Caspersz, *Est.*, 4th ed., pt. 2, 584-7. But a judgment which is neither *in rem* nor *res judicata* may be admissible in evidence under I. Ev. A., s. 13, *Dinomoni v. Brojomohini* [1901] 29 Cal., 187, P. C. Ameer Ali & Woodroffe, *Ev.*, 71-84.

Similar Law—Cf. I. Ev. A., ss. 40-3.

binding—even though proceeding upon an erroneous view of the law, *Kaveri v. Sastri* [1902] 26 Mad., 104, 106.

only on the parties—and not strangers, *Wise v. Sunduloonissa* [1867] 11 M. I. A., 177, 180; *Ramlal v. Secretary of State* [1881] 7 Cal., 304, 317, P. C.; *Jaipal v. Indar* [1904] 26 All., 238, 243, P. C., *Razeekour v. Zalim* [1866] P. R., No. 29; *Sohel v. Sadi* [1888] P. R., No. 99. Distinguish *Rampal v. Ram Prasad* [1904] 27 All., 37, P. C.; *Peari v. Durlavi* [1913] 20 I. C., 815. As to what constitutes privity, see 2 Black, *op. cit.*, s. 549.

parties claiming—Reversioners are bound by a decree fairly and properly obtained against a female heiress completely representing the estate, *Katama v. Shivaganga* [1863] 9 M. I. A., 543, 608; Mayne, *H. L.*, s. 652.

III.—Question of status. Cf. *Wise v. Sunduloonissa*, *supra*; *Gatha v. Moohita* [1875] 23 W. R., 179.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appoint-
ment of Re-
ceivers dis-
cretionary.
Reference
to Code of
Civil
Procedure.

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure.

Principle—Relief granted *quia timet*, the object being to secure the preservation of property to its appropriate uses and ends by taking it into the custody of the Court, pending litigation concerning it. Ante, 29.

Receiver—For definition, see ante, 29. Ordinarily, a party to a litigation should not be appointed a Receiver, *Suprasanna v. Vupendra* [1914] 18 C. W. N., 533. May be appointed by a Magistrate where there is dispute as to immoveable property, and the Magistrate attaches the subject of dispute, Cr. P. C., s. 146 (2), and the Civil Court should ordinarily continue him, *Bidya v. Asrafi* [1913] 40 Cal., 862. A common manager under s. 95, Act VIII of 1885 (B. C.), holds an analogous position, *Naba v. Atul* [1913] 40 Cal., 150, but pendency of application for appointment of such manager before District Judge does not preclude a Subordinate Judge from appointing a Receiver in a proper case, *Jibanessa v. Majidunnessa* [1913] 17 C. W. N., 581.

pending a suit—Ante, 545. Under C. P. C., a receiver may be appointed either before or after decree, Act V of 1908, Sch. I, Or. 40, r. 1. But an appointment pending a suit is not necessarily put an end to by the decree, ante, 577-9, and the appointment may even be permanent, *Umamba v. Dipamba* [1895] 19 Mad., 120, P. C. For a receiver appointed under Act III of 1907, see *Hanseswar v. Rakhal* [1913] 18 C. L. J., 359; *Anand v. Ganesh* [1913] 40 Cal., 678. A receiver may be appointed even after the sale of mortgaged properties in execution, *Madheswar v. Mahamaya* [1911] 13 C. L. J., 487.

discretion—S. 22 ante, 2 Story, *Eq.*, ss. 831, 834-8, exercised with great care and caution, upon a view of the whole circumstances of the case, including those connected with the right asserted and to be established, *Siddheshwari v. Abhoyeswari*,

[1888] 15 Cal., 818, *Jiwani v. Labhu* [1908] P. R., No. 107; ante, 546-51. Cf. *Mohammad v. Amar* [1913] 16 O. C., 238. The applicant has to establish a good *prima facie* title, *Chandidat v. Padmanand* [1895] 22 Cal., 459, and unrighteousness on the part of the opposite side, e.g., gross waste of the subject-matter of litigation, *Siaram v. Mohabir* [1899] 5 C. W. N., 362, or misappropriation, *Hanumayya v. Venkata* [1894] 18 Mad., 23, or removal under suspicious circumstances, *Sham v. Ram* [1894] 5 C. W. N., 365. The safe rule, is that, without some substantial ground, no receiver should be appointed to supersede a *bona fide* possessor, *Mathura v. Shiddolal*, 14 C. W. N., 252. Mere poverty or insolvency of the defendant is no ground, *Sivaji v. Aiswari* [1915] 29 I. C., 485. So, where it appears to the Court to be *just and convenient*, Act V of 1908, Sch. I., Or. 40, r. 1 (also see Halsbury 17, p. 202). It may appoint a receiver in respect of mortgaged property, which is not likely to fetch a good price at a forced sale, *Latafut v. Anunt* [1896] 23 Cal., 517; or, in respect of property held by tenants, who may be exposed to a double claim by reason of the defendant being apparently without any title, *Sangappa v. Shivbasawa* [1899] 24 Bom., 38. But, if other remedies are available, an order for a receiver will not be made, *Manchester Banking Co. v. Parkinson* [1889] 22 Q. B. D., 173.

the Court—in which the suit is pending or to which an appeal may be taken from it, Act V of 1908, Sch. I., Or. 43, r. 1(s). A Civil Court has no power under Order XL of C. P. C. to supersede a receiver appointed by the Magistrate under section 146, clause 2 of the Code of Criminal Procedure, *Bidya v. Ashrafi* [1913] 40 Cal., 862.

mode—Act V of 1908, Sch. I., Or. 40, r. 1, 5. For the *old law*, see ante, 581-3. As to the jurisdiction of the High Court, see *Jaikisondas v. Zenabai* [1890] 14 Bom., 431; ante, 545-6.

effect of appointment—is to place the property in *custodia legis*, Ante, 558-9, 561, but not to prejudge the case, *Satya v. Keshabati* [1914] 18 C. W. N., 537. As to rights of stranger claiming under title paramount, see *Hudson v. Morgan* [1909] 36 Cal., 713; he interferes with the receiver at peril, and if dispossessed, should apply to the Court for redress, *Ray Chaudhuri v. Noliniprokas* [1914] 18 C. W. N., 289. An attachment of property in the receiver's hands, without the sanction of the Court which appointed him, is therefore improper and irregular, *Mahommed v. Mahommed* [1893] 21 Cal., 85, *Kahn v. Ali* [1892] 16 Bom., 577. Distinguish *Jogendra v. Debendra* [1898] 26 Cal., 127. In a suit for partition, the receiver may be put in possession of the entire estate, and he may raise money on its security, *Poreshnath v. Omerto* [1890] 17 Cal., 614.

rights—Ante, 566-73 ; a receiver is an officer of the Court, and he is entitled to his costs, charges and expenses properly incurred, *Balaji v. Ramchandra* [1894] 19 Bom., 660. As to suits by and against receivers, see ante, 562-7 ; *Krishtu Chandra v. Krista Sakha* [1908] 36 Cal., 52.

powers—similar to those of an owner, such as the Court may invest him with, ante, 568-70 ; Act V of 1908, Sch. I, Or. 40, r. 1 ; *Tiel v. Abdool* [1872] 19 W. R., 37 ; *Gopalasami v. Sankara* [1885] 8 Mad., 418 ; *Manick v. Surrut* [1895] 22 Cal., 648. Sale under C. P. C., s. 356 ; *Piare v. Ganeshi* [1909] P. R., No. 46. He can continue suit instituted by insolvent after adjudication, *Ramasami v. Pavadai* [1914] 23 I. C., 813.

duties—Ante, 573-6 ; Act V of 1908, Sch. I, Or. 40, r. 3. In all important matters a receiver should apply for and obtain the direction of the Court, *Balaji v. Ramachandra*, supra.

liabilities—Ante, 575-7 ; Act V of 1908, Sch. I, Or. 40, r. 3 (d), 4 ; *Balaji v. Ramchandra*, supra ; *Orr v. Muthia* [1894] 17 Mad., 501 ; *Muthia v. Orr* [1897] 20 Mad., 224. *Baroda v. Rashmani* [1915] 20 C. L. J., 113. Cf. Trusts Act, ss. 46-54. For removal of receiver, see *Ranganuyagammal v. Mahali* [1909] 4 L. B. R. 356.

Code of Civil Procedure—Act V of 1908, Sch. I, Or. 40. See Appendix F.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Scope—This summary remedy is provided in substitution for the writ of *mandamus* which, under 13 Geo. III., c. 63, the old Supreme Courts of the three Presidency towns in British India, as offshoots of the Court of King's Bench in England, had jurisdiction to issue, a jurisdiction which was preserved in favour of the original side of the High Courts in those towns subsequently established under 24 & 25 Vict., c. 104, by their respective Letters Patents. *Queen v. Clarke* [1862] 1 Ind. Jur., O. S., 137; *Regina v. E. I. Ry. Co.* [1866] 1 *ibid.* N. S., 244; *Queen v. Justices of the Peace for Calcutta* [1867] 2 *ibid.* 152; *Re Toolsee Dass* [1867] 7 W. R., 228; *Justices of the Peace for Calcutta v. Oriental Gas Co.* [1872] 17 W. R., 364; *Albert Mills Co. v. Shivji* [1872] 9 Bom. H. C., 438; *Ex parte Varadarajulu* [1862] 1 Mad. H. C., 66. Ante, 536.

Similar Law—For the (English) Common Law prerogative writ of *mandamus*, see 3 Stephen, *Com.*, 686; 8 *Encyc. Law Eng.*, 523 sqq.; ante, 535. See also Common Law Procedure Act, s. 68.

45. Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature :

Power to order public servants and others to do certain specific acts.

Scope—Ante, 536. The jurisdiction is limited to the High Courts in the three Presidency towns. The High Court at Allahabad has no ordinary original civil jurisdiction, much less the unchartered Chief Courts and Judicial Commissioner's Courts. All these Courts, however, may issue injunctions, as part of the remedy in a regular suit, against public bodies, like municipal boards, *Ganga v. Munl. Bd. of Cawnpore*, [1897] 19 All., 313, *Strachey v. Munl. Bd. of Cawnpore* [1899] 21 All., 348.

an order—made upon motion, *Gell v. Taja Noora* [1903] 27 Bom., 307, and not a decree in a suit, *Strachey v. Munl. Bd.*, supra.

specific act—of public duty, *E. v. Bank of England* [1819] 2 B. & Ald., 622; e.g., the admission or restoration to a public office or franchise or academical degrees, the production, inspection or delivery of public books and papers, the surrender of the regalia of a corporation, or the affixing by a body corporate of its common seal, the holding of a Court, the proceeding to an election, etc., 3 Stephen, *Com.*, 687. Cf. *Vellai v. Court of Wards* [1910] 7 M. L. T., 73.

within the local limits—no order can be issued under this section outside these limits, *Moran v. Motihari Municipality* [1889] 17 Cal., 329.

ordinary original civil jurisdiction—But the High Court on the appellate side may, in the exercise of its powers of superintendence under 24 & 25 Vict., c. 104, s. 15, compel a lower Court to do its duty by a proceeding in the nature of a *mandamus*, *Girdhari v. Hurdeo* [1876] 26 W. R., 44, P. C.

person holding a public office—except those crown officers who are mentioned in cl. (f) and (g) *infra*, e.g., a commissioner of police, collector, municipal commissioner, or a board of examiners, ante, 538-9. Cf. *Re Shah Callander* [1866] 1 Ind. Jur., N. S., 263 (registrar).

corporation—e. g., a Municipality, *Munl. Comrs. v. Branson* [1881] 3 Mad., 201; *Re Jogendro Mukhuti* [1908] 36 Cal., 271; *Bholaram v. Corp. of Calcutta* [1909] *ibid*, 671; *Re Nisith Sen* [1912] 39 Cal., 754.

inferior court—e.g., a Court of small causes, *Re Toolsee Doss Seal* [1867] 7 W. R., 228, *Re Sharafly* [1910] 34 Bom., 649; or, a Presidency Magistrate, *Bank of Bengal v. Dinonath* [1881] 8 Cal., 166. Cf. *Brommo v. Anund Moyee* [1867] 7 W. R., 316; *Re Adhur Shah* [1873] 11 B. L. R., 250; *Malcolm v. Gasper* [1877] 2 Cal., 278. The object of the writ to inferior Courts is not only to restrain their excesses, but also to quicken their diligence and obviate a denial of justice, 3 Stephen, *Com.*, 688.

Provided—

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

provided—the remedy being of an extraordinary character, the right to it is carefully restricted, ante, 536-7, 543. *Shiva v. Soma* [1883] 7 Bom., 341, 370, F. B. *In re Vijiaraghavalu* [1914] 26 M. L. J., 510.

application—to be made by motion, and not by petition, *Gell v. Taja* [1903] 27 Bom., 307; and to be supported by an affidavit, s. 46, post.

person whose property...would be injured—The petitioner must have a real interest in requiring the duty to be performed, *R. v. Mayor of Peterborough* [1875] 44 L. J. Q. B., 85.

personal right—not a private right *in personam*, but one qualifying for some public office, capacity or distinction, ante, 536, 538, *e.g.*, fitness to appear at a public examination, *Re Rudra Roy* [1901] 28 Cal., 479, or to be elected a municipal commissioner, *Re Rajendra* [1892] 19 Cal., 195, 198.

(b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

clearly—An extraordinary remedy will not be granted to enforce a legal duty which is not beyond dispute, ante, 539. Where the duty is conditional on the approval of another person or body being obtained, there is no right to the writ, until such approval has been given, *R. v. St. Lukes* 31 L. J., Q. B., 50, *Re Rasul* [1914] 18 C. W. N., 430.

incumbent—not merely discretionary, or optional, *Re Mutty Ghose* [1892] 19 Cal., 192, *Munl. Comrs. v. Branson* [1881] 3 Mad., 201, *Ismail v. Munl. Comr.* [1903] 28 Bom., 253; *Re Kesho Prasad* [1911] 38 Cal. 553. Ante, 539-40, 542. The granting of a license, *Rustom v. Kennedy* [1908] 26 Bom., 396, *Re Hassam* [1902] 4 Bom. L. R., 773, *Gell v. Taja* [1903] 27 Bom., 307, or the cancellation of a notice, *Re Tarabai* [1905] 7 Bom. L. R. 161, may be a legal obligation on a public officer; ante, 539. Cf. *Queen v. Justices of the Peace* [1867] 2 Ind. Jur., N. S., 182 (maintenance of tank.)

corporation—for acts *ultra vires* of corporations, see ante, 540-1. Cf. *Reg. v. E. I. Ry. Co.* [1866] 1 Ind. Jur., N. S., 258; *Albert Mills Co. v. Shivji* [1872] 9 Bom., H. C. R., 438; *Kameshwar v. Bhabua Munic.* [1900] 27 Cal., 849.

corporate character—No protection will be granted against a corporation where the act complained of will not be enjoined if committed by an individual defendant, *Shepherd v. Trustees of Bombay Port* [1876] 1 Bom., 132 (case of libel, *qq.* as to actual decision.)

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

Principle—An extraordinary remedy will not be granted, unless demanded by justice. Ante, 536-7.

consonant to right and justice—3 Stephen, *Com.*, 686. *Re Romesh Sen* [1912] 39 Cal., 598 (settlement of electoral roll under Calcutta Municipal Act). Relief refused where applicant did not come with clean hands, *Board of Examiners v. Provas*, [1913] 40 Cal., 588.

(d) that the applicant has no other specific and adequate legal remedy ; and

Principle—An extraordinary remedy cannot be resorted to when it is not really needed.

English Law—If the applicant may maintain an action at law he cannot have the writ ; otherwise, if the opposite party can only be indicted, *R. v. Severn Ry. Co.* [1819] 2 B. & Ald., 646. But see *R. v. Jeyes* [1835] 3 Ad. & E., 416. 8 *Encyc.*, *L. E.*, 529-31.

no other specific and adequate legal remedy—*Bank of Bengal v. Dinonath* [1881] 8 Cal., 166 ; *Re Bombay E. I. Co.* [1892] 16 Bom., 398 ; *Re Kesho Prasad* [1911] 38 Cal., 553 (execution of decree) ; ante, 540. *R. v. Stepney Borough Council* [1902] 1 K. B., 317.

(e) that the remedy given by the order applied for will be complete.

Principle—An extraordinary remedy will be granted only where necessary and effective, 8 *Encyc. L. E.*, 531. *Semble*, the existence of an easier remedy under this chapter does not apparently bar a suit for specific performance. But in England, see *Leominster Canal Co. v. Shrewsbury Ry. Co.* [1857] 3 K. & J., 654. 1 Stokes, *A.-I. Codes*, 981.

Exemptions
from such
power.

Nothing in this section shall be deemed to authorize any High Court—

(f) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal ;

(g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown ; or

(h) to make any order which is otherwise expressly excluded by any law for the time being in force.

Scope—The extraordinary jurisdiction is not to be exercised against the Crown as represented by certain privileged officers, as also in the matter of claims made upon it. Nor should an

illegal order be passed under cover of this extraordinary jurisdiction. Ante, 537-8.

Similar Law—21 Geo. III, c. 70, s. 8 (revenue). 8 *Encyc. L. E.*, 537.

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Application
how made.

Procedure
thereon.

If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Order in
alternative.

Procedure—*Re Kesho Prasad* [1911] 38 Cal., 553; failure to implead party, whose interest will be affected, fatal to application, *ibid.* Application not maintainable where provisions of ss. 45 and 46 disregarded, *Board of Examiners v. Provas* [1913] 40 Cal., 588.

Title to property will not be tried in *mandamus* proceedings, *re Kesho Prasad* (1911) 38 Cal., 553.

47. If the person, Court or corporation, to whom or to which such order is directed, makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Peremptory
order.

Procedure—Ante, 537-8.

peremptory order—A *peremptory mandamus* in England is a second *mandamus* which issues where the return which has been made to the first writ, is found either insufficient in law or false in fact. To this writ no other return will be admitted, but a certificate of perfect obedience and due execution. Wharton, *Lex*.

48. Every order under this Chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

Execution
of, and
appeal from,
order.

every order—whether made before or after cause shown.

may be appealed from—alters old law, as expounded

in *Justices of the Peace v. Oriental Gas Co.* [1872] 8 B. L. R., 433.

Costs.

49. The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

Bar to issue
of *mandamus*.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

Object--to abolish the writ of *mandamus*, inasmuch as a substitutionary remedy is given by ch. viii; ante, 536. The alteration, however, is not of substance but of form, Mukhopadhyaya, 146.

Power to
frame rules.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this Chapter; and, until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this Chapter.

rules—See App. D, post.

PART III.

OF PREVENTIVE RELIEF.

Ante, 22, 588-90, 27. *Definition*, s. 6, ante.

CHAPTER IX.

ON INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive
relief how
granted.

discretion.—S. 22, ante; *Callianji v. Narsi* [1894] 18 Bom., 702, 715 [1895] 19 Bom., 764; ante, 595-6, 603, 659. *Bhabikan v. Chakradar* [1911] 9 I. C., 227.

the Court—need have jurisdiction only over the person of the defendant, *Baban v. Nagu* [1876] 2 Bom., 19.

injunction.—defined, ante, 27; operates *in personam*, *Appu v. Raman* [1891] 14 Mad., 425, *Venkatesa v. Ramasami* [1895] 18 Mad., 338; and does not run with the land, *Dahyabhai v. Bapalal* [1901] 26 Bom., 140; *Jamsetji v. Hari* [1907] 32 Bom., 181; ante, 613, 668. Cf. *Raja v. Dharam* [1905] 2 A. L. J. R., 601.

temporary or perpetual—defined in s. 53, post.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Temporary
injunctions.

Similar Law—German Code Civ. Proc., s. 935: “Temporary injunctions, concerning the object of litigation, may be issued, if there is any danger that by a change of the actual situation the enforcement of the right of one of the parties would be prevented or made subject to grave difficulties.” See also s. 940. Cf. C. P. C., s. 94(a), *Sito v. Christian* [1913] 17 C. W. N., 318.

temporary injunctions—Ante, 590-601; the Court interferes to prevent serious, if not irreparable, mischief pending decision of the legal right, and maintains the subject-matter

in *statu quo* until final decree, if satisfied that there is a *bonâ fide* contention between the parties, *Gomes v. Carter* [1866] 1 Ind. Jur., N. S., 411; *Nusserwanji v. Gordon* [1881] 6 Bom., 266; *Chandra v. Sree Gobind* [1900] 6 C. W. N., 308. Cf. *Chandidat v. Padmanand* [1895] 22 Cal., 459; *Vathiar v. Aiyana-chariar* [1912] 23 M. L. J. R., 316. *Hemanta v. Baranagar, etc.*, [1914] 24 I. C., 313. Interim injunctions may be called for to prevent waste, damage or transfer of property, whether moveable or immoveable, *pendente lite*, ante, 590-2; or breaches of contract, see *Re Gunput* [1875] 1 Cal., 74 (marriage), *Abdul v. Abdul* [1881] 6 Bom., 5 (charter-party); ante, 590, 597; or wrong, independent of contract, ante, 590; Act V of 1908, Sch. I, Or. 39, r. 1, 2; *Willis v. U. F. P. L. Soc.* [1905] 10 C. W. N., cclv. (picketing); *Ratanji v. Edalji* [1871] 8 Bom. H. C., O. C., 181; but can be sought only in aid of prospective order for perpetual injunction, *Jit Lal v. Kamaleswari* [1912] 16 C. L. J., 555. See also *Mati v. Brojo* [1902] 7 C. W. N., viii. For company cases, see *Quin v. Salmon* [1909] 78 L. J., Ch., 506, *Bury v. Famatina Dev. Corp.*, *ibid*, 508. For decrees of Revenue Court transferred for execution to Civil Court, see *Ram v. Newaz* [1908] 9 C. L. J., 125.

further order of the Court.—Such injunction dissolved *ipso facto*, when suit for perpetual injunction decreed, *Mohini v. Surendra* [1914] 21 C. L. J., 68.

are regulated by the Code of Civil Procedure—and are not affected by s. 56, post; an inferior Court may therefore enjoin a sale in execution of proceedings pending in a superior Court, *Amir v. Admr.-Genl.* [1895] 23 Cal., 351 (*contra*, *Malik v. Ahmad* [1899] P. R., No. 57). Distinguish *Dhuronidhur v. Agra Bank* [1879] 5 Cal., 86. Query, if the regulation is not in respect of matters of procedure only, and if the right to a temporary injunction is not co-extensive with the existence of an 'obligation,' as defined in s. 3, ante. See s. 5(c) ante. The High Court may, by a temporary injunction, restrain a party from proceeding with a suit in another Court, *Rash v. Bowani* [1906] 34 Cal., 97, *Mungle v. Gopal*, *ibid*, 101, *Uderam v. Hyderally* [1908] 10 Bom. L. R., 1141; *contra*, *Jairamdas v. Zamonlal* [1903] 27 Bom., 357, *Jumna v. Har-charan* [1911] 38 Cal., 405. Cf. *Hukum v. Kamalanand* [1905] 33 Cal., 927. Distinguish *Vulcan Iron Works v. Bisshumbhur* [1908] 36 Cal., 233. In *Harendra v. Brinda Rani* [1898] 2 C. W. N., 521, injunction prohibiting marriage of minor was issued against party outside the jurisdiction of the Court, as also against another who was no party to the proceedings. In a case under Act VIII of 1890, the court may act *suò motu* in the interest of the minor, *Ramasami v. Lakshmi* [1913] 24 M. L. J. R., 231.

Code of Civil Procedure—Act V of 1908, Sch. I, Or. 39. Temporary injunction under the code is issued solely for the benefit of a party to suit, *Ramasami v. Lakshmi*, supra, and it should not be issued without notice to opposite party and without recording reasons for adopting such course, *Sanwal v. Narpat* [1908] 11 O. C., 151. *Qy.* whether mufassil courts have jurisdiction under Or. 39, r. 2, to grant a mandatory injunction pending suit, *Rasul v. Pirubhai* [1914] 16 Bom. L. R., 288. S. 91, sub-s. (1), Act VI of 1908 (B. C.) bars issue of temporary injunction or appointment of receiver, *Ram v. Lachmi* [1913] 17 C. L. J., 239.

Perpetual
injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit : the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Object—to restrain the undue exercise of rights, prevent threatened wrongs, restore violated possessions, prevent multiplicity of suits, and secure the permanent enjoyment of the rights of property, 2 Story, *Eq.*, s. 868 ; ante, 603, 614, 631-2.

Scope—Kerr, *Inj.*, 1-2, 32-5. Difference between temporary and perpetual injunctions : (1) the former does not impose a permanent restraint, like the latter, nor (2) conclude a right, like it, and (3) may be granted at any stage of the litigation, while the latter forms part of the decree in the suit made after a trial upon the merits, *Jairamdas v. Zamonlal* [1903] 27 Bom., 357. For discharge of a temporary injunction, see Act V of 1908, Sch. I, Or. 39, r. 4.

injunction—may be either prohibitory or mandatory, *Behary v. Sheo* [1907] 3 N. L. R., 114, 117 ; ante, 27.

upon the merits—*i.e.*, after the right and its violation have been established upon trial, *Bhikaji v. Bapu* [1877] 1 Bom., 550, *Muthaya v. Sivaraman* [1882] 6 Mad., 229, *Sivaraman v. Muthaya* [1888] 12 Mad., 241, P. C.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

Perpetual
injunctions
when
granted.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) :—

(a) where the defendant is trustee of the property for the plaintiff ;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion ;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief ;

(d) where it is probable that pecuniary compensation cannot be got for the invasion ;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this section, a trade-mark is property.

Illustrations.

(a) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(d) The Directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) A, a trustee for B, is about to make an imprudent sale of a small part of the trust property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(h) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(i) A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house left to C as will prevent the comfortable enjoyment of the house left to B. B may sue for an injunction to restrain them from so doing.

(k) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

(l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(m) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir expectant may sue for an injunction to restrain her.

(n) A, B and C are members of an undivided Hindu family. A cuts timber growing on the family-property, and threatens to destroy part of the family-house and to sell some of the family-utensils. B and C may sue for an injunction to restrain him.

(o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the Official Assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q) A, in an administration suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(r) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens

to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(v) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) A improperly uses the trade-mark of B. B may obtain an injunction to restrain the user, provided that B's use of the trade-mark is honest.

(x) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(y) A, a very eminent man, writes letters on family-topics to B after the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(z) A carries on a manufactory and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

Scope—Wherever there is a duty enforceable by law, whether express or implied, and whether arising out of a contract or not, it may be enforced by an injunction, *Gas Light Co. v. St. Mary Vestry* [1885] 15 Q. B. D., 1, *North L. Ry. Co. v. Great N. Ry. Co.* [1883] 11 *ibid.*, 38, unless considerations of expediency or convenience determine the discretion of the Court otherwise, *Batten v. Gedgo* [1889] 41 Ch. D., 507. *Ante*, 588. The distinction between a common law action of ejectment and an equity suit for an injunction ought not to be recognised in this country. *Dijendra v. Purnendu*, 11 C. L. J., 189. The institution or continuance of judicial proceedings, if inequitable, may also be restrained, s. 56 (a) *post*; *ante*, 612, *Shib v. Krishna* [1911] 9 L. C., 576. The Indian statute law follows English precedents and introduces no new principles, *ante*, 604. *Behari v. Sheo* [1907] 3 N.L.R., 114. But see *Boyson v. Deane* [1899] 22 Mad., 251 (*query*); *Ramanjulu v. Aparanji* [1911] 21 M. L. J. R., 313.

Similar Law—36 & 37 Vic., c. 66, s. 25 (8), *ante*, 36. Suit not affected by C. P. Municipal Act, XVIII of 1889, s. 27.

other provisions—S. 52 *ante*, and ss. 55, 56 (a) to (e) and (h) to (k), *post*, in the case of *all* injunctions, and, in addition, ss. 56 (f) and 57, where contracts are concerned (also

Ch. II, ante), and s. 54, cl. 3(a) to (e), and expln., and s. 56-1 post, where property rights are involved. Nelson, *Injs.*, 303-4.

An interlocutory injunction is *ipso facto* dissolved by a decree granting perpetual injunction, *Mohini v. Surendra* [1915] 18 C. W. N., 1189.

perpetual injunction—defined, s. 53, ante.

may be granted—by decree in a suit. See s. 53, ante. The court of appeal may introduce a variation in the injunction so as to fit in with facts actually established, *Jwala v. Munna* [1910] 37 C. 204. For forms of *plaint*, see Act V of 1908, App. A, Nos. 35 (waste), 36 (nuisance), 37 (public nuisance), 38 (diversion of water-course), 39 (moveable property threatened with destruction); for forms of *decree*, *ibid*, App. D., Nos. 14-16. See App. F, *infra*. *Seshadri v. Arayar* [1910] 7 I. C., 558. As to *discretion* of the Court, see ante 602-4; also under s. 52 ante, and s. 55 post; *Tituram v. Cohen* [1905] 9 C. W. N., 1073, 1080, P. C. *Umesh v. Nibaran* [1914] 19 C. L. J., 305 (appellate court slow to interfere). Injury caused to strangers to the suit by issue of injunction, may be considered by Court, *Maythorne v. Palmer* [1865] 11 L. T., N. S., 261.

Parties to suit—*Baiju v. Bulak* [1897] 24 Cal., 385. Government or public officer is not entitled to notice under Act V of 1908, s. 80, *Ganoda v. Nalini* [1908] 36 Cal., 28; *Naginlal v. Official Assignee* [1912] 14 Bom. L. R., 1148. But see *Secy. of State v. Gajanan* [1911] 35 Bom., 362. Distinguish *Hari v. Secretary of State* [1903] 27 Bom., 424, 450; *Secy. of State v. Kalekhan* [1912] 23 M. L. J. R., 181 (*Secy. of State* entitled to notice). Cf. *Govinda v. Talug Bd.* [1908] 4 M. L. T., 209, F. B. (Act V of 1884, Mad., s. 156). Some tenants may sue for themselves and other tenants, *Ahmedbhoy v. Balkrishna*, [1894] 19 Bom., 391. Where wrong complained of is of personal character, upon defendant dying pending suit, it cannot be prosecuted against his legal representative, *Josiam v. Sami* [1910] 5 I. C., 937. In cases under C. P. C., Sch. I. Or 1, r. 8, injunction does not bind persons not parties on record, *Thambi v. Hamid* [1911] 2 M. W. N., 534.

Court-fee—*ad valorem*, according to the Plaintiff's valuation, under Act VII of 1870, s. 7, cl. iv (d), *Sardarsingji v. Ganpatsingji* [1892] 17 Bom., 56, *Gulabsingji v. Laksamansingji* [1893] 18 Bom., 100, *Guruvajamma v. Venkatakrishnama* [1900] 24 Mad., 34, *Mulkunnisa v. Munl. Com., Delhi* [1904] 5 P. L. R., No. 118.

Limitation—6 years, under I. Lim. Act, Sch. I, art. 120, *Kanakasabai v. Muttu* [1890] 13 Mad., 445, *Waziran v. Babulal* [1904] 24 A. W. N., 69; ante, 668-9; *Cherukuru v. Cherukuru* [1908] 18 M. L. J. R., 602; *Ganda v. Nathu* [1912] 151 P. L. R.

Form—An injunction lacking precision should not be granted. *Kesha v. Srinivasa* [1911] 13 C. L. J., 394.

Execution of decree—See Act V. of 1908, Sch. I, Or. 21, r. 32, *Sakaral v. Parvatibai* [1901] 26 Bom., 283 (execution against legal representative); distinguish *Dahyabhai v. Bapalal*, *ibid*, 140 (auction-purchaser); *Jamsetji v. Hari* [1907] 32 Bom., 181. To an application for execution of decree, art. 182, and not art. 181, Act IX of 1908, Sch. I, applies, and the right to apply will accrue on each successive breach, *Venkatachalam, v. Veerappa* [1905] 29 Mad., 314, *Bhagwan v. Sukhdai* [1905] 28 All, 300. Disobedience to an injunction is punishable as contempt of Court, *Re Chandrakanta* [1880] 6 Cal., 445, *Ram v. Chatar*, [1901] 23 All., 465, *Advocate-General v. Gangji* [1894] 19 Bom., 152, *Pranjivan v. Mayaram* [1862] 1 Bom. H. C., 148, though, *semble*, a District Court, not being a Court of record, must be set in motion by the aggrieved party; *Kachappa v. Sachi* [1902] 26 Mad., 494, *Maung Tha v. Lutchman* [1908] 14 Bur. L. R., 276. An injunction issued without jurisdiction is absolutely void, *Subhadra v. Dhajadhari* [1912] 15 C. L. J., 147.

to prevent—S. 5 (c), *ante*.

breach of an obligation—The plaintiff is entitled to prohibit the continuance of waste or damage; he cannot demand the prohibition of the commission thereof. *Maharajah Ram Narayan v. Krishna* [1912] 17 I. C., 490. The plaintiff must establish a legal right and its infringement. See cases cited under s. 53, *ante*, **upon the merits**, *supra*; otherwise no relief can be given, *North L. Ry. Co. v. G. N. Ry. Co.* [1883] 11 Q. B. D., 38., *Prankristo v. Huro* [1868] 10 W. R., 435, *Kristna v. Venkatachella* [1872] 7 Mad. H. C. R., 60, *Krishnaji v. Vithalrao* [1887] 12 Bom., 80, 83, *Govind v. Sadashiv* [1892] 17 Bom., 771; *Lachmeswar v. Manowar* [1891] 19 Cal., 253, P. C., *Munl. Bd. v. Dakkhan* [1907] 30 All., 70; *ante*, 604, 649. *Nelson Inj.*, 15-23. *Gur Das v. Bhag* [1911] 11 I. C., 231 (*birt* or priestly offerings). See also *Orr v. Raman* [1895] 18 Mad., 320 (customary easement proved by defendant); *Hari v. Barada* [1904] 31 Cal., 1014 (masonry dwelling-house on homestead land built by occupancy tenant, Bengal Tenancy Act, s. 76); *Sadhu v. Sarbamangala* [1910] 8 I. C., 65 (*ditto* by under-raiyat holding under permanent lease); *Delhi & L. Bank v. Hem* [1887] 14 Cal., 839 (no right to uninterrupted flow of southern breeze). In the absence of custom or contract, a zamindar has no right to interfere with his tenant's enjoyment of trees on latter's holding, so long as relation of landlord and tenant subsists, *Ganga v. Badham* [1908] 30 All., 134, or to restrain him, without proving special damage, from constructing a well upon his holding, *Raghunandan v. Jarao* [1912] 15 O. C., 170.

breach—must cause substantial injury, *Ponnuswami v.*

Coll. of Madura [1869] 5 Mad. H. C. R., 6, *Barlow v. Gobindram* [1897] 24 Cal., 364, *Munl. Corp. v. Vasudeo* [1904] 6 Bom., L. R., 899, *Mahadev v. Narayan*, *ibid*, 123, *Framji v. Framji*, [1904] 7 *ibid*, 73, *affd.*, 30 Bom., 329, *Chotalal v. Lalubhai* [1904] 29 Bom., 157, *Prosser v. Mendi* [1805] 8 O. C., 356. If the injury to the plaintiff's legal rights is small and capable of being estimated in, and adequately compensated, by money, the Court may deem the granting of an injunction as oppressive upon the defendant, *Kiley v. Halifax Corp.* [1907] 97 L. T., 278; 22 *Cye.*, 728; and give damages instead, *Behari v. Sheo* [1907] 3 N. L. R., 114, *Dhunjibhoy v. Lisboa* [1888] 13 Bom., 252, though there is no special prayer for it, and will not refer the plaintiff to another suit, *ante*, 668, 97; *Tejumul v. Chabilomal* [1909] 2 Sind L. R., 65. But the Court will not be disposed to balance conveniences, where the act complained of is in itself and its incidents tortious, *Sullivan v. Jones Steel Co.*, [1904] 66 L. R. A., 712.

obligation—defined, s. 3 *ante*; *Balakrishnadas v. Govind* [1909] 5 N. L. R., 67; *Gur Pershad v. Khuda* [1910] 8 L. C. 687, will not be affected by religious prejudices or ethical or political considerations, *ante*, 665-8; and need not be connected with any property, s. 55, *ill. (e)*, *post*; *ante*, 648-50. *Venkatacharyulu v. Rangacharyulu* [1890] 14 Mad., 316 (suit to restrain parents in law from re-marrying plaintiff's bride). Cf. *Harendra v. Brinda* [1898] 2 C. W. N., 521; *Kanahi v. Biddya* [1878] 1 All., 549; *Nanabhai v. Janardhan* [1892] 16 Bom., 636. *Bindo v. Sham Lal* [1904] 1 A. L. J., 102 (injunction to restrain marriage of plaintiff's minor daughter in defendant's custody). For a suit for restitution of conjugal rights, see U. B. R. [1897-1901] 488, 496. As to the right of privacy, see *ante*, 647. A right to hunt and fish in navigable waters was enforced by injunction in *Ainsworth v. Munoskong Club* [1908] 17 L. R. A., N. S., 1236.

the applicant—*i.e.*, the plaintiff who prays for an injunction in his plaint. A perpetual injunction cannot be had upon an application, as distinguished from a suit. See s. 53, *ante*.

expressly—*e.g.*, in the case of an express contract, as in *ill. (a)*.

by implication—resulting, *e.g.*, from a recital in a contract, *Mackenzie v. Childers* [1890] 43 Ch. D., 265, or from the acts or representations of parties, *Pollard v. Photographic Co.* [1889] 40 *ibid*, 345. Cf. *ill. (j), (k), (l)*; *Chunnilal v. Manishankar* [1893] 18 Bom., 616, 630 (reservation of easement of necessity). Tenants may not change usual course of husbandry without landlord's consent, *Lakshmana v. Ramchandra*

[1887] 10 Mad., 351, or build upon agricultural land, *Surendra v. Hari* [1903] 31 Cal. 174, *Chandra v. Sree Gobind*, [1900] 6 C. W. N., 308; nor one partner exclude another from the partnership business, *Virdachala v. Ramasvami* [1863] 1 Mad. H. C. R., 341.

arises from contract—Ante, 614-28; see also ss. 56 (f), 57, post. *Express* negative agreement: *Callianji v. Narsi* [1894] 18 Bom., 702, affd., 19 Bom., 764. *Implied* negative agreement: *Madras Ry. Co. v. Rust* [1890] 14 Mad., 18; *Charlesworth v. MacDonald* [1898] 23 Bom., 103; *Burn & Co. v. McDonald* [1908] 36 Cal., 354. An incomplete agreement will not be enforced, *Abdul v. Abdul* [1881] 6 Bom., 5; nor a restrictive covenant in a contract which has been repudiated by plaintiff, *General Bill-posting Co. v. Atkinson* [1908] 1 Ch., 537, affd., 78 L. J. Ch., 77; *Measures Brothers Limited v. Measures* [1910] 2 Ch., 248.

Chapter II—esp. ss. 12 and 21, ante, since injunction is a form of specific performance which deals with negative covenants and contracts, ante, 28, 614-5. Apart from strictly legal considerations, the contract may not be one which ought to receive special favour from Court, *Eley v. Pos G. S. L. Ass. Co.* [1876] 1 Ex. D., 20.

invades—by the commission, e.g., of *trespass*, ante, 633-6, *Ganoda v. Nalini* [1908] 36 Cal., 28, Nelson, *Inj.*, 169-190, Woodroffe, *Inj.*, ch. ix, *Jairam v. Babaji* [1905] 1 N. L. R., 182, 184 (alteration of flow of water so as to increase burden on lower land); *waste*, ante, 636-9, Nelson, *Inj.*, 427-32, Woodroffe, *Inj.*, ch. ix; *nuisance*, ante, 639-42, Nelson, *Inj.*, 390-427, Woodroffe, *Inj.*, ch. x, *Galstaun v. Doonia* [1905] 32 Cal., 697, *Behari v. Ghisa* [1902] 24 All., 499 (overhanging tree), *Appayya v. Purvala* [1912] 14 I. C., 267 (raising tank bund and narrowing sluice, so as to render plaintiff's land liable to submersion), (as to public nuisance, see Act V of 1908, s. 91); *disturbance of easements*, ante, 642-4, Nelson, *Inj.*, 432-84, Woodroffe, *Inj.*, ch. x, I. Easements Act, s. 35, *Nandkishor v. Bhagubhai* [1883] 8 Bom., 95 (light and air), *Nosarbhay v. Badrudin* [1891] 16 Bom., 533 (water from eaves), *Bahar v. Indyat* [1905] 6 P. L. R., No. 26 (access to room); or *infringement of a statutory or common law right*, ante, 644-7, Nelson, *Inj.*, 485-506, Woodroffe, *Inj.*, ch. xi; *Bishun v. Perfect* [1904] 7 O. C., 103 (patent). Substantial and wrongful injury must be shown: it is not necessary that the plaintiff's property should be destroyed, *Yaro v. Sanaullah* [1897] 19 All., 259, 261. If act complained of was done in such a way as to be likely to damage plaintiff, proof of specific damage need not be given, *Rama v. Subramania* [1908] 31 Mad., 171, 176; *Exchange Tel. Co. v. Gregory* [1896]

1 Q. B., 147. But invasion must be proved to have been made within six years, and not patiently submitted to, *Ganda v. Nathu* [1912] 13 I. C., 661.

threatens to invade—The plaintiff must show not mere vague apprehension, *Chabildas v. Municipal Commissioners* [1871] 8 Bom. H. C. R., 85, but a strong probability of damage which is imminent and will be very substantial, if not irreparable, *Ramjas v. Brojomohan* [1915] 19 C. W. N., 887. *Gangabai v. Purshotum* [1907] 9 Bom. L. R., 912, *Mahadev v. Narayan* [1907] 6 *ibid*, 123, *Lakshmi v. Tara* [1904] 31 Cal., 944; ante, 622-3. See *ills. (b) to (d), (f) to (i), (k), (l), (r), (y), (z), post*. Mere obtaining of decree for possession without any attempt to execute it, not sufficient, *Karnadhar v. Hari* [1910] 37 Cal., 731. Where the injury has actually taken place, an injunction prevents the recurrence of the injury; where it is only threatened, an injunction prevents its occurrence, ante, 28, 588-9, *Nelson, S. R. A.*, 306. A perpetual injunction against planting trees likely to penetrate into the foundation of the plaintiff's building is unworkable, *Lakshmi v. Tara* [1904] 31 Cal., 944.

right to or enjoyment of property—*e.g.*, joint proprietorship, *Watson v. Ramchund* [1891] 18 Cal., 10 P. C., *Anant v. Gopal* [1894] 19 Bom., 269 (Hindu co-parcenary), ante, 45-7; easement, ante, 638 642-4 of light and air, *Hariganga v. Tricamlal* [1902] 26 Bom., 374, *Ahmad v. Poker* [1912] 15 I. C., 945, *Hardasmal v. Kundabai* [1913] 7 S. L. R., 21, right of way, *Mudden v. Chunder* [1872] 18 W. R., 379, *G. I. P. Ry. Co. v. Nowroji* [1885] 10 Bom., 390, *Bhaoorai v. Chunilal*, [1899] 24 Bom., 188, *Maharaj v. Paresb* [1904] 31 Cal., 839, 846 (owner's right in dedicated soil), one co-owner cannot by injunction against another co-owner prevent the carrying out of necessary work, *Luttayan v. Mammanna*, 35 M. 681. But one partner can against another partner carrying on independent business, to the prejudice of the partnership, *Mumtaz v. Kasim* [1913] 19 I. C., 250; right to discharge drainage, *Sultani v. Ram Saran* [1900] P. R., No. 49; right to use of water, *Madhub v. Jogesh* [1902] 30 Cal., 281, *Krista v. Joy* [1903] 8 C. W. N., 158, *Rama v. Subramania* [1908] 31 Mad., 171 (irrigation from Government channel), *Sheo v. Chandrabhal* [1911] 10 I. C., 181, right to fish and use fishing stakes and nets, *Baban v. Nagu* [1876] 2 Bom., 19; right to support, *Bindu v. Jahnabi* [1896] 24, Cal., 260; right to worship in a mosque, *Jangu v. Ahmad* [1889] 13 All., 419, F. B., *Fazal v. Maula* [1891] 18 Cal., 448, P. C., *Adam v. Isha* [1894] 1 C. W. N., 76, or temple, *Anandrar v. Shankar* [1883] 7 Bom., 323, *Kalidas v. Parjaram* [1890] 15 Bom., 309, *Venkatachalapati v. Subbarayadu* [1890] 13 Mad., 293; right to receive offerings in a temple, *Badri v. Mulloo* [1905] 8 O. C., 339, or to perform some office there, *Srinivasa*

v. *Thiruvengada* [1888] 11 Mad., 450. See also *Trimbak v. Krishnarao* [1909] 11 Bom. L. R., 389 (suit by temple committee for declaration of right to have services performed by suitable persons and for injunction against temple servants. As to caste disputes, see *Lalji v. Walji* [1895] 19 Bom., 507, ante, 497, 649; religious disputes, *Jagannath v. Akali* [1893] 21 Cal., 463, *Maine v. Islam* [1891] 15 Mad., 355, ante, 649. The right may be an existing one, though not in actual enjoyment, *Land Mortgage Bank v. Ahmedbhoy* [1883] 8 Bom., 35. See also *Sukhdeo v. Nihal* [1907] 29 All., 740 (right to hold market). 20 M. L. J. R., 803.

property—moveable or immovable; e.g., share in a *Joshi Vritti*, *Moro v. Anant* [1896] 21 Bom., 821; or inscription on a seal, *Ramanuja v. Rama* [1898] 22 Mad., 189.

may grant—For the Court's discretion, see ante, 601-4. Where a right and an infringement thereof are alleged; a cause of action is disclosed, and unless there is a bar to the entertainment of the suit, the ordinary Civil Courts are bound to entertain a suit for an injunction, *Valli v. Madras Corp.* [1912] 38 Mad., 41. An injunction will not be issued where the plaintiff has acquiesced in the injury, *Vithoba v. Mendosa* [1888] Bom. P. J., 212; cf. *Bhupendra v. Ranajit* [1913] 41 Cal., 384; or the right does not deserve protection, cf. ill. (u) to (w). Injunction may be for a limited period, *Bindo v. Sham Lal* [1904] 1 A. L. J., 102.

following cases—*Qy.* if this enumeration is exhaustive and an injunction cannot be granted in any other case? *Boyson v. Deane* [1899] 22 Mad., 251, supports an affirmative answer. But see *Framji v. Framji* [1905] 7 Bom. L. R., 352. The first four cases correspond closely to those specified in s. 12, ante, and are special applications of the exception enacted in s. 56, cl. (i), post.

cl. (a). Trustee—defined, s. 3, ante. See ill. (b) to (i), (l), (z), post; Nelson, *Inj.*, 506-522. In the case of a breach of trust, it is not necessary to show that there can be no adequate compensation in money, ante, 83, 610.

cl. (b)—Pecuniary compensation *impracticable*, ante, 119. It not being possible to assess damages, none that may be awarded will restore the *status quo ante*, and the injury will therefore be *irreparable*, ante, 631-2.

no standard—*Ghanasham v. Moroba* [1894] 18 Bom., 474, 489; *Ramanadhan v. Zamindar of Ramnad* [1893] 16 Mad., 407, 409-10; *Fazl v. Maula* [1891] 18 Cal., 448, P. C.; *Apaji v. Apa* [1902] 26 Bom., 735, 738. Cf. ill. (h), (i), post. Injury to property which renders it in a material degree unsuitable for the purposes to which it is now applied, or

lessens considerably the enjoyment which the owner now has of it, does not admit of being measured and redressed by damages, *Jackson v. Newcastle* [1864] 3 DeG. J. & S., 275, 284 (Westbury, C.).

ascertaining—even approximately, *Cory v. Yarmouth & N. Ry. Co.* [1844] 3 Hare, 593, 603.

cl.(c)—Pecuniary compensation *inadequate*. Where such compensation is adequate, an injunction is not called for, ante, 28-9, 609; *Nelson, Inj.*, 381-6; *Boyson v. Deane*, supra; *Framji v. Framji*, supra; *Raghunandan v. Jarao* [1912] 15 O. C., 170; *Soliappa v. Soliappa* [1912] 11 I. C., 807 (sale of shares); *Bhaosingh v. Hazari* [1912] 7 N. L. R., 179; 13 I. C., 862. *Sethuram v. Gopal* [1914] 23 I. C., 785. The Courts lean towards awarding compensation in light and air cases, because the wrong is done by the wrong-doer upon his own property, *Jethalal v. Lalbhai* [1904] 28 Bom., 298, 304; *Mohan v. Chunni* [1905] 2 N. L. R., 4; cf. *Kalliandas v. Tulsidas* [1899] 23 Bom., 786.

not afford adequate relief—*e.g.*, allow the defendant to purchase the plaintiff's property against the latter's will, ante, 632; *Jethalal v. Lalbhai*, supra, *Mhan v. Chunni*, supra. See also *Jamnadas v. Atmaram* [1877] 2 Bom., 133; *Shadi v. Anup* [1889] 12 All., 436, F. B.; *Soshi v. Gonesh* [1902] 29 Cal., 500; *Kalidas v. Parjaram* [1890] 15 Bom., 309; *Sultani v. Ram* [1900] P. R., No. 49. Where part of the injury may be compensated for in money, the Court may award damages for that part and grant an injunction in respect of the remainder, ante, 668.

cl.(d)—Damages *not recoverable*, by reason, *e.g.*, of the defendant's insolvency, ill. (o), post.

cl.(e)—Ante, 609., Ill. (p). Cf. s. 56 (a), post.

multiplicity of judicial proceedings—may result, *e.g.*, from recurring violation of the plaintiff's rights, *Apaji v. Apa* [1902] 26 Bom., 735, 736. See also *Land Mortgage Bank v. Ahmedbhoy* [833] 8 Bom., 35, 91; *Venkatesa v. Ramasami* [1895] 18 Mad., 338, 341-2; *Karnadhar v. Hari* [1910] 37 Cal., 731; *Mumtaz v. Kasim* [1913] 11 A. L. J. R., 423. *Gur v. Khuda* [1910] 8 I. C., 687, is doubtful law.

trademark—"a mark used for denoting that goods are the manufacture or merchandise of a particular person," I. P. C., s. 478. Ante, 645-6. Ill. (w), post.

property—not of the importer and seller of goods, but of the manufacturer, *Heiniger v. Droz* [1900] 25 Bom., 433. Distinguish *Ralli v. Fleming* [1878] 3 Cal., 417, 428; *Jwala v. Munna* [1910] 37 Cal., 204 (vendee's suit decreed). Assignment

of trademark, apart from good will, passes no title to trademark, *B. A. Tobacco Co. v. Maboob* [1910] 7 I C., 279.

III.(a)—Case of express contract, *City of London v. Pugh* [1727] 4 Bro. P. C., 395.

III.(b)—Trust, threatened breach. *Re Chertsey Market* [1818] 6 Price, 261, 279; *Balls v. Strutt* [1841] 1 Hare, 146.

III.(c)—This and the next six illustrations also contemplate case of fiduciary relationship where a breach of trust is threatened *MacDougal v. Jersey Hotel Co.* [1864] 2 H. & M., 528. As to payment of interest out of capital by railway companies during construction, see Act X of 1895, s. 3.

III.(d)—*Natusch v. Irving* [1824] 2 Coop., 358; *Sham-nugger Jute Factory v. Ram* [1886] 14 Cal., 189. For the doctrine of *ultra vires*, see ante 204 sqq.

III.(e)—Williams, *Executors*, pt. I bk. iii, ch. 1. In the case of an executor, misconduct or insolvency is not enough; consequential jeopardy to the testator's estate must be shown before an injunction will issue. Kerr, *Inj.*, ch. xiv. See also Ingepu., *Ex.*, 45.

III.(f)—Cf. s. 56, cl.(i), post. *Anon* [1821] 6 Madd., 10.

III.(g)—Cf. ss. 24 (d), 25 (e), ante. The injunction does not operate indirectly as a specific performance of the settlement, but only to prevent an extraneous act in violation of it, and the settlement should apparently be one capable of specific enforcement under s. 12(a), ante. Collett, 5th. ed., 380.

III.(h)—The contract of service between the parties constitutes a fiduciary relation and forbids the legal or medical—**III.(i)**—adviser from taking advantage of his position. *Davis v. Clough* [1837] 8 Sim., 262; *Lewis v. Smith* [1849] 1 M. & G., 417; *Evitt v. Price* [1827] 1 Sim., 483. Cf. Lord Ashburton v. Pape [1913] 2 Ch., 469. If there be no danger of any breach of confidence, injunction must be refused, *Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch., 831.

III.(j)—*Palmer v. Paul*, [1833 2 L. J., Ch., 154. Implied obligation of a tenant. Ante, 618.

III.(k)—*Pratt v. Brett* [1817] 2 Madd., 62; ante, 618.

III.(l)—*Miles v. Thomas*, [1839] 9 Sim., 606, 609; and if A give notice to dissolve, this will not affect the injunction, 1 Stokes, *A-I. Codes*, 985. Cf. *Ganpat v. Annaji* [1898] 23 Bom., 144 (Hindu family partnership). Ante, 618-9. Performance of particular terms of partnership may be enforced, *Karri v. Kollu* [1908] 32 Mad., 76.

III.(m)—Question of waste as between, say, life-tenant and remainderman, ante, 636; *Baker v. Sebright* [1880] 13 Ch

D., 179 ; *Subba Reddi v. Chengalamma* [1898] 22 Mad., 126, 129. Ghose, *H. L.*, 245-6. For injunction against alienation, see *Ratansi v. Umerbai* [1911] 9 I. C., 997.

III.(n)—Equitable or destructive waste as between joint owners ; *Job v. Potton* [1875] 20 Eq., 84. No co-owner is allowed to offer to others the alternative of submitting to either a partition or a destruction of joint property ; ante, 638.

III.(o)—Pure trespass, *Hodgson v. Duce* [1856] 2 Jur., N. S., 1014 ; *Best v. Drake*, [1853] 11 Hare, 369 ; ante, 633-5.

III.(p)—Disturbance of easement, *Weale v. W. M. Waterworks Co.* [1820] 1 J. & W., 358, 369. In this and the next ill., injunction is issued to prevent multiplicity of suits ; ss. 54 (e), 56 (a). Ante, 643.

suit against several—so brought as to be binding upon all the villagers, under sec. 43, ante. Collett, 5th. ed., 392.

III.(q)—2 Daniell, *Ch. Pr.*, ed. 5, 1463 ; but see *ibid*, ed. 6, 1944.

III.(r)—Trespass under colour of title ; *Lonsdale v. Curwen* [1821] 3 Bli., 168 ; *Mitchell v. Dors* [1801] 6 Ves., 147 ; ante, 633-5.

III.(s)—Nuisance, *Soltau v. De Held* [1851] 2 Sim., N. S., 133 ; ante, 639-42.

III.(t)—Nuisance, *Sampson v. Smith* [1838] 8 Sim., 272. *Umar v. Kewalmal* [1909] 3 Sind L. R., 30. The nuisance may also result from noxious gases, offensive odours, dust or cotton fluff, *Land Mortgage Bank v. Ahmedbhoi* [1883] 8 Bom., 35, 54-5.

III.(u)—Ante, 644 ; *Sarnath v. Butler*, [1906] 4 A. L. J. R., 11. Not only must the plaintiff's title to the patent and the defendant's infringement thereof be shown, but also that the patent is valid and good, and the plaintiff has a meritorious claim.

III.(v)—*Ganga v. Moreshvar* [1889] 13 Bom., 358 ; *Re Weatherby & Sons* [1910] 2 Ch., 297 (an action will lie, even though no damage was shown). ante, 644-5. Here, too, it must be shown that the equities are on the plaintiff's side, and the work in which copy-right is claimed, deserves to be protected, e.g., it is not seditious, *Walcot v. Walker* [1802] 7 Ves., 1 ; *Southey v. Sherwood* [1817] 2 Mer., 435. 1 Stokes, *A.-I. Codes*, 987.

III.(w)—*Nooroodeen v. Sowden* [1904] 15 M. L. J. R., 45 ; ante, 645-6. *Rey v. Lecouturier* [1908] 2 Ch., 715 ; *Smidt v. Reddaway* [1905] 32 Cal., 401 (trade-name) ; *Karm Elahi v. Abdul Aziz*, 127 P. L. R., 1909 ; *Re Warwick Tyre Co. Limited* [1910] 1 Ch., 248.

honest—and not a deception upon the public *Re Joseph Crosfield & Sons* [1910] 1 Ch., 130. 1 Stokes, *op. cit.*, 987.

III.(x)—Fraudulent misuse of name, with a view to the defendant's profit resulting, or likely to result, in loss to the plaintiff, *Routh v. Webster* [1847] 10 Beav., 561; *Dixon v. Holden* [1869] 7 Eq., 488. Ante, 646.

III.(y)—Literary property, *Gee v. Pritchard*, [1818] 2 Sw., 402; *Woolsey v. Judd* [1855] 4 Duer, 379; ante, 646. Cf. s. 55, ill. (d).

III.(z)—Protection of secret inventions and trade secrets, *Yovatt v. Winyard* [1820] 1 J. & W., 394; ante, 648. Cf. *Tipping v. Clarke* [1843] 2 Hare, 383, 393; *Hardy v. Veasey* [1868] 3 Ex., 107 (banker divulging state of customer's account). Distinguish ill. (h), (i) ante, where there is breach of trust, but not necessarily any damage to property; such damage is in the present case essential. Collett, 5th.ed., 416-7. The real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person, is that there is in the contract of service an implied contract on the part of the employee that he will not, after the service is determined, use information which he has gained while the service was subsisting, to the detriment of his former employer, *Robb v. Green* [1895] 2 Q. B., 315; *Kirchner v. Gruban* [1908] 78 L. J., Ch., 117.

Mandatory
injunction.

55. When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations.

(a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to put down so much of them as obstructs B's lights.

(b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.

(d) In the case put as illustration (y) to section 54, the Court may also order A's letters to be destroyed.

(e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to sections 54, and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trade-marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

Principle.—To prevent the breach of an obligation it may be necessary to restore things to *status quo ante*. "A *mandatory injunction* is an order compelling a defendant to restore things to the condition in which they were when the plaintiff's complaint was made," Kerr, *Inj.* 5th. ed., 42. Ante, 650.

Scope—A mandatory injunction cannot be granted to create a new state of things, *Sheonath v. Ali* [1904] 1 A. L. J. R., 118 (invasion of privacy); ante, 654. An injunction cannot be granted restraining a person from holding a *hat* upon his own property, *Rakhal v. Emperor* [1912] 15 L. C., 655, 13 Cr. L. J., 511.

obligation—defined, s.3, ante; may arise out of a contract, in which case the Court will be disposed to enforce a literal performance, and not mind inconvenience to the defendant or the public, *Lloyd v. L. C. D. Ry. Co.* [1865] 2 D&G. J. & S., 568, 579; ante, 655-6; or, otherwise, *e. g.*, a tort, see *ills.*; ante, 651-5. A building on another's land which does not particularly affect the plaintiff's right of easement cannot be removed, *Ranchod v. Mithabhai* [1904] 28 Bom., 428. *Browne v. Flower* [1910] 1 Ch., 219.

necessary—for restoration to *status quo ante*, see under *Scope* above.

certain acts—*e.g.*, removal of constructions upon exclusive, *Gobind v. Gooroo* [1865] 3 W. R., 71, *Bhaosingh v. Hazari* [1911] 7 N. L. R., 179, or joint property, *Shadi v. Anup* [1890] 12 All., 436, *Lachmi v. Ganga* [1907] 5 A. L. J. R., 93, *Kanakayya v. Narasimhulu* [1895] 19 Mad., 38 (party wall), *Bhim v. Ganga* [1908] 11 O. C., 355, ante, 654-5; or land in which other members of the community have a common right, *e. g.*, to perform religious ceremonies, *Baiju v. Bulak* [1897] 24 Cal., 385 (case between Gayawals); or agricultural holding, *Ramanadhan v. Zamindar of Ramnad* [1893] 16 Mad., 407 (as to buildings on non-agricultural land, see *Prosunno v. Jagun* [1881] 10 C. L. R., 25, revg. 9 C. L. R., 221); *Bai Bhicaji v. Perojshah* [1915] 17 Bomd. L. R. 1040. *Wood v. Conway Corporation* [1914] 2 Ch. 47 (fumes and smoke causing permanent and serious injury to plaintiff's property); of constructions which disturb a right of easement: light and air, *Jamnadas v. Atmaram* [1877] 2 Bom., 133, *Nandkishor v. Bhagubhai* [1883] 8 Bom., 95, *Pravabutty v. Mohendro* [1881] 7 Cal., 433,

Yaro v. Sanaullah [1897] 19 All., 259, *Anderson v. Hardut* [1905] 9 C. W. N., 543, *Mahomed v. Jafur* [1865] 4 W. R., 23, *Kirpa v. Gourbakhsh* [1893] P. R., No. 2 ; way, *G. I. P. Ry. Co. v. Nowroji*, [1885] 10 Bom., 390, *Akbarali v. Abdul* [1893] Bom. P. J., 538 ; cf. *Petty v. Parsons* [1914] 1 Ch., 704 ; drainage. *Abdul v. Gonesh* [1885] 12 Cal., 323, *Sultani v. Ram* [1900] P. R., No. 49, *Jairam v. Babaji* [1905] 1 N. L. R., 182 ; user, *Muhammad v. Gulab* [1898] 20 All., 345 ; removal of trees, their roots, *Lakshmi v. Tara* [1904] 31 Cal., 944, or branches, *Hari v. Shankar* [1894] 19 Bom., 420, ante, 652 ; of obstruction to watercourse, *Balabhadra v. Najiban* [1906] 4 C. L. J., 370 ; filling up of new channel of water, *Venkatagiri v. Muddukrishna* [1904] 28 Mad., 15, *Sankar v. Secy. of State*, ibid, 72 ; cf. *Gaekwar v. Gandhi* [1903] 27 Bom., 344, P. C. ; ante, 635-6 ; filling up of pits dug, *Lakshmana v. Ramachandra* [1887] 10 Mad., 351.

capable of enforcing—Cf. s. 21, cl. (b), ante ; the Court will not interfere where it cannot pass a decree capable of execution. Ante, 160 sqq.

discretion—S. 22, ante. *Shib v. Ameri* [1900] 20 A. W. N., 191. Ante, 659 sqq. The Court may interfere when the injury is only threatened, *Lakshmi v. Tara*, supra, ante, 662, or has been completed, *Provabutty v. Mohendro* [1881] 7 Cal., 453, *Rewa v. Vrijvalabh* [1903] 6 Bom. L. R., 41, *Tumula v. Koppula* [1913] 16 I. C., 412 ; but it must weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant, *Shamnugger J. F. Co. v. Ram* [1886] 14 Cal., 189 ; *Seetharam v. Gopal* [1914] 1 M. L. W., 166. The plaintiff must establish a substantial, and not fanciful or visionary, loss, *Ranchhod v. Lallu* [1873] 10 Bom. H. C. R., 95, *Delhi & London Bank v. Hem* [1887] 14 Cal., 839, *Maneklal v. Nurbheram* [1891] Bom. P. J., 302, *Pyari v. Raja* [1911] 11 I. C., 45, *Dhamnu v. Bhagwan* [1903] P. L. R., No. 138, *Behari v. Sheo* [1907] 3 N. L. R., 114, *Akilandammal v. Mudali* [1871] 6 Mad. H. C. R., 112, which cannot be adequately compensated for by damages, *Kadarbhai v. Rahimbhai* [1889] 13 Bom., 674, *Nandkishor v. Bhagubhai* [1883] 8 Bom., 95, *Raghunandan v. Jarao* [1912] 13 I. C., 554 ante, 661, s. 56, cl. (i), post ; and the court more readily interferes where the defendant has built, in spite of the plaintiff's objection, *Jamnadas v. Atmaram* [1877] 2 Bom. 133, *Gobind v. Ganesh* [1882] Bom. P. J., 63, *Kirpa v. Gourbakhsh* [1893] P. R., No. 2, *Provabutty v. Mohendro*, supra, *Lauti v. Chhaju* [1913] 20 I. C., 368. Distinguish *Benode v. Soudaminy* [1889] 16 Cal., 252 (notice not followed by legal proceedings, building completed before suit). But, e.g., *Umesh v. Nibaran* [1914] 19 C. L. J., 305

in which order of court below was upheld, refusing mandatory injunction, even where the defendant completed the building, notwithstanding *interlocutory* injunction, on the ground that the rent of the land was now secure to the plaintiff.) Where the injury caused to defendant by the injunction will be out of all proportion to the injury complained of by the plaintiff, and amount to injustice, the Court will be slow to interfere, *Myers v. Catterson* [1890] 43 Ch. D., 470, *Behari v. Sheo* [1907] 3 N. L. R., 114, and, in any case, will restrict the injunction strictly to the extent of the invasion of the plaintiff's right, *Beharee v. Ajnas* [1866] 6 W. R., 86, *Abdul v. Gonesh* [1885] 12 Cal., 323, *Bala v. Maharu* [1895] 20 Bom., 788. Distinguish *Jamnadas v. Atmaram* [1877] 2 Bom., 133, 139; ante, 660-1. Relief will also be denied where the plaintiff has acquiesced, *Banee v. Ram* [1868] 10 W. R., 316, *Noyya v. Rupikun* [1882] 9 Cal., 609, *Shama v. Babu* [1904] 24 A. W. N., 70, *Ulagappan v. Chidambaram* [1906] 29 Mad., 497, ante, 658-9, Cf. *Bailey v. Holborn* [1914] 1 Ch., 598, or been guilty of laches, *Benode v. Saudaminey*, supra, *Ghanasham v. Moroba* [1894] 18 Bom., 474, *Abdul v. Emile* [1893] 16 All., 69, 72, *Muhammad v. Gulab* [1898] 20 All., 345, *Brommo v. Koomodinee* [1872] 17 W. R., 466, *Kaushal v. Ganesh* [1901] 21 A. W. N., 53, *Abdul v. Narain* [1913] 21 J. C. 35, ante, 657-8; the burden of proving acquiescence is on the defendant, *Nandkishor v. Bhagubhai*, supra, it will not necessarily be refused by reason of delay, *Tumuma v. Koppala* [1913] 16 I. C., 412; *Chamarti v. Arardhi* [1914] 26 M. L. J., 518. Nor will a mandatory injunction be granted which may compel the defendant to commit a wrongful act, e.g., a trespass, *Navroji v. Dastur*, [1903] 28 Bom., 20. As to interference by an Appellate Court with the discretion exercised by the lower Court, see ante, 188, 595.

grant an injunction—Where in a suit for a perpetual injunction there is a general prayer for such relief as the Court may think fit, and by reason of the defendant's subsequent conduct the plaintiff becomes entitled to a mandatory injunction during the pendency of the suit, such relief may be granted to him, *Maganalal v. Chotalal* [1901] 26 Bom., 136. For form of decree in a case of invasion of privacy, see *Sheonath v. Ali* [1904] 1 A. L. J. R., 118. The Court may also award damages in addition to, *Jamnadas v. Atmaram* [1877] 2 Bom., 133, *Abdool v. Gonesh* [1885] 12 Cal., 323, or, in lieu of an injunction, *Ghanasham v. Moroba* [1894] 18 Bom., 474, *Nawaz v. Rustamji* [1896] 20 Bom., 704, *Kallandas v. Tulsidas* [1899] 23 Bom., 786, *Framji v. Framji* [1905] 30 Bom., 319. Ante, 668.

Appointment of Commissioner.—The Court in granting a mandatory injunction may appoint a commissioner to decide the extent to which the defendant's building should be altered

or removed, *Chotalal v. Lallubhai* [1904] 29 Bom., 157, 161. Cf. *Jamnadas v. Atmaram*, supra, 139.

Jurisdiction of Mamlatdar—*Balvantrao v. Sprott* [1899] 23 Bom., 761; *Som v. Vinayak* [1900] 25 Bom., 395, F. B.

Execution of decree—Act V of 1908, Sch. I, Or. 21, r. 32; ante, 668.

Remedy for disobedience—Ante, 668, 432; *Jawitri v. Emile* [1890] 13 All., 98; *Pranjiwandas v. Mayaram* [1862] 1 Bom. H. C. R., O. C., 148.

compel performance—The decree will be affirmative in form, ante, 599*n*, 16.

III.(a)—*Jessel v. Chaplin* [1856] 2 Jur., N. S., 931; *Ratanji v. Edalji* [1871] 8 Bom. H. C. R., O. C., 181; *Mahomed v. Jafur* [1865] 4 W. R., 23; ante, 652. Obstruction must amount to a nuisance, *Anath v. Galstaun* [1908] 35 Cal., 661. But as to constructive public nuisance, see *Adv.-Genl. v. Ismail* [1910] 12 Bom. L. R., 274. Mandatory injunction may be granted to restrain local authority from altering highway so as to interfere with access to plaintiff's house, *Arnott v. Whitby Urban Council* [1909] 73 J. P., 64.

Indian Limitation Act—Act IX of 1908, ss. 26-7; Act XV of 1877, ss. 26-7. Cf. Ind. Easements Act, s. 15.

pull down so much as obstructs—The injunction is to be limited to the injury actually caused, ante, 654, 660.

III.(b)—*Nasarbhai v. Badrudin* [1891] 16 Bom., 533, 535; *Chattur v. Dhana* [1891] Bom. P. J., 287.

pull down so much as projects—Cf. *Abdul v. Ram* [1911] 38 Cal., 687.

III.(c)—Breach of trust. Ante, 628-30.

III.(d)—Violation of a right of property. In both these cases the injunction is partly mandatory and partly prohibitory.

III.(e)—Injunction granted to restrain a threatened defamation, though no right to property is in jeopardy; ante, 648, 662. *Shepherd v. Trustees of Port Bombay* [1876] 1 Bom., 132, is no longer good law. As to when malice is presumed, see *Venkata v. Kotayya* [1889] 12 Mad., 374, 378.

Indian Penal Code—Act XLV of 1860, ch. xxi (defamation).

III.(f) Threatened defamation, involving further a breach of duty arising out of a fiduciary relation, as in ill.(e) above. Ills.(e) and (f) are cases of prohibitory injunction, and should have been placed under s. 54, ante, 628*n*. Collett, 5th. ed., 423.

III.(g)—See under ill.(d) above.

56. An injunction cannot be granted—

Injunction
when
refused.

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

Scope—This section summarises the main defences to a suit for an injunction, ante, 28, 604-14; cls.(a) to (e) are general; the other clauses would apply to special cases.

cannot be granted—Ante, 604, 661; the Court in the exercise of its discretion *may* refuse an injunction upon other grounds also, but it *must* refuse one if any of the grounds specified in section 56 is substantiated.

Cl. (a), (b). *Scope*—Judicial proceedings can be stayed only in a subordinate Court, and, if pending, where the injunction is necessary to prevent a multiplicity of proceedings; ante, 612-3. Not applicable to applications for temporary injunctions, *Amir v. Admr.-Genl.* [1895] 23 Cal., 351; *contra, Soharà v. Ahmad* [1899] P. R., No. 57, *Khushala v. Dit Mal* [1903] 4 P. L. R., 133. Distinguish *Jairamdas v. Zamonlal* [1903] 27 Bom., 357, Ante, 133.

Similar Law—36 & 37 Vict., c. 66, s. 24, sub-s. 5. *Pending* proceedings cannot be now restrained in England, though the institution of proceedings may be, *Besant v. Wood* [1879] 12 Ch. D., 630. Cf. Bills of Peace, 2 Story, *Eq.*, ch. xxii.

pending—*Appu v. Raman* [1891] 14 Mad., 425, 430 (execution of decree not yet applied for, prohibited). *Contra, Karnadhar v. Hari* [1910] 37 Cal., 731. For prohibition of execution of decree obtained improperly, see ante, 526, 613; prohibition refused. *Jaggivan v. Shridhar* [1877] 2 Bom., 252, *Money v. Gour* [1884] 11 Cal., 146, *Muncherji v. Noor* [1893] 17 Bom., 711, *Azizan v. Matuk* [1893] 21 Cal., 437, *Deno v. Hari* [1903] 31 Cal., 480, *Fatteh v. Menghi* [1904] 5 P. L. R., 99, *Roshan v. Bhanpertala* [1887] 2 C. P. L. R., 75, *Mohan v. Potts* [1891] 5 *ibid.*, 112. An injunction in respect of a contemplated judicial proceeding is not prohibited, 19 M. L. J., 14 (notes of recent cases). It is no longer practice to stay proceedings against infants, *Bai Shri v. Agarsinghji*, [1910] 34 B., 676.

necessary to prevent a multiplicity of proceedings—*Venkatesa v. Ramasami* [1895] 18 Mad., 338, *Deno v. Hari*, *supra*; *Karnadhar v. Hari*, *supra*, ante, 612. Relief may be necessary where one person claims or defends a general right against many, or, where many claim or defend such a right against one, 2 Story, *Eq.*, s. 854. Cf. s. 54, *ill.(p)*, ante.

in a Court—The injunction is an order *in personam* to the party, and not to the Court, *Venkatesa v. Ramasami*, supra; 22 Cyc., 787; ante, 613. Cf. *Raja Ram v. Dharam* [1905] 2 A. L. J. R., 601; *Vulcan Iron Works v. Bishambhar* [1908] 36 Cal., 233. Injunction, therefore, not issued where party not resident within jurisdiction, *Jumna v. Harcharan* [1911] 38 Cal., 405.

not subordinate—*Venkatesa v. Ramasami*, supra, *Sethurayar v. Shanmugam* [1897] 21 Mad., 353 (same Court), *Mahip v. Chotu* [1883] 5 All., 429 (revenue Court, *Dhuronidhur v. Agra Bank*, [1878] 4 Cal., 380, 396. Ante, 612. Distinguish *Appu v. Raman* [1891] 14 Mad., 425, 429, *Manraj v. Radha* [1884] 4 A. W. N., 352. Suit for declaration that site of plaintiff's house is his property and not public road, and for withdrawal of order for demolition issued by a magistrate at the instance of a municipality, is not barred by this section, *Jaganath v. Berhampur Municipality* [1907] 9 C. L. J., 286. No bar, where execution proceedings are not pending in a superior Court, *Nataraja v. Subramania* [1908] 5 M. L. T., 294.

(c) to restrain persons from applying to any legislative body;

Ante, 611.

any—whether in India or elsewhere, 1 Stokes, *A.-I. Codes*, 988. The Court will as a rule abstain from interfering with any matter of a political character, *Emperor of Austria v. Day*, [1861] 3 DeG. F. J., 217; ante, 649-50; 22 Cyc., 757. "Chancery has no jurisdiction to protect purely political rights, such as those in respect to public elections," *Fletcher v. Tuttle* [1894] 25 L. R. A., 143.

(d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government;

Ante, 610-1. Story, *Eq.*, s. 951 (e).

public duties—which are legal under an express enactment or otherwise, ante, 610-1.

Government of India—defined, Act X of 1897, s. 3, cl. 22.

Local Government—defined, *ibid*, cl. 29.

Public bodies with statutory powers—The Court does not interfere with the discretionary power of a corporate body unless it is abused, *Municipal Comrs. v. Branson* [1881] 3 Mad., 201; *Hormasji v. Pedder* [1875] 12 Bom. H. C. R., 199, *Ahmedabad Municipality v. Manilal* [1894] 19 Bom., 212, *Patel v. Ahmedabad Municipality* [1896] 22 Bom., 230, *Ibrahim v. Muni.*

Com. Lahore [1900] P. R., No. 52; *Ali Mardan v. Munl. Com., Kohat* [1905] 6 P. L. R., No. 50; *Aiyasami v. District Board, Tanjore* [1908] 31 Mad., 117. Where statutory powers are exceeded, see *Gaekwar v. Gandhi* [1903] 27 Bom., 344, P. C.; ante, 656.

(e) to stay proceedings in any criminal matter ;

Ante, 613-4; *Kerr v. Corporation of Preston* [1877] 6 Ch. D., 466. Cf. s. 7, ante. 2 Story, *Eq.*, s. 893; 1 Joyce, *Inv.*, 54.

stay proceedings—For stay of criminal proceedings pending civil suits, see *Rajkumari v. Bamasundari* [1896] 23 Cal., 610, *re Nana* [1892] 16 Bom., 729; *re Tilak* [1902] 26 Bom., 785; *re Devji* [1893] 18 Bom., 581.

criminal—i.e., merely and purely criminal, ante 614, 34; Daniell, *Ch. Pr.*, 1578. Cf. *Jagannath v. Berhampur Municipality* [1907] 9 C. L. J., 286.

(f) to prevent the breach of a contract, the performance of which would not be specifically enforced ;

Principle—A contract which will not be affirmatively enforced by a decree for specific performance will not be negatively enforced by an injunction; ante, 614-5. An injunction is a form of specific performance, 22 *Cyc.*, 844-5. For a qualification of this clause, see s. 57, post.

would not be specifically enforced—See ss. 17, 21, ante; e.g., where the agreement is opposed to law, *Bhikaji v. Bapu* [1877] 1 Bom., 550 (association of 20 persons not registered as a company), or is one for personal service, *Nusserwanji v. Gordon* [1881] 6 Bom., 266 (agent and solicitor). Macdonell, *Master & Serv.*, pt. 1, ch. xvi. Cf. *Mahip v. Chotu* [1883] 5 All., 429; *Ram v. Rakhal* [1913] 17 C. W. N., 1045 (superintendent of endowment).

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

Principle—A discretionary remedy will not be granted unless the Court is satisfied that it is really needed; especially where the injury is only threatened. Ante, 662-3. There should be a cause of action antecedent to the suit. Cf. *Ramlal v. Dalganjan* [1883] 5 All., 369.

nuisance—anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights, 2 Cooley, *Torts*, 1175. Cf. 3 Blackstone, *Com.*, 215; Garrett, *Nuisances*, 3-4. E.g., a privy constructed regardless of the plaintiff's rights, though under the orders of the municipality, *Ja'fir v. Kadir* [1888] 12 Bom., 634.

not reasonably clear—*Rattigan v. Munl. Com. Lahore*

[1888] P. R., No. 106 (slaughter-houses), *Haines v. Taylor* [1846] 10 Beav., 75, *Framji v. Framji* [1905] 30 Bom., 319, 325 (obstruction to light and air).

Conditional injunction—A conditional injunction may be granted to prevent a nuisance, though it should not be a temporary injunction of indefinite duration; the proper order is to grant a perpetual injunction, conditional upon the defendant not removing the cause of prospective damage within a fixed period, *Hari v. Munl. Com. Pindighat* [1901] P. R., No. 78.

(h) to prevent a continuing breach in which the applicant has acquiesced ;

Principle—Delay defeats equity. Ante, 606-7.

continuing breach—as in *Barret v. Blagrove* [1801] 6 Ves., 104 ; not where the breach is caused by distinct acts, each complete in itself, ante, 659, Cf. *Powell v. Hemsley*, [1909] 2 ch., 252, affg. 1 ch., 680.

applicant—i.e., the plaintiff.

acquiesced—For the elements of *acquiescence*, see ante, 658, 378-9 ; *Leeds v. Amherst* [1846] 2 Ph., 117, 123. Cf. *Ranchhod v. Lallu* [1873] 10 Bom. H. C., 95. Lightwood, *Time Limit*, ch. v., s. 2.

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

Principle—An injunction is treated as an extraordinary remedy and is held not to be called for where redress in a different form, but effective and certain, is available to the plaintiff. Ante, 604.

equally efficacious—i.e., practical and adequate ; ante, 609-10.

relief—e.g., pecuniary compensation, *Watson v. Ramchund* [1890] 18 Cal., 10, P. C., *Somasundaram v. Bappu* [1911] 12 I. C., 635 ; *Soliappa v. Soliappa* [1912] 11 I. C., 807 ; *Buta v. Hamir* [1888] P. R., No. 22 ; *Puna v. Gargji* [1886] 1 C. P. L. R., 151. Distinguish *Ramanjulu v. Apparanji* [1911] 21 M. L. J. R., 313 ; *Bal v. Sardarsang* [1911] 13 Bom. L. R., 905 (invasion likely to continue) ; *Mumtaz v. Kasim* [1913] 11 A. L. J. R., 423 (rival markets).

certainly be obtained—Ante, 609-10 ; where the defendant is poor or insolvent, a decree for damages will be infructuous, s. 12 (d), ill., ante.

any other usual mode of proceeding—e.g., a suit for money, *Chedi v. Dy. Comr. Bahraich* [1900] 3 O. C.,

351 ; or damages, *Raja v. Krishnabhat* [1879] 3 Bom., 232, *Dhunjibhoy v. Lisboa* [1888] 13 Bom., 252, *Ghanasham v. Moroba*, [1894] 18 Bom., 474, *Boyson v. Deane* [1899] 22 Mad., 251 ; or possession, *Kanakasabai v. Muttu* [1890] 13 Mad., 445, 446-7 ; *Jahar v. Nanda* [1914] 18 C. W. N., 545 ; or an appeal under Bombay District Municipal Act (IV of 1901), s. 86, *Chunilal v. Surat City Municipality* [1903] 27 Bom., 403. Distinguish, *Gaekwor v. Gandhi*, *ibid*, 344. P. C. ; *Gauri v. Lala* [1908] 12 O. C., 33. A suit by owner out of possession for permanent injunction does not bar subsequent suit for possession on same cause of action, *Bande v. Gokul* [1912] 34 All. 172 (overruling 8 I. C., 9).

Alternative decree for damages—should be made, where injunction is refused, without referring the plaintiff to a fresh suit, ante, 416, 668 ; *Nasarbhai v. Budrudin* [1891] 16 Bom., 533 ; *Bal v. Sardarsang* [1911] 13 Bom. L. R., 905. In every suit for injunction, an issue should ordinarily be drawn raising the question of the amount of damages payable in the event of injunction being refused, and, if necessary, the plaint may be amended, *Tejmal v. Chabilomal* [1909] 2 Sind L. R., 65.

except in case of breach of trust—Cf. s. 54, para. 3, cl. (a), ante. *Nelson, Inj.*, 506 sqq. Ante, 628.

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;

Illustrations.

(a) A seeks an injunction to restrain his partner, B, from receiving the partnership-debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(b) A manufactures and sells crucibles, designating them as "patent plambago crucibles," though in fact they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one, and he cannot obtain an injunction.

Principle.—He who seeks equity must do equity ; he who comes into equity must come with clean hands. Ante, 605-6 ; 22 *Cyc.*, 776.

conduct—inequitable, ill. (a), or dishonest, ill. (b) and (c), or likely to cause loss to the defendant, *Venkatachalam v. Sivaganga* [1904] 27 Mad., 409. But where no case of fraud upon the public is made out, mere 'puffing' statements will not disentitle plaintiff to relief, *Lawrence v. Bushnell* [1908] 12 C. W. N., 753 (copyright pirated). Relief may be denied where the

plaintiff has been negligent, *Seeni v. Santhanathan* [1896] 20 Mad., 58, or has acquiesced in the injury, *Radha v. Joy* [1864] 1 W. R., 228, *Nil v. Jujoo* [1873] 20 W. R., 328; *Sankaralingam v. Ralli*, 29 Mad., 500n. Cf. *Jamnadas v. Atmaram* [1877] 2 Bom., 133; *Nayna v. Ruipkun* [1882] 9 Cal., 609 611.

disentitle—mere *delay* is not enough, *Uda v. Imamuddin* [1875] 1 All., 82, *Kedarnath v. Manu Bibi* [1912] 16 C. W. N. 247 and ‘standing by,’ to extinguish legal right, should involve fraud or deceit, *Langlais v. Rattray* [1878] 3 C. L. R., 1. Ante, 657. Cf. *Bisheshar v. Muirhead* [1892] 14 All., 362; *Krishna v. Mahomed* [1899] 3 C. W. N., 255; *Ismail v. Jaigun*, [1900] 27 Cal., 570. The burden of proving acquiescence is on the defendant, *Benode v. Soudaminey* [1889] 16 Cal. 252, 259, ante, 659n.

III. (a)—*Littlewood v. Caldwell*, [1822] 11 Price, 97.

III. (b)—*Morgan v. McAdam*, [1867] 36 L. J., Ch., 228.

III. (c)—*Perry v. Truefitt* [1842] 6 Beav., 66 Ante, 606.

(k) where the applicant has no personal interest in the matter.

Principle—A court of equity will not aid a nominal plaintiff, whose suit is an imposition on the Court. Ante, 605.

personal interest—not limited to right of ownership, commodity or easement, as was supposed to be the law prior to this Act. (Cf. *Shepherd v. Trustees, Bombay Port* [1876] 1 Bom., 132).

interest—may be that of a member of a Hindu community, *Baiju v. Bulak* [1897] 24 Cal., 385; or a ryot in a village, *Ahmedbhoy v. Balkrishna* [1894] 19 Bom., 391; or a tax-payer in a municipality, *Vaman v. Sholapur Municipality* [1897] 22 Bom., 646. Where a village tank is common property of all the inhabitants, no single family can, on the ground of improvement and additions made by its ancestors, claim a right, by injunction or otherwise, to exclude the rest from contributing to its repairs, *Sivaraman v. Muthaya* [1888] 12 Mad., 241, P. C. (modg. 6 Mad., 229).

Bombay Mamlatdars Act—A landlord in constructive possession through tenants cannot obtain an injunction under Act III of 1876, s. 4, *Desai v. Keshavbhai* [1887] 12 Bom., 419, *Nemava v. Devandrappa* [1890] 15 Bom., 177, *Aba v. Parvatrao* [1892] 18 Bom., 46. Distinguish *Chintamanrav v. Bala* [1889] 14 Bom., 17.

Injunction
to perform
negative
agreement.

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied,

not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement : provided that the applicant has not failed to perform the contract so far as it is binding on him.

Illustrations.

(a) A contracts to sell to B for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000, but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b) A contracts to sell to B the good-will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(c) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(d) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

(e) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

Principle—To bind men's consciences to a fair and liberal performance of their agreements, *Lumley v. Wagner* [1852] 21 L. J., Ch., 898, 902 ; *Home v. Douglas* [1913] 17 C. W. N., 215 P. C., ante, 78.

Similar Law—Cf. s. 16, ante.

Scope—Exception to s. 56 (f), ante. There must be two agreements, an express affirmative and an express or implied negative agreement, the latter separable and capable of equitable cognizance, and the plaintiff should have performed his part of the contract, before the Court will by injunction compel partial performance. Ante, 626-7 ; *Langdell, Eq. J.*, 68-72. The section gives legislative sanction in India to the view expressed by Lord Selborne in *Wolverhampton &c. Ry. Co. v. London &c. Ry. Co.* [1873] 16 Eq., 433, 440, *Burn & Co. v. McDonald* [1908] 36 Cal., 354, 364. The section does not represent the present English doctrine, *ibid*, 368, *Chapman v. Westerby* [1913] 58 S. J., 50, but later English decisions cannot affect the codified law of India, *Munisami v. Subbarayar* [1907] 31 Mad., 97, 99.

negative agreement--not invalid or objectionable on

grounds other than co-existence with an affirmative agreement which is not specifically enforceable, *Pragji v. Pranjiwan* [1903] 5 Bom. L. R., 878. A servant cannot enforce a positive contract of service, *Sircār v. Baraboni Coal Concern* [1912] 16 C. W. N., 289. The agreement should be negative in substance, not merely in form, ante, 622-3, 626; *Kirchner v. Gruban* [1908] 78 L. J., Ch., 117.

express, e.g., not to take service elsewhere, *Brahmaputra Tea Co. v. Searth* [1885] 11 Cal., 545, 550, ante, 622-3; not to sell, *Carlisles Nephews v. Ricknauth* [1882] 8 Cal., 809, *Mackenzie v. Striramiah*, [1890] 13 Mad., 472, *South India Export Co. v. Subba* [1910] 8 M. L. T., 149, or consign goods to third parties, *Subba v. Badsha* [1902] 26 Mad., 168. Ills. (a), (c), post.

implied—not merely subsidiary, incidental or correlative to the affirmative agreement, but supported by an express negative purpose, ante, 621-2; *Star Newspaper Co.* [1893] W. N. (Eng.), 114. *Callianji v. Narsi* [1894] 18 Bom., 702, 711, 19 Bom., 76; *Yule v. Ardeshir* [1914] 16 Bom., L. R., 173. Ills. (b), (d), post.

not to do a certain act—some specific thing on which you can put your finger, and not merely what is inconsistent with the subject-matter of the affirmative covenant, *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch., 416; Fry, s. 857; ante, 623, 626. The act in itself must be calculated to injure the party expecting to benefit by the affirmative agreement, *Andrew Yule v. Ardeshir* [1913] 15 Bom. L. R., 724.

unable to compel specific performance—under any cl. of s. 21 ante, *Madras Ry. Co. v. Rust* [1890] 14 Mad., 18, *Callianji v. Narsi*, supra, 18 Bom., 715, *Subba v. Badsha*, supra, 171.

shall not preclude—but the Court may refuse relief in the exercise of its discretion where the parties, e.g., are not on equal terms, *Callianji v. Narsi*, supra. *Brahmaputra Tea Co. v. Searth*, supra.

provided—He who seeks equity must do equity. Ante, 627-8. Ill. (e), post. Kerr, *Inj.*, 5th. ed., 432.

Ill. (a)—Express negative agreement. As to agreements for sale of **goodwill**, see ante, 152; the agreement being **unconnected with business-premises** here may not be specifically enforced. As to agreements in *restraint of trade*, see I. C. A., s. 27, esp. exc. 1; *Auchterlonie v. Bill* [1868] 4 Mad. H. C. R., 77; *Burn & Co. v. Mc Donald* [1908] 36 Cal., 354, 368 (Harington, J.); *Cohen v. Wilkie* [1912] 16 C. W. N.,

534; *United Shoe Mfg. Co. v. Brunet* [1909] 78 L. J., P. C., 101; *Bromley v. Smith*, *ibid*, K. B., 745.

III. (b)—Implied negative agreement not to solicit custom, ante, 623. “In continuing to supply the plaintiff’s original customers, (the defendant) has actually retained the most valuable element of the thing sold to him; and it is to compel the full and complete execution of the agreement according to its spirit, that the Court intervenes by its decree for specific performance,” *Palmer v. Graham* [1850] 1 Pars. Eq., 478, 2 Scott, 20.

III. (c)—Express negative agreement. *Lumley v. Wagner* [1852] 1 DeG. M. & G., 604. *Charlesworth v. MacDonald*, [1898] 23 Bom., 103.

III. (d)—Implied negative agreement. Cf. s. 21, ill.(1) of cl. (b), ante. *Madras Ry. Co. v. Rust* [1890] 14 Mad., 18; *Callianji v. Narsi*, supra; *Burn & Co. v. McDonald*, supra; *National Prov. Bank v. Marshall* [1889] 60 L. T., N. S., 341.

III. (e)—Express negative agreement not enforced, because *B* fails to perform the contract so far as it is binding on him, ante, 627.

specified distance—In England, the courts examine if the area of restraint is reasonable, *Nevans v. Walker* [1914] 1 Ch., 413.

APPENDIX D.

RULES FRAMED UNDER SECTION 51, SPECIFIC RELIEF ACT.

Calcutta High Court.

The High Court of Calcutta has framed the following rules:—

1. Every application under sec. 45 of the Specific Relief Act, 1877, shall be made to the Judge or one of the Judges exercising the original civil jurisdiction of this Court.

2. If a rule or alternative order be granted or made under sec. 46 of the said Act, the matter shall, unless otherwise ordered, be set down for hearing at the head of the peremptory list of contested suits for the day fixed by such rule or order.

3. If cause be shown or answer made upon affidavit putting in issue any material question of fact, the Court may adjourn the matter to some early day for hearing upon the testimony of witnesses to be examined in like manner as in a suit.

4. When a matter is adjourned for hearing upon the testimony of witnesses, either party may obtain summonses to witnesses, and the procedure in all other respects shall be similar to that followed in a suit.

5. Every application, affidavit, rule, order or other proceeding under the eighth chapter of the said Act, shall be entitled in this Court and in the matter of the Act and of the applicant. (*Calcutta Gazette*, 1877, pt. 1, p. 1030).

6. Unless otherwise ordered, every rule under sec. 46 of the said Act shall call not only on the public servant, corporation, or inferior Court, but also on any person other than the applicant who may be affected by the act to be done or forborne to show cause.

7. The service of every rule or order under the eighth chapter of the said Act shall be made in like manner as to the service of the orders made by the Court in the exercise of its ordinary civil jurisdiction.

Bombay High Court.

The following rules have been framed by the High Court at Bombay :—

257. Every application under Chapter VIII of the Specific Relief Act shall be instituted in the matter of the Act and of the applicant, and be made on motion in open Court before one of the Judges on the original civil side of the Court, and shall be supported and answered by affidavits, unless in lieu thereof, or in addition thereto, the Court shall direct oral testimony to be taken.

258. Any rule granted on such application as aforesaid shall, unless the Judge otherwise orders, be returnable four days after service thereof, and all affidavits in reply shall be filed in the Prothonotary's Office, and copies thereof served upon the applicant or his attorney at or before 4 o'clock on the day preceding the showing of cause against such application.

APPENDIX E.

INDIAN CONTRACT ACT.

ACT No. IX OF 1872.

Definitions.

[See Specific Relief Act, s. 3, App. C, 24, *supra*.]

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Consideration.	(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.
Agreement.	(e) Every promise and every set of promises, forming the consideration for each other, is an agreement.
Void agreement.	(g) An agreement not enforceable by law is said to be void.
Contract.	(h) An agreement enforceable by law is a contract.
Voidable contract.	(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.
Void contract.	(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.
Fraud.	17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :— (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true ; (2) the active concealment of a fact by one having knowledge or belief of the fact ; (3) a promise made without any intention for performing it ; (4) any other act fitted to deceive ; (5) any such act or omission as the law specially declares to be fraudulent.

Explanation—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here the relation between the parties will make it A's duty to tell B if the horse is unsound.

(c) B says to A—"If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

18. "Misrepresentation" means and includes—

Misrepresentation.

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

77. "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer. Sale.

[Cf. 56 & 57 Vict., c. 71, sec. 1 (3)].

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done or who is so represented, is called the "principal." Agent,
principal.

APPENDIX F.

CODE OF CIVIL PROCEDURE.

ACT No. V OF 1908.

SCHEDULE I.

ORDER XXXIX.

[*Vide Specific Relief Act, sec. 53, ante, 143.*]

Temporary Injunctions.

Cases in which temporary injunctions may be granted (C. P. C., s 492.)

1. Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditor,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Injunction to restrain repetition or continuance of breach (C. P. C., s. 493.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction or restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of

the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

3. The Court shall, in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction, Court to direct notice to opposite party (C. P. C., s. 494).

4. Any order for an injunction may be discharged or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside (C. P. C., s. 496).

5. An injunction directed to a corporation is binding, not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers (C. P. C., s. 495).

ORDER XL.

[Vide Specific Relief Act, sec. 44, ante, 134].

Appointment of Receivers.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

Appointment of receivers (C. P. C., s. 503).

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation,

management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Remuneration (C. P. C., s. 503).

2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Duties (C. P. C., s. 503).

3. Every receiver so appointed shall—

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;
- (b) submit his accounts at such periods and in such form as the Court directs;
- (c) pay the amount due from him as the Court directs; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Enforcement of receiver's duties.

4. Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

When Collector may be appointed receiver (C. P. C., s. 504).

5. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

APPENDIX A (3).

PLAINTS.

No. 32.

MOVEABLES WRONGFULLY DETAINED.

In the Court of—

A.B. (*add description and residence*)... *Plaintiff.*

against
C.D. (*add description and residence*)... *Defendant.*

A.B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff owned (or state facts showing a right to the possession) the goods mentioned in the schedule hereto annexed (or describe the goods), the estimated value of which is rupees

2. From that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees , and for the purpose of court-fees is rupees

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had.

(2) rupees, compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title*).

A.B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of

ground belonging to the defendant, situated at contained (ten bighas).

2. The plaintiff was thereby induced to purchase the same at the price of rupees, in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only (five bighas).

(*As in paras. 4 & 5 of form No. 1 [see form No. 32, supra]*).

7. The plaintiff claims—

(1) rupees, with interest from the
day of 19 ,

(2) that the said agreement be delivered up and cancelled.

— — —
No. 35.

AN INJUNCTION RESTRAINING WASTE.

(*Title*).

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of (describe the property).

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has (cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale) without the consent of the plaintiff.

(*As in paras. 4 & 5 of form No. 1.*)

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

(*Pecuniary compensation may also be claimed*).

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title).

A.B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of (the house No. street, Calcutta.)

2. The defendant is, and at all the said times was, the absolute owner of (a plot of ground in the same street).

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and, from that day until the present time, has continually caused cattle to be brought and killed there (and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff).

4. In consequence, the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.

(As in paras. 4 & 5 of form No. 1).

7. The plaintiff claims the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title).

A.B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as street at , so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General (or of the Collector or other officer appointed in this behalf) to the institution of this suit.

(As in paras. 4 & 5 of form No. 1).

5. The plaintiff claims—

(1) A declaration that the defendant is not entitled to obstruct the passage of the public along the said public road.

- (2) An injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A
WATER-COURSE.

(Title).

A.B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a stream known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the _____ day of _____ 19____, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas before the said diversion of water, he was able to grind _____ sacks per day.

(As in paras 4 and 5 of form No. 1).

7. The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY
THREATENED WITH DESTRUCTION,
AND FOR AN INJUNCTION.

(Title).

A.B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of (a portrait of his grand-father which was executed by an eminent painter), and of which no duplicate exists (*or state any facts showing that the property is of a kind that cannot be replaced by money*).

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the (painting).

(As in paras. 4 and 5 of form No. 1.)

8. The plaintiff claims—

- (1) That the defendant be restrained by injunction from disposing of, injuring or concealing the said painting.
- (2) That he be compelled to deliver the same to the plaintiff.

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title).

A.B., the above-named plaintiff, states as follows :—

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of (or sell to) the plaintiff certain immoveable property therein described and referred to, for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part, of which the defendant has had notice.

(As in paras. 4 and 5 of form No. 1.)

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property (or to accept a transfer and possession of the said property) and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title).

A.B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant entered into an agreement in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the day of 19 , the plaintiff tendered rupees to the defendant and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 19 , the plaintiff again demanded such transfer (*or* the defendant refused to transfer the same to the plaintiff).

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

(*As in paras. 4 and 5 of form No. 1.*)

8. The plaintiff claims—

(1) that the defendant transfer the said property to plaintiff by a sufficient instrument (*following the terms of the agreement*);

(2) rupees compensation for withholding the same.

APPENDIX A (4).

WRITTEN STATEMENT.

No 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A.B., was not the agent of the defendant (*if alleged by plaintiff*).
3. The plaintiff has not performed the following conditions—(*conditions*).
4. The defendant did not—(*alleged acts of part performance*).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*state why*)
6. The agreement is uncertain in the following respects—(*state them*).
7. (*or*) The plaintiff has been guilty of delay ;
8. (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*) ;
9. (*or*) The agreement is unfair.
10. (*or*) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10), (*or as the case may be*).
12. The agreement was rescinded under conditions of sale, No. 11 (*or by mutual agreements*).

In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

APPENDIX D.

DECREES.

No. 12.

DEGREE FOR RECTIFICATION OF INSTRUMENT.

(*Title*).

It is hereby declared that the , dated the day of 19 does not truly express the intention of the parties to such . And it is decreed that the said be rectified by

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(*Title*).

Let the defendant , his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land, marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(*Title*).

Let the defendant , his contractors, agents and workmen be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title).

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at _____, the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

SCHEDULE II.

ARBITRATION.

18. Where any party to any agreement to refer to arbitration or any person claiming under him, institutes any suit against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

Stay of suit where there is an agreement to refer to arbitration.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this Schedule apply.

Exclusion of certain words in the Specific Relief Act, 1877.

SCHEDULE I.

ORDER XXI.

Execution of decrees and orders.

Decree for specific moveable property (C. P. C., s. 259).

31. (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.
- (2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.
- (3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

Decree for specific performance, for restitution of conjugal rights or for an injunction (C. P. C., s. 280).

32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both.
- (2) Where the party against whom a decree for

specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

- (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold: and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.
- (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.
- (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court at the cost of the judgment-debtor, and, upon the act being done, the expenses incurred may be ascertained in such manner as the Court may direct, and may be recovered as if they were included in the decree.

[Eng. R.S.C.
Or. 42, r. 30].

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B, and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of document, or endorsement of negotiable instrument (C. P. C., s. 261).

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor, together with a notice requiring his objections (if any) to be made within such time as the court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed by the law for the time being in force ; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(C. P. C., s.
262).

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely : —“ C. D., Judge of the Court of (or as the case may be), for A. B., in a suit by E. F. against A. B.,” and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court or such officer as it may appoint in this behalf, shall cause the document to be registered, if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

Decree for
immoveable
property
(C. P. C., s.
263).

35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Decree for delivery of immovable property when in occupancy of tenant. (C. P. C., s. 264).

APPENDIX G.

INDIAN LIMITATION ACT.

ACT No. IX OF 1908.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Schedule I.

Description of suits.	Period of limitation.	Time from which period begins to run.
3.—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property.	Six months ...	When the dispossession occurs.
41.—To restrain waste ...	Three years ...	When the waste begins.
42.—For compensation for injury caused by an injunction wrongfully obtained.	Do. ...	When the injunction ceases.
48.—For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same.	Do. ...	When the person having the right to the possession of the property first learns in whose possession it is.
49.—For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Do. ...	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
91.—To cancel or set aside an instrument not otherwise provided for.	Do. ...	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

Description of suits.	Period of limitation.	Time from which period begins to run.
92.—To declare the forgery of an instrument issued or registered.	Three years ...	When the issue or registration becomes known to the plaintiff.
93.—To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Do. ...	The date of the attempt.
95.—To set aside a decree obtained by fraud or for other relief on the ground of fraud.	Do. ...	When the fraud becomes known to the party wronged.
96.—For relief on the ground of mistake.	Do. ...	When the mistake becomes known to the plaintiff.
113.—For specific performance of a contract.	Do. ...	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
114.—For the rescission of a contract.	Do. ...	When the facts entitling the plaintiff to have the contract rescinded first become known to him.
118.—To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Six years ...	When the alleged adoption becomes known to the plaintiff.
119.—To obtain a declaration that an adoption is valid.	Do. ...	When the rights of the adopted son as such are interfered with.
120.—Suit for which no period of limitation is provided elsewhere in this schedule.	Do. ...	When the right to sue accrues.
125.—Suit during the life of a Hindu or Mahomedan female by a Hindu or Mahomedan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void, except for her life or until her re-marriage.	Twelve years...	The date of the alienation.
126.—By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Do. ...	When the alienee takes possession of the property.

Description of suits.	Period of limitation.	Time from which period begins to run.
129.—By a Hindu for a declaration of his right to maintenance.	Twelve years	When the right is denied.
133.—To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Do. ...	The date of the purchase.
134.—To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	Do. ...	The date of the transfer.
141.—Like suit by a Hindu or Mahomedan entitled to the possession of immoveable property on the death of a Hindu or Mahomedan female.	Do. ...	When the female dies.
142.—For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Do. ...	The date of the dispossession or discontinuance.
144.—For possession of immoveable property or any interest therein, not hereby otherwise specially provided for.	Do. ...	When the possession of the defendant becomes adverse to the plaintiff.

APPENDIX H.

INDIAN REGISTRATION ACT.

ACT No. XVI OF 1908.

[*Vide Specific Relief Act, s. 4 (c), supra, 26.*]

17. (1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, No. XX of 1866, or the Indian Registration Act, No. VII of 1871, or the Indian Registration Act, No. III of 1877, or this Act came or comes into force, namely :—

Documents of which registration is compulsory.

- (a) instruments of gift of immoveable property ;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ; and
- (d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent :

Provided that the Local Government may, by order published in the local official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

- (i) any composition-deed ; or
- (ii) any instrument relating to shares in a Joint Stock Company, consisting in whole or in part of immoveable property ; or

- (iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or
 - (iv) any endorsement upon or transfer of any debenture issued by any such company ; or
 - (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest ; or
 - (vi) any decree or order of a Court and any award ; or
 - (vii) any grant of immoveable property by Government ; or
 - (viii) any instrument of partition made by a Revenue officer ; or
 - (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, No. XXVI of 1871, or the Land Improvement Loans Act, No. XIX of 1883 ; or
 - (x) any order granting a loan under the Agriculturists Loans Act, No. XII of 1884, or instrument for securing the repayment of a loan made under that Act ; or
 - (xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage, when the receipt does not purport to extinguish the mortgage ; or
 - (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer.
- (3) Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.

Effect of
non-regis-
tration of
documents
required to
be regis-
tered.

49. No document required by section 17 to be registered shall—
- (a) affect any immoveable property comprised therein ; or
 - (b) confer any power to adopt ; or

- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

50. (1) Every document of the kind mentioned in clauses (a), (b), (c) and (d) of section 17, sub-section (1), and clauses (a) and (b) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Certain registered documents relating to land, to take effect against unregistered documents.

(2) Nothing in sub-section (1) applies to leases exempt under the proviso to sub-section (1) of section 17, or to any document mentioned in sub-section (2) of the same section, or to any registered document which had not priority under the law in force at the commencement of this Act.

Explanation—In case where Act No. XVI of 1864 or the Indian Registration Act, No. XX of 1866, was in force in the place and at the time in and at which such unregistered document was executed, “unregistered” means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under the Indian Registration Act, No. VIII of 1871, or the Indian Registration Act, No III of 1877, or this Act.

APPENDIX I.

THE COURT FEES ACT.

ACT No. VII OF 1870.

Computation of fees payable in certain suits.

For moveable property of no market-value.

For a declaratory decree and consequential relief.
For an injunction.

For specific performance.

7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :—

iv. In suits—

- (a) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,
- (c) to obtain a declaratory decree or order, where consequential relief is prayed,
- (d) to obtain an injunction—
according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought.

x. In suits for specific performance—

- (a) of a contract of sale—according to the amount of the consideration ;
- (b) of a contract of mortgage—according to the amount agreed to be secured ;
- (c) of a contract of lease—according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term ;
- (d) of an award—according to the amount or value of the property in dispute.

SCHEDULE I.

AD VALOREM FEES.

Number.		Proper Fee.
2. Plaint in a suit for possession under "the Specific Relief Act, 1877, s. 9."	.....	A fee of one-half the amount prescribed in the foregoing scale. [N.B.—A table showing the proper <i>ad valorem</i> fee is annexed to Schedule I, Court Fees Act].

SCHEDULE II.

FIXED FEES.

Number.		Proper Fee.
17. Plaint or memorandum of appeal in each of the following suits :— iii. To obtain a declaratory decree where no consequential relief is prayed : iv. To set aside an award : v. To set aside an adoption : vi. Every other suit where it is not possible to estimate at a money value the subject-matter, and which is not otherwise provided for by this Act.	...	Ten rupees.

THE
FEDERAL
BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

1
2
3
4

1
2
3
4

INDEX.

[The reference is to pages. The numbers in italics refer to pages of the Appendices.]

A						PAGE.
ABANDONMENT						
of contract	...	...	...	...	...	380
rights	...	...	...	...	...	378, 378 <i>n</i>
ABILITY to perform,						
power to acquire	...	...	...	...	...	127
ACCEPTANCE of proposal						189
absolute	...	...	...	...	...	192
communication of	...	...	...	...	...	194
nugatory variation in	...	...	...	...	...	193
qualified	...	...	...	...	...	192
within reasonable time	...	...	...	...	...	194
ACCORD and satisfaction						264
ACCOUNTS						
in patent cases	...	...	...	...	600, 607 <i>n</i> , 658, 668	
specific relief	...	...	...	...	...	30-1
ACQUIESCENCE						...377, 378, 393, 475, 501, 503, 606, 651, 653 <i>n</i> , 657-9, 668
essentials of	...	...	...	...	...	658
in trespass	...	...	...	...	...	32
injunction, temporary and permanent	...	...	...	...	658, 664, 153, 161	
SEE INJUNCTION.						
Onus—SEE ONUS.						
See DELAY, LACHES, LIMITATION.						
ACT of State						... 610, 164
ACTION						
multiplicity of,	418, 550, 603, 609, 641, 643, 644 <i>n</i> , 58, 71, 103, 128, 157					
See Suit.						
ACTIONABLE CLAIM						
contract about	...	...	...	...	...	121
ACTS, British Indian						
1847, XX of	...	...	...	...	...	644 <i>n</i>
1854, VI of, s. 29	...	...	...	...	...	487 <i>n</i> , 118
1850, III of (Bombay)...	...	...	...	...	...	153
1857, VI of...	...	...	...	...	...	41
1858, XXXIV of, s. 20	...	...	...	...	...	91
1859, VIII of, s. 15	...	...	...	...	...	487, 2, 16, 118
s. 192	...	...	...	...	...	2, 58
s. 230	...	...	...	...	...	36
XIV of, s. 1, cl. 9	...	...	...	...	...	377
s. 15	...	...	...	...	...	53, 54, 56, 13, 30
s. 17	...	...	...	...	...	13

						PAGE.
ACTS— <i>contd.</i>						
1860, XXI of	...	...	...	...	...	21
XLV of	...	...	...	...	...	142
ch. xxi.	...	...	...	...	...	158
s. 478	...	...	...	...	...	645, 155
s. 499	...	...	...	...	...	27
1863, XX of	...	...	...	...	...	581, 21
1864, XVII of	...	...	...	...	...	21
1865, VIII of (Madras)	...	...	...	...	...
s. 85	...	...	...	...	...	563, 1, 125
X of,	s. 3	...	...	...	...	383, 23
s. 4	...	...	...	...	...	14, 16
s. 5	...	...	...	...	...	407
s. 271	...	...	...	...	...	97
ill. (c)	...	...	...	...	...	330
s. 275	...	...	...	...	...	16
1869, IV of,	...	...	...	...	...	126
XIV of,	s. 24...	...	...	...	...	396
1870, VII of,	s. 7, iv, cl. (c)	...	...	...	...	485, 524, 113, 122
(d)	...	...	...	...	...	669, 149, 198
x	...	...	...	...	...	433
sch. II, art. 17, cl. (1)	...	...	...	...	...	122, 199
(3)	...	...	...	...	...	524, 113, 121, 199
(6)	...	...	...	...	...	104
1871, IX of, sch. II, art. 113	...	...	...	...	...	377, 15
1872, I of,	s. 4	...	...	...	...	95, 45
13	...	...	...	...	...	133
32	...	...	...	...	...	135
33	...	...	...	...	...	34
ss. 40-3	...	...	...	...	...	133
s. 65	...	...	...	...	...	407
91	...	...	...	...	...	87
92	...	...	...	...	...	197, 248, 254, 266, 444, 87
prov. 1	...	...	...	...	...	248, 324, 85
3	...	...	...	...	...	199
4	...	...	...	...	...	265
93	...	...	...	...	...	197
95	...	...	...	...	...	197
97	...	...	...	...	...	197
110	...	...	...	...	...	56
111	...	...	...	...	...	94
115	...	...	...	...	...	336
IX of	...	...	...	...	...	4, 24
ch. ix	...	...	...	...	...	69
xi	...	...	...	...	...	30
s. 2 (a)	...	...	...	...	...	8, 189
(b)	...	...	...	...	...	8, 189
(d)	...	...	...	...	...	135, 210, 316, 24, 82, 94, 175
(e)	...	...	...	...	...	8, 24, 88, 102, 174
IX of,	s. 2 (g)	...	...	...	...	77, 144, 24, 112, 174
(h)	...	...	...	...	...	8, 24, 88, 174
(i)	...	...	...	...	...	23, 77, 211, 24, 25, 105, 112, 174
(j)	...	...	...	...	...	24, 77, 24, 112, 174
4	...	...	...	...	...	194, 195
5	...	...	...	...	...	195, 210
6	...	...	...	...	...	195
cl. 2	...	...	...	...	...	194
7,	cl. 2	...	...	...	...	194
8	...	...	...	...	...	195
10	...	...	...	...	...	23, 76, 135-6
11-23	...	...	...	...	...	25
s. 11	...	...	...	...	...	135, 199, 41

ACTS—*contd.*

PAGE.

1872, IX of,

s. 12	...	...	135, 200, 298
ill. (b)	...	...	200
13	...	...	12, 133, 189, 340
14	...	...	23, 211
15	...	...	23, 211, 94, 95
expln.	...	...	212
16	...	...	23, 213, 22, 94, 95
cl. (3)	...	...	94
ill. (c)	...	...	217
17	...	23, 218, 24, 73, 85, 94, 95, 100, 174	
cl. (1)	...	...	219
(2)	...	...	220
(3)	...	...	218
(4)	...	...	220, 319
(5)	...	...	220, 229
expln.	...	...	221
ill. (a)	...	...	229
(b)	...	...	222
(c)	...	...	227
(d)	...	...	229
18	...	23, 241, 24, 73, 85, 87, 95, 175	
19	...	23, 211, 451, 105, 112	
expln.	...	...	234
exc.	...	...	236, 95
ill. (a)	...	...	236
(b)	...	...	234
(d)	...	...	220
19A	...	...	211, 451
20	...	24, 133, 336, 461, 68, 85, 93, 96	
ills. (a), (b), (c)	...	...	134
21	...	...	340, 341, 96
ill. (i)	...	...	87
22	...	...	329, 85, 96
23	...	136, 140, 144, 465, 106	
ill. (j)	...	...	139
(k)	...	...	139
24	...	...	77, 356
s. 25	...	...	77, 135, 24
cl. (1)	...	...	211, 384
(3)	...	...	144
expln. (1)	...	...	384
26	...	...	77, 149
27	...	77, 120, 150, 151, 615, 52	
exc.	...	...	152
28	...	77, 120, 143, 68	
exc. (1)	...	...	148
(2)	...	...	145
29	...	...	77, 132
ill. (a)	...	...	196
(c)	...	...	196
(d)	...	...	196, 197
30	...	...	77, 152
31	...	...	267
32	...	...	267
ill. (c)	...	...	267
37	...	397, 414, 76	
para. 2	...	...	76
ill. (a)	...	...	400
(b)	...	...	398
39	...	380, 451, 457, 108	
40	...	...	398

ACTS—contd.

1872, IX of,

ill. (a)	...	...	400
(b)	...	...	398
42	...	...	412
44	...	...	412
51	...	...	414
53	...	...	458, 105
55	...	...	270, 458, 51, 105
para. 3	...	...	274
56	...	...	274, 281, 47, 60
para. 2	...	...	138
ill. (d)	...	...	275
(e)	...	...	277
57	...	...	134, 204, 256, 52
58	...	...	204, 356, 52
62	...	...	265, 451, 88, 104
ills. (a), (b)	...	...	266
63	...	...	264, 265
ills. (a), (b), (c)	...	...	265
64	...	...	451, 470, 473, 486, 109, 115
65	...	...	470, 486, 1.9, 115
67	...	...	458, 105
71	...	...	70, 33
73	...	...	420, 25, 84, 81
74	...	...	117, 420, 60
75	...	...	470
77	...	...	25, 82, 175
86	...	...	281, 46
ill. (b)	...	...	278, 281
s. 95	...	...	69, 38
96	...	...	69
107	...	...	425
108	...	...	68
ill.	...	...	68
109	...	...	229, 53
110	...	...	53
ss. 110-6	...	...	224
s. 114	...	...	224
118	...	...	53
121	...	...	451
123	...	...	240
145	...	...	114
146	...	...	114
153	...	...	458, 105
ill.	...	...	459
ss. 167-70	...	...	38
s. 168	...	...	38
178	...	...	40
180	...	...	69
182	...	...	24, 175
208	...	...	330, 97
216	...	...	23
226	...	...	76
229	...	...	257, 23, 90
230	...	...	400, 76
cl. (2)	...	...	76
231	...	...	400, 76
232	...	...	400, 76
236	...	...	400, 80
238	...	...	231
265	...	...	618
s. 12	...	...	396

1873, III of,

ACTS—contd.		PAGE.
1874, III of,	...	407, 14
1876, I of (Madras), ss. 5-6	...	516, 139
1876, III of (Bombay Mamlatdars)	...	31
VII of (Bengal)	...	528, 33
s. 59	...	517
VIII of (Bengal)	...	496, 135
1877, I of,	...	34, 17
ch. i.	...	29
ii.	...	78, 41, 146, 152
iii.	...	84, 100
iv.	...	24, 470, 93, 104, 110
v.	...	477, 484, 104, 110
vi.	...	116
vii.	...	134
viii.	...	536, 538, 539, 137
ix.	...	27, 143
x.	...	27, 146
1877, I of, pt. I.	...	17
II.	...	78, 29
III.	...	143
Preamble	...	17
s. 1	...	17
2	...	19
3	...	76, 209, 218, 383, 603, 628, 19, 25
ill. (a)	...	38, 42, 66, 77, 82, 99, 114, 144, 151, 154, 159
(b)	...	19, 22
(c)	...	19, 22
(d)	...	20, 22
(e)	...	20, 22
(f)	...	20, 23
(g)	...	20, 23
(h)	...	257, 20, 23, 26, 91
4	...	257, 20, 23, 91
cl. (a)	...	76, 254, 25, 84
(b)	...	76, 24, 41, 75
(c)	...	25, 41
5	...	254, 25, 75
cl. (a)	...	4-5, 26-7
(b)	...	5, 35, 64, 26
(c)	...	8, 76, 27, 41
(d)	...	8, 588, 26, 27, 144
(e)	...	27
6	...	544, 27
7	...	27, 143
8	...	5, 540, 17, 27
9	...	29
para. 2	...	53-67, 33-7, 113
3	...	55, 36
4	...	67, 36
10	...	67, 36
expln. 1	...	69, 37-9
2	...	70, 37
ills.	...	37, 38
11	...	70, 38, 39
cl. (a)	...	39-41
(b)	...	71, 39, 41, 42
(c)	...	72, 87, 39, 41
(d)	...	72, 87, 39, 41
ill. (a)	...	68, 39, 41
(b)	...	71, 39, 40
	...	72, 39, 40

		PAGE.
ACTS— <i>contd.</i>		
1877, I of,	ill. (c) ..	13, 40
ss. 12-21	...	71
s. 12	...	78, 87, 159, 41, 52, 97, 152
	cl. (a) ..	83-4, 384, 630, 41, 99, 156
	ill. (b) ..	85, 41, 42
	ill. (c) ..	83, 87, 119, 42, 44
s. 12,	ill. (d) ..	... 42, 43
	cl. (c) ..	83, 87, 97, 110, 43, 45, 61
	ill. (i) ..	... 43
	(ii) ..	108, 110, 43, 44, 63
	(iii) ..	... 90, 43, 44, 45
	(iv) ..	88, 43, 44, 45, 63
	cl. (d) ..	83, 87, 119, 127, 129, 130, 44
	ill. (e) ..	... 129, 44
	expln. ..	... 95, 97, 45
13	...	281, 282, 46, 49, 60
	ill. (a) ..	279, 282, 283, 46, 47-8
	(b) ..	272, 279, 282, 295, 319, 46, 48
14	...	97, 174, 243, 308, 337, 353, 362,
		366, 426, 427, 48-9, 51
		59, 68, 80, 82, 96, 97
	ill. (a) ..	... 48, 49
	(b) ..	... 48, 49
15	...	174, 182, 272, 337, 353, 362, 366,
		426, 50, 68, 80, 82, 96
	ill. (a) ..	... 50, 51
	(b) ..	... 50, 51
16	...	97, 174, 204, 243, 356, 51, 68, 97
17	...	... 174, 619, 48, 53
18	...	... 126-9, 53-7, 82
	cl. (a) ..	... 126, 55
	(b) ..	... 127, 55
	(c) ..	... 127, 128, 56
	(d) ..	... 426, 56-7
19	...	408, 415, 426, 469, 26, 57, 81, 97
	expln. ..	... 419, 57, 95
	ill. (i) ..	... 419, 58, 59
	(ii) ..	... 419, 58, 60
para. 2, ill.	...	... 416, 57-8, 60
3, ill.	...	... 417, 58, 60
4	...	... 419, 60
20	...	... 116, 60
	ill. (a) ..	... 60
21	...	604, 627, 41, 52, 55, 59, 60, 75, 152
	cl. (a) ..	97, 155, 159, 416, 43, 59, 61
	ill. (i) ..	... 155, 61, 62
	(ii) ..	... 156, 61, 62
	(iii) ..	... 158, 62
	(b) ..	... 165, 621, 627, 44, 62, 160
	ill. (i) ..	... 62, 63
	(ii) ..	... 115, 62, 63
	(iii) ..	... 162, 62, 63
	(iv) ..	... 62, 63
	(v) ..	... 165, 62, 63
	(vi) ..	... 165, 62, 63
	(vii) ..	... 165, 62, 63
	(viii) ..	... 162, 62, 63
	ill. (ix) ..	... 62, 63

ACTS—contd.

			PAGE.
1877, I of, s. 21,	ill.	(x)	... 163, 311, 62, 63
		(xi)	... 291, 416, 62, 63
		(xii)	... 163, 62, 63
	ills.	...	... 348-9
	cl. (c)	...	... 159, 288, 416, 64
		ill. ...	... 291, 64, 65
	(d)	...	... 169, 416, 65
		ill. ...	... 170, 65
	(e)	...	... 208, 65, 66
	ill.	(i)	... 208, 65
		(ii)	... 209, 65
		(iii)	... 65
		(iv)	... 209, 65-6
	(f)	...	... 204, 207, 66, 79
		ill. ...	... 204, 66
	(g)	...	... 169, 416, 67
		ill. ...	... 168, 67
	(h)	...	... 48, 67
		ill. ...	... 134, 322, 68
	last para.	...	... 146, 68-70
22	...	...	... 182, 184, 188, 226, 530, 596, 42
		...	... 52, 55, 60, 70, 98, 102, 103, 127, 134, 160
I	...	...	... 296, 307, 72, 94
	ill. (a)	...	... 296, 72, 73, 95
	(b)	...	... 296, 72, 73
	(c)	...	... 220, 72, 73
	(d)	...	... 298, 72, 73
II	...	...	... 306, 307, 314, 333, 73
	ill. (e)	...	... 307, 73, 74
	(f)	...	... 310, 73, 74
	(g)	...	... 297, 324, 73, 75
	(h)	...	... 308, 73, 75
	(i)	...	... 310, 73-4, 75
	(j)	...	... 310, 74, 75
	(k)	...	... 311, 64, 74, 75
III	...	...	... 258, 75
	ill. ...	...	... 110, 112, 63, 75
23	...	...	... 397, 76
	cl. (a)	...	... 397, 76
	(b)	...	... 397, 398, 76
	prov.	...	... 398, 399, 76
	(c)	...	... 210, 404, 406, 77
	(d)	...	... 403, 77
	(e)	...	... 34, 401, 78
	(f)	...	... 34, 401, 78
	(g)	...	... 402, 79, 92
	(h)	...	... 403, 79, 92
24	...	...	... 55, 79
	cl. (a)	...	... 400, 407, 79
	ill.	...	... 79
	(b)	...	... 407, 80, 95
		ill. (i)	... 407, 80, 81
		(ii)	... 368, 80, 81
		(iii)	... 369, 80, 81
		(iv)	... 369, 80, 81
	(c)	...	... 408, 427, 58, 81
		ill. ...	... 81
	(d)	...	... 211, 81, 84, 156
25	...	...	... 358, 53, 82
	cl. (a)	...	... 358, 82, 83
		ill. (a)	... 358, 359, 83, 83

		PAGE.	
ACTS—contd.			
1877, I of, s. 25	cl. (b)	...	358, 368, 83
	ill. (b)	...	361, 83, 83-4
	(c)	...	83, 84
	(c)	...	210, 384, 81, 81
	ill (d)	...	210, 384, 84
26		...	248, 444, 428, 430, 55
		...	64, 73, 84, 93, 101
		...	245-0, 380, 344, 85
	cl. (a)	...	344, 85
	ill. (a)	...	245-6, 330, 342 345, 85
	(b)	...	345, 86
	ill. (b)	...	245, 247, 368, 373, 374 86, 93
	(c)	...	362, 373, 86
	ill. (c)	...	342, 346, 435, 87, 103
	(d)	...	346, 87
	ill. (d)	...	267, 87, 156
	(e)	...	207, 87
	ill. (e)	...	408, 409, 54, 63, 88
27	...	...	408, 88
	cl. (a)	...	258, 408, 55, 89
	(b)	...	409, 89, 91
	ill. (i)	...	409, 89, 91
	(ii)	...	409, 89, 91
	(iii)	...	410, 89, 90, 91
	(iv)	...	410, 89, 90, 91
	(v)	...	411, 55, 91
	(c)	...	411, 91, 92
	ill. (i)	...	411, 91, 92
	(ii)	...	34, 411, 79, 92
	(d)	...	412, 79, 92
	(e)	...	244, 318, 55, 73, 93
28	...	...	318 93
	cl. (a)	...	226, 330, 91, 96
	(b)	...	183, 330, 333, 336, 342, 343, 96
	(c)	...	330, 96, 97
	ill. (i)	...	330, 96, 97
	(ii)	...	427, 25, 58
29	...	...	104, 201, 382, 98
30	...	...	26, 428, 436, 438, 440, 445, 449
31	...	...	87, 100-1
	ill. (a)	...	436, 100, 102
	(b)	...	435, 100, 102
32	...	...	434, 447, 100, 102
33	...	...	443, 102, 103
34	...	...	325, 429, 449, 84, 103
	ill	...	449, 103
35	...	...	451, 452, 476, 477, 104, 110
	cl. (a)	...	455, 68, 105
	ill.	...	454, 105
	(b)	...	465, 105, 106
	ill.	...	466, 106
	(c)	...	468, 106
36	...	...	24, 461, 473, 105, 107, 108, 115
37	...	...	24, 427, 469, 108, 110
38	...	...	473, 105, 108, 115
39	...	...	24, 477, 480, 105, 110, 111, 117
	ill. (a)	...	476, 481, 110, 114
	(b)	...	479, 110, 111, 114
	(c)	...	479, 110, 111, 114
	(d)	...	476, 110, 114
	para. 2	...	483, 110, 114

					PAGE.
ACTS— <i>contd.</i>					
1877, I of, s. 40	...	...	...	...	483, 114
	ill.	...	...	...	483, 114
41	...	...	...	...	485, 114
42	...	487, 498, 502, 510, 512, 516, 519, 526, 527	...	...	530, 533, 116
	expln.	...	...	...	509, 116
	ill. (a)	...	...	...	492, 116, 132
	(b)	...	...	...	496, 116, 132
	(c)	...	...	...	505, 116, 132
	(d)	492, 498, 499, 503, 522, 116, 132	...	...	492, 500, 503, 116, 132
	(e)	...	...	...	492, 500, 503, 116, 132
	(f)	...	...	...	495, 116-7, 132
	(g)	...	...	...	491, 117, 132
	(h)	...	...	...	27, 488, 509, 511, 512, 516, 519, 527
	prov.	...	...	...	529, 531-2, 116, 133
43	...	...	...	...	520, 132, 157
	ill.	...	...	...	491, 520, 132, 133
44	...	...	...	...	30, 545, 134
	para. 2.	...	...	...	545
45	...	...	...	...	537, 544, 137
	cl. (a)	...	...	...	138
	(b)	...	...	...	139
	(c)	...	...	...	139
	(d)	...	...	...	140
	(e)	...	...	...	140
	(f)	...	...	...	538, 140
	(g)	...	...	...	538, 140
	(h)	...	...	...	538, 140, 171
46	...	...	...	...	537, 141, 171
47	...	...	...	...	537, 141
48	...	...	...	...	537, 141
49	...	...	...	...	142
50	...	...	...	...	142
51	...	...	...	...	142, 171
52	...	...	...	...	588, 595, 143
53	...	...	...	...	590, 601, 143
54	...	589, 601, 604, 628, 631, 659, 662, 140, 158	...	...	610, 632, 154
	cl. (a)	...	...	...	629, 632, 154
	(b)	...	...	...	632, 155
	(c)	...	...	...	632, 155
	(d)	...	...	...	609, 630, 632, 155, 157
	(e)	...	...	...	631, 645
	expln.	...	...	...	616, 156
	ill. (a)	...	...	...	588, 629, 156
	(b)	...	...	...	629, 156
	(c)	...	...	...	629, 156
	(d)	...	...	...	630, 156
	(e)	...	...	...	610, 629, 156
	(f)	...	...	...	630, 156
	(g)	...	...	...	211, 628, 632, 81, 156, 158
	(h)	...	...	...	628, 632, 156, 158
	(i)	...	...	...	618, 156
	(j)	...	...	...	618, 156
	(k)	...	...	...	618, 156
	(l)	...	...	...	637, 156
	(m)	...	...	...	638, 157
	(n)	...	...	...	632, 634, 157
	(o)	...	...	...	632, 634, 157
	(p)	...	...	...	609, 157
	(q)	...	...	...

				PAGE.
ACTS— <i>contd.</i>				
1877, I of, s. 54	cl. (r)	...	...	634, 157
	(s)	...	...	588, 640, 157
	(t)	...	...	640, 157
	(u)	...	...	644, 157
	(v)	...	...	589, 644, 157
	(w)	...	...	644, 155, 157
	(x)	...	...	646, 158
	(y)	...	...	646, 158
	(z)	...	...	648, 158
	para. 2	...	...	614
55	...	...	...	27, 589, 604, 650, 158
	ill. (a)	...	...	651, 158, 162
	(b)	...	...	652, 158, 162
	(c)	...	...	652, 158, 162
	(d)	...	...	652, 158, 162
	(e)	...	...	628, 648, 158, 162
	(f)	...	...	628, 648, 159, 162
	(g)	...	...	652, 159, 162
56	...	...	...	604, 144, 155, 163
	cl. (a)	...	...	612, 155, 157, 163
	(b)	...	...	612, 163
	(c)	...	...	613, 164
	(d)	...	...	611, 164
	(e)	...	...	608, 614, 27, 165
	(f)	...	...	615, 619, 165, 168, 169
	(g)	...	...	662, 165
	(h)	...	...	657, 659, 166
	(i)	...	155, 604, 608, 631, 43, 154, 160, 166	
	(j)	...	...	605, 167
	(k)	...	...	604, 168
	ill. (a)	...	...	605, 167-8
	(b)	...	...	606, 167-8
	(c)	...	...	606, 167-8
57	...	...	...	620, 623, 627, 61, 63, 165, 168
	ill. (a)	...	...	623, 169-70
	(b)	...	...	623, 169-70
	(c)	...	...	620, 169-70
	(d)	...	...	623, 63, 169-70
	(e)	...	...	151, 623, 627, 169-70
1877, III of,	...	...	...	483, 195, 197
s. 17	...	...	...	254
32	...	...	...	159
49	...	...	...	254, 255
50	...	...	...	26
ss. 71-7	...	...	...	159
XV of, s. 4	...	...	...	144
ss. 26-7	...	...	...	162
s. 28	...	...	...	260
	sch. II, art. 3	...	...	53
	91	...	...	485
	113	...	...	260, 378
	115	...	...	260
	116	...	...	260
	118	...	...	534
	119	...	...	534
	120	...	...	24, 430
	125	...	...	485
	142	...	...	261
	143	...	...	480
	144	...	...	261
1878, I of,	...	...	...	137
1879, V of, (Bombay)	...	...	...	508

ACTS—contd.

PAGE.

1880, I of,	...	...	...	...	21
1881, V of,	s. 4	...	...	...	400
	90	...	...	...	400
	92	...	...	...	330
XII of,	s. 148	...	...	...	117
XVIII of, (C. P.)	s. 83	...	...	...	128
XXII of,	...	...	...	...	187
XXVI of,	ss. 87-9	...	...	...	262
1882, II of,	...	...	...	...	83, 21
	ch. III-IV	...	...	...	208
	ss. 1-2	...	...	...	42
	s. 3	...	...	...	84, 208, 257, 20, 23
	23, ill. (g)	...	...	...	85
	31	...	...	...	59
	ss. 46-54	...	...	...	136
	s. 59	...	...	...	31
	82	...	...	...	157, 21
	83	...	...	...	21
	84	...	...	...	413
	88	...	...	...	22
	91	...	...	...	255, 258, 23, 90
	96, prov.	...	...	...	23
IV of,	...	...	...	...	24, 108
	ch. IV	...	...	...	30
	ss. 1-2	...	...	...	452, 104
	s. 3	...	...	...	257, 23, 82, 90
	4	...	...	...	23
	6, cl. (a)	...	...	...	125, 54
	(h)	...	...	...	106
	35	...	...	...	471
	40	...	...	...	393
	43	...	...	...	23, 53
	49	...	...	...	285
	51	...	...	...	425
	53	...	...	...	229, 23, 106, 111
	54	...	...	...	255, 280, 281, 282, 47
	55	...	...	...	197, 226, 229, 280, 421
	sub-s. (5), cl. (b)	...	...	...	46, 56
	(c)	...	...	...	46, 281
	(6), (a)	...	...	...	281
	(b)	...	...	...	425, 57
	59	...	...	...	255
	66	...	...	...	637, 638
	76	...	...	...	638
	78	...	...	...	23
	81	...	...	...	23
	83	...	...	...	44
	86	...	...	...	30
	88	...	...	...	30
	92	...	...	...	30
	107	...	...	...	255, 425
	108, cl. (e)	...	...	...	276
	118	...	...	...	255
	123	...	...	...	255
	sch.	...	...	...	452
V of,	s. 15	...	...	...	162
	ss 33-5	...	...	...	643
VI of,	s. 3	...	...	...	66
	6	...	...	...	543
	58	...	...	...	540
	s. 226	...	...	...	66

				PAGE.
ACTS— <i>contd.</i>				
1882, X of,	s. 133	...	...	508, 124, 125
XIV of,	...	...	...	469, 4, 29
	ch. XX	...	...	545
	ch. XXXVII	...	...	104, 145, 382, 480
	pt. V	...	...	104
	s. 12	...	...	612
	13	...	...	408, 427, 58
	expln. 2	...	...	429
	15	...	...	396
	16	...	...	172, 173, 546
	prov.	...	...	395
	16A	...	...	546
	s. 17, cl. (a)	...	...	395
	(b)	...	...	395
	(c)	...	...	395
	expln. 3	...	...	395
	s. 26	...	...	397
	32	...	...	413
	43	...	...	430, 532, 58, 97
	50	...	...	414
	cl. (d)	...	...	507
	53	...	...	414, 531
	54	...	...	669
	108	...	...	67
	110	...	...	429
	111	...	...	429
	ss. 114-6	...	...	429
	s. 115	...	...	67
	s. 208	...	...	74
	244	...	...	527, 45
	257A	...	...	138
	259	...	...	74, 188
	260	...	...	74, 432, 188-9
	261	...	...	189
	262	...	...	58, 190
	263	...	...	41, 44, 30, 33
	264	...	...	41, 44, 30, 33
	272	...	...	561
	274	...	...	514
	278	...	...	527, 594
	283	...	...	527, 593, 595, 117
	311	...	...	570
	318	...	...	41, 33
	319	...	...	41, 517, 33
	326	...	...	59
	331	...	...	37
	332	...	...	36
	351	...	...	559
	375	...	...	137
	392	...	...	60
	437	...	...	70
	492	...	...	138, 590, 591, 600 642
	493	...	...	590, 600, 669
	494	...	...	500, 601
	495	...	...	590
	496	...	...	590, 601
	497	...	...	590, 601
	499	...	...	545
	503	...	...	545, 547
	cl. (b)	...	...	567
	(c)	...	...	567

ACTS—contd.

	PAGE.
1882, XIV of, s. 503, cl. (d) ...	568, 572
(e) ...	501, 573
(f) ...	568
(g) ...	568
(h) ...	575
prov. ...	568
s. 504 ...	584
505 ...	581, 582
520 ...	104
521 ...	104
523 ...	145
525 ...	98
526 ...	104, 145, 382, 98
545 ...	594, 600
578 ...	530
582 ...	595
584 ...	596
588, cl. 24 ...	583, 601
622 ...	539
647 ...	37
sch. IV, no. 99 ...	464, 104
nos. 100-2 ...	669
no. 103 ...	74, 669
no. 111 ...	414
112 ...	414
122 ...	429
166 ...	669
167 ...	669
168 ...	545
169 ...	573
1883, XIX of, ...	196
1884, V of (Madras), s. 156 ...	149
XII of, ...	196
1885, VIII of, s. 29 ...	52
s. 76 ...	150
1886, XXII of, s. 108 (4) ...	125
1887, IV of, s. 170 ...	539
1887, IX of, sch. II, arts. 15-7 ...	395
XII of, s. 12 ...	396
19 ...	396
XVI of, s. 77 (3) ...	117
XVII of, s. 45 ...	117
1888, V of, ...	144
1889, IV of, ...	645
XVIII of, s. 27 ...	148
1890, VI of, ...	21
VIII of, s. 30 ...	201
1891, XII of, sch. I, pt. 1 ...	30
s. 11 ...	515
48 ...	131
s. 11 ss. 16-8 ...	132
s. 30 ...	132
36 ...	132
48 ...	131
1895, X of, s. 3 ...	132
1897, X of, s. 3, sub-s. 7 ...	18
22 ...	164
5 ...	63, 24, 30, 82
9 ...	164
4 ...	68, 24, 82
ss. 5-6 ...	19
1898, V of, ch. X—XII ...	17

				PAGE.
ACTS— <i>contd.</i>				
1898, V of, ch. XLIII	...	...	...	17
s. 145	...	...	...	64, 561, 31, 36
146	...	...	...	545, 134, 135
245	...	...	...	142
548	...	...	...	539
552	...	...	...	17
sch. II	...	...	...	142
1899, II of, s. 2 (14)	...	...	...	101
(24)	...	...	...	23
IX of,	...	...	...	104, 68
s. 3	...	...	...	145, 69
5	...	...	...	145
6	...	...	...	145, 68
19	...	...	...	145, 68
21	...	...	...	69
1900, XIII of (Punjab)	...	...	...	37
1901, II of (Agra)	...	...	...	137
s. 167	...	...	...	31
198	...	...	...	117
201, prov.	...	...	...	533
202	...	...	...	126
III of (U. P.), s. 40	...	...	...	33
111	...	...	...	117
IV of (Bombay), s. 86	...	...	...	167
1902, IV of (Bombay), s. 28	...	...	...	539
1907, III of, s. 16	...	...	...	286
cl. (2)	...	...	...	545
ss. 18-22	...	...	...	545
s. 20	...	...	...	286
1908, V of	...	...	...	429, 37, 68
App. A (3), no. 13	...	...	...	429
32	...	...	...	38
34	...	...	...	464, 104
nos. 35-9	...	...	...	669, 180-3
no. 39	...	...	...	40, 182-3
no. 44	...	...	...	31
nos. 45-6	...	...	...	30
47	...	...	...	414, 430, 42, 183
48	...	...	...	414, 42, 184
(4) no. 13	...	...	...	185
App. D, no. 12	...	...	...	102, 214
nos. 14-6	...	...	...	669, 186-7
nos. 17-20	...	...	...	31
nos. 21-2	...	...	...	30
F, no. 6	...	...	...	561
7	...	...	...	561, 573
8	...	...	...	669
s. 9	...	...	...	125
s. 10	...	...	...	612
s. 11	...	...	...	408, 427, 58, 90
expln. 4	...	...	...	429
15	...	...	...	396
16	...	...	...	546
18	...	...	...	546
20, cl. (a)	...	...	...	395
(b)	...	...	...	395
(c)	...	...	...	395
21	...	...	...	396
47	...	...	...	526, 45
92	...	...	...	21, 123
95	...	...	...	601

	PAGE.
ACTS— <i>contd.</i>	
1908, V of, s. 96	39, 40
99	530
100	188, 506
114	37
115	67, 37
148	468
151	468
sch. I, or. 1, r. 1	397
8 (2)	413
10 (2)	413
2, r. 2	36, 58, 90, 97, 129
6, r. 17	531
7,	414
r. 1 (e)	507
3	414
7	416
10	396
9, r. 13	37
20, r. 9	30
10,	38
r. 13	31
21, r. 31	38, 188
32	669, 40, 64, 162, 188-9
(2)	432, 188-9
or. 21, r. 1 (5)	432
34	98, 189-90
35	33, 190
(1)	30
36	30, 33, 191
42-54	545
54	514
58	527, 594
58 (2)	594
63	527, 594, 117, 122, 123, 128
95	33, 35
96	517, 33, 35
22, r. 11	595
31, r. 1	38
39,	590, 145, 176-7
r. 1	30, 590, 591, 600, 144
2	590, 600, 669, 144
3	601
4	601, 145
40,	545, 583, 136, 177-8
r. 1	546, 550, 558, 567, 583, 134, 135, 136
(1), cl. (d)	568, 569
(2)	568
2	572
3	561, 136
(a)	573
(b)	574
(c)	574
(d)	575, 136
4	577, 136
5	584, 135
41, r. 5	584
43, r. 1 (r)	601
(s)	577, 583, 135
sch. II	382, 480
ss. 14-5	98
17-9	69

					PAGE.
ACTS— <i>contd.</i>					
1908, V of, sch. II, ss. 20-1	...	...	...	...	98
s. 18	...	...	...	...	68, 186
s. 22	...	...	...	...	70, 186
1908, IX of, s. 10	...	...	...	...	40, 192
24	...	...	...	...	669
ss. 26-7	...	...	...	...	162
s. 28	...	...	...	...	260, 35
sch. 1, art. 3	...	...	...	...	53, 37, 193
11	...	...	...	...	123
41, 42	...	...	...	...	192
48	...	...	...	...	40, 192
49	...	...	...	...	39, 40, 192
91	...	...	...	...	484, 99, 113, 192
92, 93	...	...	...	...	123, 193
95, 96	...	...	...	...	450, 193
97	...	...	...	...	59
113	...	260, 261, 377, 429, 430, 431,	46, 99, 193	...	...
114	...	...	...	475, 104, 193	...
115	...	...	...	260, 430	...
116	...	...	...	260, 430	...
118, 119	...	...	...	534, 123, 193	...
120	...	261, 450, 484, 485, 533, 668,	122, 193	...	...
125	...	...	...	484, 485, 123, 193	...
126	...	...	...	...	193
129	...	...	...	123, 194	...
133	...	...	...	194	...
134	...	...	...	194	...
141	...	...	...	484, 485, 194	...
142	...	...	...	261, 194	...
144	...	...	...	261, 46, 194	...
181	...	...	...	...	669
XVI of	...	...	...	...	26, 110
s. 17	...	...	...	...	26, 195-6
cl. (v)	...	...	...	...	26
49	...	...	...	...	26, 196-7
50	...	...	...	...	197
ACTS, English—See STATUTES.					
ADAMS, Brooks, on law	...	...	...	...	33
ADEQUACY—See CONSIDERATION, DAMAGES.					
ADMINISTRATION					
of estate of dead person	...	...	...	...	30, 496
trust estate	...	...	...	...	31
suit for, decree in	...	...	...	...	608
ADOPTION,					
agreement for	...	...	...	...	64
<i>anumati-patra</i>	...	...	...	...	111
declaration regarding	...	...	...	...	501, 118, 120
suits regarding, limitation for	...	...	...	...	534
to set aside	...	...	...	...	129
See HINDU LAW, STATUS.					
ADVANTAGE,					
undue	...	...	...	308, 318, 319, 320, 334, 93	...
See UNFAIR ADVANTAGE.					
ADVERTISEMENT,					
puffing	...	...	...	...	606n
ADVICE,					
independent or legal	...	...	...	...	216, 320

	PAGE.
ADVISER,	
legal, medical or spiritual	19, 22
AFFIRMANCE	
of contract	460, 471, 475
AFFIRMATIVE contracts	22, 120, 162, 163
and negative agreements	662, 168-70
covenants	393, 656
AGENT,	
commission received by	165, 175
contract, when may sue on	20
	400, 80
See PRINCIPAL AND AGENT, SUIT.	
AGREEMENT,	
ambiguous	370
complete prior, necessary for rectification	436, 438, 101
creating valid rights <i>in personam</i>	168
defined	8, 12, 173
denial of formation of } See under LEGAL DEFENCES.	
validity	
divisible	174, 243, 356-7
division of water in running stream	114
elements of, constituent	10
enforcement and setting aside of, difference between	230, 294, 334,
	341, 480
for personal service, See under PERSONAL.	151, 161-2, 348
forbidden, but not void or <i>vice versa</i>	138
honorary, See HONORARY.	356, 53
illegal	136-8, 203, 206
partly	204, 356, 105
immoral	139
impossible	275, 356, 463, 105
<i>in præsenti</i>	355
invalid	199
legal, partly	204, 356, 105
limitation, extending or shortening	143-4
negative	120, 168-70
not enforced specifically when not contract	77
not to appeal	120, 144
sue	120, 143
obligation, imperfect, of	77
other than contract	76-7
parol	374
purporting to oust jurisdiction of Court	143
requisites necessary for specific performance	184, 288
settlement of family dispute	100-1
See FAMILY ARRANGEMENT.	
substituting 'domestic forum' for ordinary tribunal	145
surrender of tenancy	99
to adopt	64
arbitrate	145-6, 147
assign, give or renew lease, See LEASE.	98
assign or sell patent, See PATENT.	123
let or sell realty	98
mortgage for money advanced	99
sell	44
ordinary chattel	156
transfer right of heir-apparent	125-6
unilateral, to convey property	284, 352
unlawful	144, 145
void	24, 133, 136, 138, 140, 144, 150, 190, 199, 205, 210,
	275, 328, 461, 465, 25, 93, 105, 112, 173
voidable	23, 190, 211, 465, 25

	PAGE.
AGREEMENT— <i>contd.</i>	
voluntary... ..	210-1
wager	152
want of consideration, See CONSIDERATION	210-1
written, for specific performance and against compensation	11, 14
See CONTRACT.	
ALIEN—See ENEMY.	
ALIUD EST CELARE ALIUD TACERE—See MAXIMS OF LAW.	
AMBIGUITY	192, 196, 238, 246, 327, 345, 370, 445
and fraud	370
in agreement—See AGREEMENT.	
in decree—See DECREE.	
interpretation by plaintiff	370
latent and patent	197
AMES,	
J. B., on benefit and burden of restrictive covenants	390
specific performance as ancient head of equity	19
S., on rectification for unilateral mistake	440
ANCIENT LIGHTS	643 <i>n</i>
ANIMUS,	
degrees of, three	38-9
<i>domini</i>	39
mental element of possession	36
ANNUITY, agreement relating to	295, 319, 322, 68
bequest of	19
covenant for	100
APPEAL,	
agreement not to	120, 144
and discretion, See DISCRETION.	188
Court of, jurisdiction of	122
decree for specific moveable property	39
possessory decree	37
receiver	582-3
second	188, 596
temporary injunction	601
APPREHENSION, See CLOUD, DECLARATION.	126
ARBITRATION,	
agreement to refer to	145, 68
distinguished from submission	147 <i>n</i> , 69
bars suit when	146-7, 68-70
condition precedent	147, 164
refusal to perform	147, 68-70
stranger to	98
submission to	163, 298
construction of	70
withdrawal from	147, 70
See AWARD, PUBLIC POLICY.	
ARBITRATOR,	
judge chosen by parties	103, 298
misconduct of	104-5
powers of	103-5
unfairness of	298
ARRANGEMENT, See FAMILY ARRANGEMENT.	
ART,	
works of	73, 88
ARTICLES, See CHATTELS.	

	PAGE.
ASPECTS	
of specific performance	22
ASSENT	189, 96
and overt acts... ..	12
ASSIGNEE	
of rights, when not entitled to declaration	505-6
See PURCHASER, SUIT, TRANSFEREE.	
ASSIGNMENT	
of contract	398, 77, 79
ASSIZ	
writ of, two kinds	57
ASSOCIATION,	
articles of, not rectified	101
ASSUMPSIT,	
action of	16, 17 ⁿ
ATTACHMENT, See DISPOSSESSION.	
ATTORNEY, See SOLICITOR.	
AUCTIONEER,	
authority of, revocation of	330, 96
sale by, under mistake	330-1, 96
AUCTION SALE,	
agreement between bidders	151, 240
puffing at	240, 298, 73
AUSTIN, J.,	
on rights arising from civil delicts	14 ⁿ
AUTHOR,	
contract by... ..	162
AWARD,	
cancellation of	480, 111
consummation of contract	382, 431, 98
direction in	261
grounds for challenging	104-5, 382, 98
in excess of authority	104
judgment of judge chosen by parties	382
limitation, See LIMITATION.	
merger of claims submitted	105
proper only in part	356
specifically enforced	103, 382, 98
by suit in India	104, 431, 70, 98, 128
summary process	104-5
submission not specifically enforceable	382, 98
<i>ultra vires</i>	99
unreasonable	298

B

BADNI transactions	152
BAILMENT	69, 38
injury to or deprivation of goods bailed	69
when terminated	458-9
BAILOR and bailee,	
possession of	40 ⁿ
suit by either against wrong-doer	69-70
when entitled to possession	38

	PAGE.
BALANCE	
of convenience	392, 596, 657
hardship	24
injury	664
justice	376
BANKER	
and customer	158, 20, 158
duty of	22
BANKRUPTCY,	
assignee in	410, 91
See INSOLVENCY, PROMISOR.	
BARGAIN	335, 363
good and bad	321, 338
loss of damages for	420-1, 83
unconscionable, See UNCONSCIONABLE.	
unfair	456
BENAMIDAR,	
declaration against	512, 513-4
suit by	406n
trustee	154, 413
wrongful conduct of	494-5
BENEFICIARY, See CESTUI QUE TRUST, TRUSTEE.	
BENEFIT	
of compromise	77
contract	369-70, 399
covenant	78
restrictive	386, 388, 390, 391
theory	390
to plaintiff, See PLAINTIFF.	
BENTHAM, J., See REMEDIES.	
on restitution in nature	19
value of affection	43
BETROTHAL,	
contract of, See MARRIAGE.	163, 65
BIGELOW, M. M.,	
on history of law	80
injunction as primary remedy	28
on mistake of law	339-40
specific performance as primary remedy	16
BILLS	
to perpetuate testimony or take it <i>de bene esse</i>	26n, 117
See TESTIMONY.	
BILLS OF EXCHANGE	476, 482, 483, 110
forged endorsement on	114
BILLS OF PEACE	163
and bills <i>quia timet</i>	489, 634n, 117
BLACKBURN, LORD,	
on rescission for misrepresentation	455
BLACKSTONE, SIR W.,	
on detinue and replevin	6-7

	PAGE.
BONA FIDE	
action of department of Government	610-1
receiver	566
upon condition	452
business dealing	542
claim	405, 523
contention	144
contract	90
possession	495, 557
purchaser, See PURCHASER, TRANSFEREE.	
BOYCOTT,	
injunction against	649
BREACH	
of contract, See CONTRACT, INJUNCTION.	
trust, See TRUST.	
BRITISH INDIA,	
defined	17-8
BUILDING	
completed and injunction	657, 659-60, 160
contracts, See CONTRACT.	106-11
on another's land	653n
scheme, covenant relating to	115, 391, 617, 655, 662
BURDEN	
of covenant	386, 387, 389, 390-1
enforced against assigns with notice	410
licensees	410
squatters	410
principle	390-1
proof, See ONUS PROBANDI.	
on land	385
BURNBY, C.,	
definition of injunction	27
BUSINESS,	
agreement respecting	389
and goodwill, See GOODWILL.	
BUTWARA	125

C

CAIRNS, Lord,	
Act of, See STATUTES.	
on consensus of mind	11
CANCELLATION of instruments	24, 427, 5, 110
expired	479
forged	478, 110, 112, 114
fraudulent or mistaken	486
other than contract...	480
registered	483
unreal	479
void	477, 480-2, 112
voidable	476, 112
and declaration distinguished	485n, 110-1
rescission	110, 111
apprehension of serious injury, reasonable	476-8, 112
evidence lost by delay	481
discretion	112, 114
jurisdiction, extent of	479
not consequential relief	514, 516
partial	482-3, 114
plaintiff's interest	482, 111
<i>pro tanto</i>	442

					PAGE.
	See SUIT.				
CAPITAL					
and labour					649
CARE,					
reasonable					332, 336, 423
CASE-LAW					
and statutes					581
CASTE questions					497
CATON, C. J.,					
on plaintiff in a Court of conscience					302
CAUSE of action					
against different defendants					415, 509
antecedent to suit					507, 121, 165
breach of contract					395
demand and refusal					431
explained					395, 507
facts in plaint					414, 530-1
for declaratory relief					111
limitation					431, 122
parol assertion					524
splitting of					532, 36
CAVEAT EMPTOR, See MAXIMS OF LAW.					
CERTAINTY					
and completeness distinguished					289
reasonable					289, 64
CESTUI que trust					
as plaintiff					403n, 406, 457, 38
injunction against trustee					629
CHAMPERTY					142, 41
English law not introduced into India					142-3
Judicial Committee on					142-3
CHANGE					
of conditions, See CONDITIONS.					
position, irrevocable					252, 259
CHARITIES					21
lease of, for under-value					320n
power, execution of, informal					256-7
CHARTER-PARTY					61, 62
excepted risks of					452
CHATTELS,					
contract for delivery of specific					94
supply					163
disseisin of					6
easily available					90, 155-6
necessary for enjoyment of property					93
of limited supply					91-2
special importance to requirer					93
ordinary					156
price fixed by artist					89
restrictive covenants regarding use of					394
unique					7, 73, 88-9, 42
See MOVEABLE PROPERTY.					
CHELMSFORD, LORD,					
on fraudulent misrepresentation and enquiry					236
CHEQUE, see DRAFT.					
CHOICE					
of courses					438-9

	PAGE.
CHOSE in action, See ACTIONABLE CLAIM.	
contract about	121, 122
CIRCUMVENTION, See DECEIT, FRAUD, IMPOSITION.	94
CIVIL CODE,	
Canadian	53
French, See FRENCH LAW.	
German	61 <i>n</i> , 46, 58
New York, Draft	149 <i>n</i> , 150, 241-2, 11, 14, 15, 27, 60, 88, 96, 100, 104, 110, 114
CIVIL	
delicts, rights arising from	14 <i>n</i>
injuries, result of violation of obligations	5
specific relief granted to prevent	5, 608
See CRIME, PENAL LAW.	
rights, See RIGHTS.	
CLOUD	
upon title	26, 478-9, 480, 482, 493, 507, 513, 516-7, 524-5, 527 <i>n</i> , 533, 112, 117, 122
defined	491-2
test of	528-9
threatened	528, 125
verbal claim	524-5
CLUB,	
internal management of	630 <i>n</i>
members; rights of	630
COCKBURN, SIR A.,	
on unwritten law	33
CODES	
in British India	32
See CIVIL CODE.	
CODICIL,	
defined	383 <i>n</i> , 23
directions in, for settlement	384
See SETTLEMENT, WILL.	
CODIFICATION,	
effect of	11
COERCION	211, 457, 91, 105, 115
COLLETT, C.,	
on mutual assumption in sale of property	463
sale of encumbered property	128
COLLUSION, See FRAUD.	
of next reversioner	501, 503, 120
COMFORT,	
physical	639, 640, 643
COMMERCE,	
modern spirit of	16
COMMISSION, See AGENT.	
COMMON	
right	65, 159
rights of	644 <i>n</i>
COMMON LAW,	
English, actions of contract	3
aimed originally at specific relief	17 <i>n</i>
alteration or rescission of contract	14
ownership protected through possessory rights and remedies	264
restrictive covenants	48
unmarketable title	385-6
writ of mandamus	364
rights	535
... ..	686

	PAGE
COMPANY,	
amalgamation of, with another	402, 411, 79, 92
bubble	846
fire insurance	538
joint stock	543
when may sue on promoter's contract	402, 79
be sued	412, 92
See CORPORATION, DIRECTOR, PROMOTER, SUIT.	
COMPENSATION	4, 5, 16, 155, 184-5, 270, 272, 320, 369,
	419, 472-3, 153
and forfeiture	173
partial performance	174, 337, 426-7, 48-51, 155
condition for or against	183, 337, 420, 454, 96
for deficiency in quantity	175, 337, 425, 48-9
restrictive covenants	177
specific performance, or with	415, 426, 57-9
upon cancellation of instrument	485-6, 114-5
rescission of contract	108-9
where specific performance impracticable	418, 57
See DAMAGES.	
COMPETENCY	
to contract	135, 190-201
See CONTRACT, INABILITY, INCOMPETENCY.	
COMPETITION,	
agreement against	120
unfair	645n
COMPLETENESS, See CERTAINTY.	
COMPOSITION-DEED	466
COMPOUNDING	
of offences	142
COMPROMISE	99, 42, 45, 68
beneficiary	404-9, 77
cancellation of	111
consideration for	99
criminal proceedings	142
doubtful rights	404-5, 77
failure of	321-2, 45, 71
probate case	137
respecting personality	100-1
See AGREEMENT, FAMILY ARRANGEMENTS.	
CONCEALMENT	220, 221, 224, 334, 337-8, 343n, 72, 94,
	105
CONDITION,	
non-performance of	268
of defeasance	274
pecuniary, of parties	138, 371, 379
precedent	199, 264, 268, 269n, 283, 367, 414, 80
arbitration	147, 164
waiver of	268
subsequent	264, 268, 274n, 367, 452, 459, 105
CONDITIONS,	
change of	312, 314, 377, 682
by act of party	371, 302
might be foreseen	303-4

					PAGE.
CONDUCT					
of defendant	...	...	...	...	473-4
parties	...	...	...	...	293, 294, 394, 480, 528
subsequent, ground for rescission	...	...	...	...	457-8
plaintiff	...	...	...	...	188, 244, 298, 302, 549, 597, 605
acts of omission and commission	...	...	...	...	368
extraneous to contract	...	...	...	...	94
non-fulfilment of terms of contract	...	...	...	...	367-8, 627
trap to defendant	...	...	...	...	371
CONFIDENCE,					
abuse of	...	...	...	...	343, 628
breach of	...	...	...	...	628n, 648, 94
CONFIDENTIAL relation					215
distinguished from undue influence	...	...	...	...	202
CONJUGAL rights,					
restitution of	...	...	...	...	385, 520, 612, 64
CONSCIENCE					
and Court of equity	...	...	...	...	423
good	...	...	...	...	379, 441
CONSENSUS					
of mind	...	...	...	...	10-1, 12-3
See CONTRACT.					
CONSENT					23, 297, 323, 340, 454, 96
causes preventing free and full	...	...	...	...	23
of stranger, See THIRD PARTY.	...	...	...	...	127, 164
without	...	...	...	...	34
CONSEQUENCE,					
harsh unforeseen	...	...	...	...	310
CONSEQUENTIAL relief					488, 492-3, 509, 116, 118, 122, 123
explained	...	...	...	...	510-11
injunction	...	...	...	...	511, 514, 518, 131
money, claim for	...	...	...	...	515, 519
negative declaration	...	...	...	...	130
omission to ask for	...	...	...	...	512-3
possession	...	...	...	...	517-9, 130
when need not be asked for	...	...	...	...	130
auxiliary and equitable	...	...	...	...	512, 516, 130
court cannot grant	...	...	...	...	510-1, 129
not appropriate	...	...	...	...	510
required	...	...	...	...	511-2, 513-6, 129
CONSPIRACY					613
CONSTRUCTION					
of contract	...	...	...	...	117-8, 192, 288, 356, 422
matter of law	...	...	...	...	338-9
document	...	...	...	...	345, 361
pleadings	...	...	...	...	414, 530
settlement	...	...	...	...	383
statute	...	...	...	...	138
declaration regarding	...	...	...	...	490, 117
equitable	...	...	...	...	254n
will, See under WILL.	...	...	...	...	384, 496, 120
CONTINGENCY,					
contract regarding	...	...	...	...	284, 295, 302, 42, 54
might have been foreseen	...	...	...	...	314
within the contract	...	...	...	...	297
CONTINUOUS					
contract, See CONTRACT.					
three years' limit in India	...	...	...	...	169, 67

	PAGE.
CONTRACT,	
abandonment of	264, 88
affirmance of	471
analysis of, Holland's...	13
Savigny's	10-1
and representation	190
assignment of, See ASSIGNMENT.	
breach of	286, 451, 614, 655
threatened	451
class and individual case	160
competency to	185, 199
conditional and not absolute	283
upon possibility and performance, in India	275
consensus of mind	10-1, 346, 440, 461
constituent elements of	13
construction of, see CONSTRUCTION.	117
<i>cy pres</i> execution of	139, 177, 365
defined	8
discharge of, see LEGAL DEFENCES.	263, 397-8
divisible	355-7, 51-3
elements of	186, 195
enforcement of and discretion	185
entire	185, 355-7
equality in...	294 <i>n</i>
essence of	48-50
time, See TIME.	
essentials of	11
features and incidents of enforceable	184
history of, Hindu Law	10
in England	9
Mahomedan Law	10
inability to, absolute	199
relative	200-1
independent parts of...	51
inducement to, material	234, 238-9, 462
See INDUCEMENT.	
jurisdiction of arch-deacon	18
motive for	304
new, not made by law for parties	439
non-existent, cannot be specifically enforced	86
not enforceable by reason of absence of essential terms	195-6
in entirety	172-3
novation of	265-6, 451, 93
object of, lawful	136
objective theory of Holland's	11-2
pillars of	10
renunciation of	458, 472 <i>n</i>
repudiation of	304, 451, 461, 465
requisites for	10
rescission of, See RESCISSION.	
risk, taking of, Holmes, theory	17-8
specific performance of, see SPECIFIC PERFORMANCE.	83
reparation, See REPARATION.	8
status to, progress of societies	5
substance of	464
terms of, different from what agreed upon...	246, 84
essential, absent	195-6
and not essential	173, 80
not performed by plaintiff	368, 80
performable by plaintiff	367
supplied by law	197, 292, 64

CONTRACT—*contd.*

PAGE.

See COVENANTS, STIPULATIONS.

time, essence of, see TIME.	
variation of	88
waiver of	263, 264
CONTRACT = instrument	438, 101
in writing, parol variation	245
rectification, See RECTIFICATION.	
rescission, see RESCISSION.	452, 104
CONTRACTS	
affirmative, see AFFIRMATIVE.	22, 120
alternative	117, 356, 366, 52, 60
bilateral	348, 350
by artist or author	162-3
by correspondence, See CORRESPONDENCE.	
promoters of companies, see PROMOTERS.	207
contingent	267, 277n
continuous	168-9, 301n, 348, 167
dependent on personal qualification or volition see	
PERSONAL	161-4, 397
depending for performance on consent of third party,	
see THIRD PARTY.	163-5
enforceable in specie...	87 sqq.
executed	21-2, 112n, 176, 199, 206, 260, 315, 381, 394, 430, 438, 455, 467-8, 480, 616, 53, 77
executory	21-2, 196, 197, 207, 211, 260, 351, 357, 381, 430, 465, 467, 480, 614, 41, 52, 77, 88
fairly and liberally performed	78
foreign	171-2
for and of sale distinguished	255, 44, 47
sale, in equity	278
India	280-1
open	357n
settlement of property on marriage	125
hard, See EQUITABLE DEFENCES.	
in breach of trust	208-9
incomplete	152
joint	412
negative	120, 152

See NEGATIVE.

not enforceable by reason of	
absence of registered instrument	254
adequacy of money compensation	155
bar of limitation	260
being not enforceable in entirety	172
opposed to public policy	139-40
consideration or object being unlawful	136
error as to person of party contracted with	134
subject-matter of agreement	133-4
illegality	136
immorality	141
inability to render or enforce decree	160-2
incompetency of parties	135, 41
material alteration in document	261-2
mistake of fact or law	133-4
supervening illegality	138-9
want of consideration	135
of betrothal	163, 65
deferred performance	121
performance by instalments	122

	PAGE.
CONTRACTS— <i>contd.</i>	
insurance	123-4
marriage	163, 385
separation	124-5
optional	117, 353
real	252
reference to valuers	164-5
regarding chose of action	121
relating to or savouring of realty	114
revocable	169-70, 63
running into details	165, 26
statuteable	131
submission to arbitration	163-4
terminable	352, 452, 105
to borrow, lend or pay money	157-8
build	106-7, 166-7, 348, 63
Pomeroy's classification	107 <i>n</i>
Railway cases	109-13, 44
complex trackage and operating contracts	109-13
Scotch and French practice	108
Story's view	107-8
when specifically enforced	106-7, 108-9
convey real and personal property together	95
devise land by will	85-6
execute works which court cannot superintend	166, 62-3
to let or sell property by person with imperfect title	126, 54
without title	357, 82
repair	130, 166-7, 63
sell or supply patented or scarce articles	121
supply goods	103
support children or parents	125 <i>n</i> , 169, 304, 348, 459
trade	163-4
uncertain } See under EQUITABLE DEFENCES.	
unfair }	
unilateral	352-3
unlawful	106
void	112
voidable	96, 199-201, 211, 270, 451, 453, 457, 460, 461, 476, 47, 105, 112
when enforceable	288
with stipulation by way of penalty and for liquidated satisfaction, distinguished	118
See AGREEMENTS, INJUNCTION, SPECIFIC PERFORMANCE.	
CONTRACTORS,	
joint	412
CONVENIENCE, See under BALANCE.	
and necessity	92
CONVERSION,	
defined	6
distinguished from trespass	6, 6 <i>n</i>
equitable	278, 47
doctrine of, examined	279-80
Indian law	280-1
remedies	7
CONVEYANCE,	
by registration	254
executed, rescission of	459
from mortgagee	129
no, loss from casualty	277-8
rectification of	446-7
title passes after, in India	281

INDEX.

	PAGE.
Co-OWNER,	
alienation by	494
exclusion of	551
title of	496
waste by, see WASTE.	551
See HINDU LAW, INJUNCTION, TENANT RIGHTS.	
COPYRIGHT	589, 681, 644, 652, 157
abridgement or imitation enjoined	645
translation	645n
CORPORATE STOCK... ..	91n
CORPORATION	66
act or omission of, <i>intra vires</i>	542
<i>ultra vires</i>	540-1
bound by compromise	100n
contract by	201
executed	206
executory	207
<i>intra vires</i>	79, 93
pre-incorporation	92
recovery of consideration	207
<i>ultra vires</i>	204, 209, 66
declaratory suit by	118
discretion	542
duty of, enforcement of	536, 543
estoppel against	206
execution of decree against	432-3
funds of, injunction against application of	611n
hardship to members of	305
receiver	567
register of, rights to inspect	543-4
rescission, before winding up	461
statutory obligation	543
trading and municipal	206n
CORPUS,	
element of possession	37
of agreement, mistake regarding	336
CORRESPONDENCE	
contract by	189
CO-SHARERS, See Co-OWNER, TENANT RIGHTS.	
injunction between, See INJUNCTION.	638, 654-5
COSTS,	
against receiver	566
in suit for rescission	107
where no breach of contract	236
Co-TRUSTEE, See TRUSTEE.	
injunction against	629
COUNCIL, LEGISLATIVE	
proceedings of	1-12
Specific Relief Bill	1-16
COURSE	
of law, due	62-3, 34
COURT-FEE,	
attempt to evade payment of	523-4, 126
in suits for cancellation	113
and declaration	484
declaration	524, 121-2, 199
with consequential relief	524, 121-2, 198

	PAGE.
COURT-FEE— <i>contd.</i>	
injunction	669, 149, 198
rescission	104
specific performance	433, 198
COURTS,	
Christian and execution of contracts	18
Competent and Registrar	483
difference of opinion on question of title	362
injunction to	612-3
of law and equity, separate	415, 416, 612, 631
	See under JURISDICTION.
COVENANT,	
action of	15
affirmative	393, 656
benefit, See BENEFIT.	
breach of	369, 392-3
burden, See BURDEN.	
continuing	168
damage	116
defined	78
for future act	354 <i>n</i>
misrepresentation regarding	454
negative	392-3, 616-7, 656
and positive	620-8, 168-71
regarding chattels	394
relating to scheme for building or improvement of land	115-6, 390-1
restrictive	345-6, 371, 385
compensation for	177
in leases	385
other transfers	386, 78
running with land	
at law	386
in equity	387, 388-9
principle	391
void	116
COVIN	
suffocating right	248
CRANWORTH, Lord,	
on appointment of receiver	548-9
promptitude of plaintiff	375
the statute of frauds and part performance	250 <i>n</i>
CREDITOR	
and receiver	555
may sue for cancellation of instrument	111
CRIME	
also civil wrong	546, 609, 17, 27
equity does not interpose to prevent	5, 607-8, 608 <i>n</i>
stifling prosecution for	142
	See CIVIL.
CRIMINAL PROCEEDINGS,	
risk of	309, 165
CROSS-CONTRACTS	52
CROWN,	
claim on	538
CUSTODY	
and possession	38-9, 60, 32
safe, of goods	38
CUSTOM	126

	PAGE.
CY PRES	
execution, See under CONTRACT .	
of settlement or trust	384
D	
DAMAGE,	
and fraud	243
irreparable	90, 632
special	654, 655
See INJURY .	
DAMAGES	
adequate	15, 61
and common law courts	7, 14-5, 81
assessment of	419, 51, 60
principle	420
awarded even if not asked for	417, 58, 97
breach of contract, usual remedy for	20, 81, 185, 364, 407 25, 29
class of contract considered	160
conjectural	88, 120, 121, 122, 42
for breach of contract for sale of goods or land	420
delay	417-8
part of contract	417-8
impracticable	73, 83, 119-20 129, 630, 45
in addition to specific performance	415, 417, 57-8
substitution for	417, 57, 76
inadequacy of	72, 83, 90, 96-7, 632
injunction, and	602-4, 609-11, 661, 668
injury must be alleged	415
liquidated	117
party not entitled to	407
property	121
secondary or substitutional remedy	16
suit for	286, 476, 36, 59, 69, 101, 108
suits successive	72
DANIELL,	
definition of receiver	29
DART,	
on defect of title as defence to specific performance	362-3
specific performance with variation	344
DAYABHAGA	634n
<i>De minimis non curat lex</i> , See MAXIMS OF LAW .	
DEATH	
of party to contract	397
personal action	398
See LEGAL REPRESENTATIVE, PLAINTIFF, PROMISOR, SUIT .	
DEBT, ...	158
contract to execute evidence of	124
purchase or sale of	124
receiver for	555-6
See CONTRACTS, CREDITOR .	
DECIT , See FRAUD, IMPOSITION, SILENCE .	
aggressive	221, 73
DECLARATION	
and cancellation of instrument	487
ejectment	516, 523, 569
as to collateral matters	525
doubtful title	522
future rights	521
legal character, See STATUS below.	
possibility of claim	124

	PAGE.
DECLARATION—<i>contd.</i>	
property	121
question of law	117
reversionary rights ... ..	...522, 116
sale of life-estate	299 <i>n</i> , 484, 116
status ... ..	...491, 520-1, 117, 118
conditions for relief	492-3, 116
(1) plaintiff, title of... ..	...491, 118
beneficial ... ..	... 119
by assignment ... ..	... 505
contingent right to moveables	...
succession	504
coparcenary	496, 119
miscellaneous titles	496, 119-20
possessory	495, 117, 119
present ... ..	...493, 120
privilege not recognised by law	... 507
proprietary ... ..	...494, 119
remainder ... ..	... 498
reversion	498, 116, 1 9
Hindu	490, 116, 118, 120
remote ... ..	...501, 120
See HINDU LAW.	
right to dignity or office ... ..	... 497 8
trust ... ..	...497, 116
(2) defendant,	
denial by	507, 124-5
interest to deny	507-8, 123
(3) consequential relief, See CONSEQUENTIAL RELIEF.	
claim for money ... ..	... 519
injunction ... ..	...518, 131
not available ... ..	... 509-16
possession, exclusive ... ..	...492, 130
joint ... ..	...517, 131
partition ... ..	...517, 131
discretion, See DISCRETION.	
inexpedient ... ..	... 522
judgment <i>in personam</i> ... ..	... 520-1
jurisdiction of court ... ..	... 122
law as to, old ... ..	...487, 118
present ... ..	... 488
similar	26-7, 117
premature ... ..	... 523
where more appropriate remedy available	...
neither party in possession	526-7, 126
not real object of suit ... ..	... 529
title-deeds lost ... ..	...523, 126
... ..	... 529
See DECREE, SUIT, TRESPASSER, TRUST, WILL.	
DECLARATOR ... ..	... 26, 117
DECLARATORY decree ... ..	... 26, 116
See under DECREE.	
DECREE,	
ambiguity in ... ..	... 482
breach after, See DECREE-HOLDER, RESCISSION.	
erroneous ... ..	... 33
execution of, proceeding in suit ... ..	... 37
when enjoined ... ..	... 613
executory ... ..	...493, 128
for specific performance, damages in lieu of	...
... ..	90
fraudulent ... ..	... 526

	PAGE.
DECREE—<i>contd.</i>	
in favour of vendor	103 <i>n</i>
possessory suit	86-7
effect of	36
suit for declaration	26, 47, 530, 5
construction of	534
effect of... ..	490, 123
English practice as to	26 <i>n</i> , 487
not capable of execution	534, 128
ejectment	67, 127
recovery of moveables	74, 38, 40
execution of	74-5, 38, 40
rectification of instrument... ..	449 <i>n</i> , 449 <i>n</i> -50 <i>n</i>
specific performance	481, 46, 98
effect of	483
execution of	432-3
inability to render or enforce	160-2, 165, 365
nugatory	169
setting aside	112
subsequently reversed	32
when followed by rescission	107
See APPEAL, SUIT.	
DECREE-HOLDER, see JUDGMENT-DEBTOR.	
default of	107
DEDICATION	43
DEEDS, see DOCUMENTS, INSTRUMENTS.	
recovery of	38
title-deeds, loss of	407, 529
DEFAMATION,	
injunction against	648
DEFECT,	
contrivances to conceal	220
formal or inadvertent	257
in expression	100
quality	174
latent... ..	223, 225
quantity	174
title	363, 529
latent... ..	228
patent	230
DEFENCES,	
equitable, see EQUITABLE DEFENCES.	
must arise out of contract	286-7
legal, see LEGAL DEFENCES.	
partial	84
personal	84
regarding whole contract	93
to suit for specific performance	184
DEFENDANT,	
action of, subsequent to suit	531
and illegal agreement	203, 106
carelessness of, see NEGLIGENCE.	96
default of	198-9, 357, 419
equities of	82, 187
hostility of	507, 124, 128
incapacity of	364
independent claim of, not considered	288
injury to, see INJURY.	426, 540, 557
may resist specific performance	230, 294
mistake of, see MISTAKE.	91

	PAGE.
DEFENDANT— <i>contd.</i>	
option of, were effect of contract misapprehended ...	345 <i>n</i>
variation set up by, see VARIATION. ...	245
wrongful conduct of ...	473-4, 558, 106
See under INSOLVENCY, SUIT.	
DEFINITION	
of subject-matter of contract ...	290
DEFINITIONS	
in Acts and Statutes ...	19
DELAY ...	375, 379, 392, 474, 606-7, 651, 657, 660, 664, 161, 168
and laches, see LACHES. ...	376
limitation, see LIMITATION. ...	377-80, 474-5, 533-4, 607, 657, 7, 15, 71, 127
damages for ...	417-8
explained ...	379
in paying purchase-money ...	80
induced or sanctioned by other party ...	380
speculative ...	381
when excused ...	380
DELEGATION	
of obligation, contractual ...	397
DELIBERATION ...	374
DELICTS, see TORTS.	
civil, rights arising from ...	14 <i>n</i>
DEMAND,	
before suit ...	414, 431
See CAUSE OF ACTION.	
DEPOSIT, see EARNEST. ...	381 <i>n</i> , 425, 56
forfeiture of ...	273, 425, 468
lien for ...	426, 57
recovery of, after possession ...	472
refund of ...	97
return of, suit for, limitation ...	431, 59
DESTINATION	
and devolution, distinguished ...	383 <i>n</i> , 24
DESTRUCTION	
of subject-matter of contract ...	275, 278
See FIRE, IMPOSSIBILITY.	
DETAILS,	
contract running into ...	165, 62-3
supplied by law ...	63
DETENTION, wrongful, of moveable property ...	517, 29, 68
DETINUE,	
action of ...	7, 8, 68, 13, 38
right to present possession ...	69
who may sue ...	69
DEVISEE,	
declaratory suit by ...	496
DEVOLUTION, see DESTINATION.	
DIGNITY,	
right to ...	498, 507
DILIGENCE,	
ordinary ...	237
DIRECTOR,	
of company, discretion of ...	542
fiduciary position ...	209, 628-9, 65
injunction against ...	628-30
limited agency of ...	206 <i>n</i>

	See COMPANY, CORPORATION.						PAGE.
DISABILITY							
of defendant	...	...	...	...	...	...	91
heir	...	...	...	...	...	...	91
	See COMPETENCY, INABILITY.						
DISCOVERY,							
right of	...	...	...	...	...	...	29
DISCRETION	...	...	31, 185-8, 539, 549, 595, 603, 42, 70-1, 98, 102				
and appeal	...	...	...	188, 530, 532, 549, 71, 72, 127			
in appointing receiver	...	...	...	...	...	546-50	
cancelling instruments	...	...	...	...	...	480-2, 114	
and awarding compensation	...	...	...	...	...	485-6, 114-5	
declaring rights	...	...	...	499, 503, 505, 532, 114-5			
conduct of parties	...	...	...	...	...	528	
decree <i>brutum fulmen</i>	...	...	...	...	...	520, 136	
inexpedient	...	...	...	...	...	522	
lands wild and unoccupied	...	...	...	...	...	529	
merits of the claim	...	...	...	...	...	528, 532	
no real injury	...	...	...	...	...	524	
not real object	...	...	...	...	...	523, 126	
other appropriate remedy available	...	...	...	...	...	526, 126	
discharging or removing receiver	...	...	...	...	...	579	
granting injunction, interlocutory	...	...	...	...	...	596, 143	
mandatory	...	...	...	...	...	659, 160	
perpetual	...	...	...	...	...	603, 154	
specific performance	...	...	...	...	...	31, 185, 70-1	
in rectifying instruments	...	...	...	...	...	447	
rescinding contract	...	...	...	...	...	474-5, 105, 107, 108	
misleading use of the term	...	...	...	...	...	31, 186	
not arbitrary	...	...	...	...	...	186, 71	
of department of Government	...	...	...	...	...	611	
director, see DIRECTOR.							
municipality, see MUNICIPALITY.							
public body...	...	...	...	...	...	539, 541	
receiver	...	...	...	...	...	565-6	
DISHONESTY							
and injunction...	...	...	...	...	...	606	
DISPOSSESSION,							
attachment and	...	...	...	...	...	130	
constituents of	...	...	...	...	...	60, 63	
partial	...	...	...	...	...	62, 31	
wrongful, discouraged	...	...	...	...	...	58	
special and speedy remedy against	...	...	...	...	...	58	
DISSEISN							
of chattels	...	...	...	...	...	6	
DISTRICT JUDGE, see SANCTION.							
DIVIDEND							
payment of, out of capital	...	...	...	...	...	629-30, 146, 156	
DOCUMENT							
agreement to execute	...	...	...	...	...	355	
alteration of, material	...	...	...	...	...	255n, 261-2	
by stranger	...	...	...	...	...	263	
in conveyance and covenant	...	...	...	...	...	262	
under mistake of fact...	...	...	...	...	...	263	
defect in	...	...	...	...	...	246	
executed, rectification of	...	...	...	...	...	446-7	
misapprehension of, see MISAPPREHENSION.							
obstructing title or enjoyment of property	...	...	...	...	...	118	
terms and effect of	...	...	...	...	...	246, 345, 86, 96	
unregistered	...	...	...	...	...	254	

	PAGE.
See INSTRUMENTS.	
DOMESTIC FORUM ...	145
DOUBT,	
as to right compromised ...	404-5
title, reasonable ...	358, 359
DOWER,	
agreement regarding ...	120
compensation or indemnity for ...	180-1
DRAFT,	
dishonour of ...	158
DUE course	
of law ...	62, 34
DURESS	
of person ...	212
property ...	212
DUTIES	
of individuals, agreement against public ...	148
public ...	535
DUTY	
continuous ...	67
defined ...	3
distinguished from obligation ...	3n
of disclosure, see OBLIGATION TO SPEAK, TRUST....	296
E	
EARNEST, see DEPOSIT. ...	193, 105
EASEMENT, ...	386, 634
declaration regarding ...	116, 120
extinguished ...	462n
light ...	642-3
misrepresentation regarding ...	454
negative ...	388, 391
physical comfort... ...	643
public... ...	644n
violation of ...	630, 650-1
injunction against ...	642-4, 651
way ...	643, 105, 86
See INJUNCTION.	
ECCLESIASTICAL Courts	
and specific performance ...	18-9
EJECTMENT, ...	608
action of ...	490, 29, 97
not restricted to ouster from surface estate ...	49
ELDON, Lord,	
on contract of purchase in equity ...	277-8
hardship and inconvenience ...	305
indadequacy of consideration ...	318
receiver in partnership cases ...	552-3
the Statute of Frauds ...	251
vendee's right to performance with abatement ...	178, 9
<i>En ventre su mere</i> ...	637
ENDOWMENT, see <i>Math, Wakf.</i>	
injunction against <i>shebait</i> or <i>mutwalli</i> ...	594
ENEMY,	
act of ...	452n
contract by ...	201
trade with ...	141

	PAGE.
ENGLISH LAW,	
departure from in India ...	169, 264, 275, 285-6, 623n, 10, 14-6, 51, 55, 67, 82, 87, 103
See COMMON LAW, DECREE.	
EQUALITY	72
EQUITABLE	
consideration for refusing specific performance ...	154-83
conversion, see CONVERSION.	
execution	555n
relief, see RELIEF.	
remedies, expansion of... ..	131
EQUITABLE DEFENCES	
to suit for specific performance	286-7
hardship of the contract	301-15, 73-4
changed conditions	312
disproportion between burden on defendant and benefit to plaintiff	312
forfeiture and penalty	308, 74
harsh consequence unforeseen	310
inadvertent act or covenant	310
inequality in inception	306
operation	307
purchase of property not capable of enjoyment	310, 74
risk of litigation or prosecution	309, 73
subsequent events not contemplated	313
See HARDSHIP.	
inability of Court to enforce part of contract	353-7
where contract single and entire	354
executory	357
inadequacy of consideration	316-22
doctrine old and modern	316
evidence of fraud	317, 93
undue advantage... ..	318, 93
failure of consideration	321
time when judged	318
unequal position of parties	319
See CONSIDERATION.	
incapacity of defendant	365-7
caused by himself	365
contract alternative	366
mistake	323-47
about effect of written contract	345
form	345
terms	344
See DOCUMENT, MISAPPREHENSION.	
of law	338, 68
mutual	324
non-disclosure by plaintiff	334
unilateral, defendant's	325
plaintiff's	325
vital	336
about quality	337
quantity	336
See MISTAKE.	

	PAGE.
EQUITABLE DEFENCES.—<i>contd.</i>	
plaintiff's conduct disentitling him to relief	367-81
acts of omission and commission	368
alteration of conditions	371
delay short of limitation	378
for speculation	381
inability to perform material stipulation	371
laches	375
non-fulfilment of representations	372
trap to defendant...	371
See CONDUCT, DELAY, LACHES, PLAINTIFF.	
uncertainty of contract	288-93
identification and definition	290
reasonable doubt as to intention	289
See UNCERTAINTY.	
unfairness in the contract	293-301, 72
inconvenience to public	300
matters for consideration...	295
misconduct not necessary	298
prejudice to third party	299
time when judged	301, 72
unequal position of parties	297
want of mutuality	347-53
in contracts, bilateral	348, 349
terminable	352
unilateral	352
obligation and remedy	350
tested at time of suit	351-2
want of title in property let or sold	357-64
defects in title	362-3
doubtful title	360
in fact	362
law	360
vendor's knowledge	358
mistake	359
See TITLE, VENDOR.	
EQUITIES	
of defendant, see DEFENDANT.	82
EQUITY	
acts <i>in personam</i> } See MAXIMS OF EQUITY.	
and clean hands }	
conscience	423
assists vendor in building contracts	110
attempted to do complete justice	82
doctrine regarding compensation and forfeiture	173, 272
endeavours to preserve rights of both contracting parties	173
has no power to change terms of contract	173
he who seeks, must do (see MAXIMS OF EQUITY).	
holds man to agreement he can perform	17, 127
jurisdiction, growth of, in England	18
looks upon that as done which is agreed to be done } See MAXIMS OF EQUITY.	
maxims (see MAXIMS OF EQUITY).	
not merely remedial, but preventive of injustice	24
troubled by formal or accidental defect	257
superior, contravention of	300n
walks arm-in-arm with precedent	32
ERROR, see MISTAKE	
<i>in substantialibus</i>	459

	PAGE.
ESCHEAT,	
right of	106
ESTATE	
in expectancy and in possession	493
See EXPECTANCY, LIFE-ESTATE, PROPERTY.	
ESTOPPEL	11, 190, 336, 475, 501, 610, 61-2
against public policy	467
equitable	174, 501, 607n
interest feeding	126, 54
EVASION	615, 644
EVIDENCE,	
extrinsic	196, 480
latent and patent ambiguity	197
of dead witness when admissible	34
parol	197, 199, 246, 247, 248, 362, 429n, 443, 445, 85, 87, 95, 101, 102
secondary	197n, 255, 407n, 26
<i>Ex dolo malo non oritur actio</i> , see MAXIMS OF LAW.	
EXAMINERS,	
board of	538
EXECUTION	
and declaration	526-7, 126
attachment and dispossession	514
of decrees, see DECREE,	
deeds, see INSTRUMENT.	
trust, see TRUST.	
EXECUTOR,	
declaration against	116
fiduciary position of	630
Hindu	400n
injunction against	630, 156
Mahomedan	400n, 556
not lightly displaced by receiver	556, 630n
sale by, under mistake	330, 196
EXPECTANCY,	
agreement to divide	54
distinguished from present interest	493
estate in	493
transfer of	125
EXPEDIENCY,	
and doctrine of mutuality	348
rule presuming knowledge of law	339-41
EYRE, C. B.,	
on inadequacy of consideration	316-7

F

FACT,	219-20
extrinsic, mistake as to	464
foreign law	341
material	231
matter of private right	219, 339, 341
novation of contract	266
opinion	220
part performance	259, 75
personal status	341n
state of mind...	218
title	362, 462

See MISTAKE.

	PAGE.
FAIRNESS	
of contract, when judged	801, 72
	See DEFENCES, UNFAIR ADVANTAGE.
FALSHOOD, see LIE.	
FAMILY,	
arrangement or settlement	100, 301, 404, 404-5, 504, 44 72, 77
and mistake	343, 405
doubtful legal principles	341n
enforced by beneficiary	403-4
final	100
	See AGREEMENT, COMPROMISE.
FARWELL, J.,	
on doctrine of specific performance	79
FAULTS,	
sale with all, see SALE.	
FEAR	23
FELONY,	407
conviction of	142
trade of	18
FIDEI INTERPOSITIO...	21
FIDUCIARY character or relation	71, 201-2, 209, 473, 628, 40, 156
disability due to	201-2
duty to disclose	222
	See TRUST, TRUSTEE.
FIRE,	
destruction of property sold by	278, 279, 46-8
when contract conditional	283
vendor liable	279n, 47
insurance, benefit of	284-5
FOLLY,	
consequences of	238
FORECLOSURE	
proceedings, declaration respecting	485
receiver in	554
FOREIGN	
contract	171-2
country, laws of	141
FORFEITURE,	
defendant to blame for	309
relief against	272, 308-9
FORGERY	478, 482-3
	See CANCELLATION, INSTRUMENT.
FORGETFULNESS	
and mistake	105
Forum, see COURTS, JURISDICTION.	
<i>rei sitæ</i>	546
FRANCHISE	536, 138
FRAUD,	190, 217 218, 245, 248, 256, 318, 319, 334, 345, 364, 370, 390, 405, 435-8, 442-3, 446, 451, 455, 459, 460, 463, 476, 477, 482, 484, 551, 556, 605, 607, 613, 644, 657, 72, 73, 79, 85, 86, 87, 88, 91, 95, 100, 102, 105, 110, 111, 112, 124
actual and constructive	239-40
and damage or injury	243, 456
forms of law	241
misrepresentation	241
restitution	473-4
confirmation of	471n
elements of	218-40

	PAGE.
FRAUD—con'd.	
evidence of, inadequate consideration	317, 318, 319, 321
means of discovering truth	234.7
of vendor	177, 352
personal bar to specific performance	243, 245
presumption against	362
remedies of party deceived	451
right to remedy against, personal	234
shield and instrument	252
suspicion of	246
upon public	244, 646, 79
varieties of	239
without moral culpability	238n
See COLLUSION, DECETT, IMPOSITION, MISREPRESENTATION.	
FRAUDULENT	
pretences	460
representations	40
See REPRESENTATION.	
FREEDOM	
of contract	140, 317
trade	389
FRENCH LAW,	
building contracts	108
inadequacy of consideration	317n
specific performance	19
FRY, Sir E.,	
on consent being essential to contract in equity	323n
court's jurisdiction in damages	418
defences to action for specific performance	185
ecclesiastical law and specific performance	18
money as measure of loss	81
obligation to disclose	221.8
pecuniary damages and specific performance	82n
perfect system of jurisprudence	19
wife being made to join husband's conveyance	128n
FURTHER relief, see CONSEQUENTIAL RELIEF.	510, 128
FUTURE	
acts, representations regarding	372
consideration	354
events, profits dependent on	121, 43
interest, expectation of	505
liability	505
rights, declaration regarding	521
G	
GAMBLING,	
collateral agreements	153
in litigation	143
not wholly illegal	153
except in Bombay	153
See WAGER.	
GERMAN	
Civil Code, see CIVIL CODE.	
law, specific performance in	19
temporary injunction in	143

	PAGE.
GHAT,	
rights in ... ..	...506, 124
GIFT	384, 484, 508
GOD	
act of	277n, 366, 374, 452n, 471n, 31
GOLD	
coin, agreement to pay in	95
GOOD FAITH, see BONA FIDE.	
breach of	370
breaches of	374, 80
GOODS, see CHATTELS, MOVEABLE PROPERTY.	
GOODWILL,	
defined	152
transfer of, together with business premises	152, 615, 169
unconnected with " "	152, 160, 623, 62, 169, 170
GOVERNMENT, see CROWN, LEGISLATURE, PUBLIC POLICY.	
declaration against	125
department of, injunction against	610-1, 613, 64
foreign	611, 164
internal	141
local or provincial	538, 164
order in the nature of mandamus against	537, 538, 140
possessory suit against	67, 30, 36
trespass by	635
GRAFT	
upon stock	22
GROTIUS, HUGO,	
on equality in contracts	294n
GROVER, J.,	
on contract to repair	166n
GUARDIAN, see under MINOR.	
GUILT,	
degrees of	203n

H

HALL, V. C.,	
on covenants at sale of building lots	391-2
HARDSHIP,	
and inconvenience	305, 74
unilateral mistake	338, 74
due to delay	379
executed contracts	315
subsequent events	313-4, 74
latent and patent	305
of contract and unfairness distinguished	302
on plaintiff	305, 74
on defendant	302, 660, 73
limitations of doctrine	303-6
defendant to blame	305
miscalculation	303
terms of agreement	306

See EQUITABLE DEFENCES.

HARDWICKE, LORD,	
on appointment of receiver	30
contracts relating to merchandise	156
ingredients necessary for specific performance	288
symbolical possession	41

	PAGE.
HARRIMAN, E. A., on Holmes' theory of contract ...	17
HEADING, not part of enactment ...	539n
HEIR, presumptive ...	501n
See DISABILITY.	
HEIR-APPARENT, protection of, in equity ...	315
HEIRLOOMS ...	73, 89
HIGHWAY, obstruction of ...	642, 652, 125, 162
HINDU LAW, agreements contravening ...	137
contract of betrothal or marriage ...	163
joint family ...42, 181, 200, 411n, 496, 514, 517, 526, 594, 638, 55 92, 104, 130, 147, 153, 156	
karta of ...	124
sale by father in ...	408n, 66
necessity, legal ...	560-1, 115, 116, 125
partition ...	517, 552, 538n
reversioner ... 499, 501, 509-10, 521, 55, 111, 112, 115, 116, 118	
female ...	501n, 502, 121
remote, when may sue for declaration ...	501-2, 120
specific performance in ...	14
surrender of life-estate ...	508, 120
widow, adoption by ...	501, 521, 524, 525-6, 116
alienation by 181, 200, 485, 501, 503, 508, 509, 521, 527 112, 116, 118, 125	
mismanagement or waste by ...	551, 637-8, 147
testamentary declaration by ...	120, 126
HOBHOUSE, Sir A., on specific relief ...	1, 2
Specific Relief Bill ...	1-2
HOLLAND, T. H., on contract, analysis of ...	13
objective theory of ...	11
status ...	491-2
HOLMES, O. W., on assent ...	12
contract ...	17
early forms of liability ...	4
intent in possession ...	39
HONORARY arrangement or engagement ...	189, 191, 438
HUSBAND and wife, contract for settlement of property, on marriage ...	125, 172
of separation ...	124-5
declaration regarding relation ...	117, 118
negative agreements between ...	120
HUSBANDRY agreements relating to ...	165, 368, 618, 147

I

Id certum est quod certum reddi potest, See MAXIMS OF LAW.

IDOL, family, recovery of ...	72
IGNORANCE and mistake ...	23, 338n, 341, 379, 381, 455, 478n
consequences of ...	238

See KNOWLEDGE, MISTAKE,

	PAGE.
<i>Ignorantia juris haud excusat</i> , see MAXIMS OF LAW.	
ITHERING, Von,	
on possession ...	39
and ownership ...	47
ILLEGAL	
acts ...	5
agreements ...	136, 106
ILLEGALITY,	
and statutes ...	138
manifest ...	106
not presumed ...	203
parties not <i>in puri delicto</i> ...	203, 106
See <i>In pari delicto</i> .	
supervening ...	138
<i>Illom</i> ,	
agreement relating to ...	106
ILLUSTRATIONS	
to Acts and Statutes ...	282-3, 502-3, 539, 21-2
IMMORALITY ...	139
IMMOVEABLE PROPERTY,	
corporeal and incorporeal	
defined ...	63
mesne profits of ...	108
partial possession of ...	62
rents and profits of ...	422, 469, 107
specific recovery of ...	29
tangible and intangible ...	63-4
See ESTATE, PRESUMPTION, PROPERTY, VENDOR	
AND PURCHASER.	
IMPLEMENT ...	20
IMPOSITION, see DECRET, FRAUD.	466
IMPOSSIBILITY of performance ...	274-86, 321, 46-8, 53, 60
by reason of contrary law ...	275
destruction of subject-matter ...	275, 471, 47
<i>res perit domino</i> ...	281, 46
misadventure, illness or death of promisor ...	277
very nature of things ...	275
compensation ...	418-9
conditional contract ...	283, 47
created by party ...	458, 471, 47
supervening, and alternative contracts ...	366
partial ...	282, 46
IMPRISONMENT,	
threat of ...	457
IMPROVEMENT,	
made by <i>bona fide</i> possessor ...	423-5 472
where sale fraudulent, not allowed for ...	107
IMPROVIDENCE ...	303, 305, 320, 343, 74
<i>In pari delicto</i> ...	203, 466-8, 106
See ILLEGALITY.	
INABILITY	
of court to enforce or render decree, see DECREE.	
party subsequently cured ...	351, 364, 41, 89
of plaintiff to perform ...	371, 407, 80
to sue for specific performance ...	97
INADEQUACY ...	73
See CONSIDERATION.	

	PAGE.
INADVERTENCE	298, 328, 332, 435
of act or covenant	310
INCAPACITY,	
to contract,	199-202
absolute	199
due to fiduciary relation	201
mental	343
relative	200
subsequently removed	202
perform, legal, mental, physical	407, 80
'INCLUDES,'	
enumerative, not exhaustive	19
INCONSISTENT	
claims	370, 483, 528, 97, 108
pleas	114
INCORPORAL RIGHTS	63-5, 34
declaration regarding	514
INDEMNITY	
and compensation	427, 59
as between vendor and vendee	181, 427, 50, 109
contracts of	114
for receiver	571, 572
INDIVIDUAL	
action, freedom of	148
duties of	148
INDUCEMENT	
to contract	234, 238-9, 440, 462, 95
part of	368
INEQUALITY	
and mutually	349-50
in contract	297, 455
in inception	306
operation	307
of condition	466
See CONTRACT	
INFANCY, see MINOR,	544
INFRINGEMENT	
of right	507, 150
INJUNCTION	
against execution of decree	526, 163
and specific performance	28, 614
as consequential relief	511, 514, 518, 130
defined	27
does not run with land	669n, 143
explained	22, 11
general doctrine of	28-9
principles	631-2
historical ground for granting damages instead	28, 631
interlocutory or temporary	27, 590-601, 141-5
and perpetual, right to, compared	664, 145
bill of exchange	592
chattels	592-3
compensation for	601
conditional	600
discharge of	601
discretion	595-8

	PAGE.
INJUNCTION— <i>contd.</i>	
<i>lis pendens</i>	591, 592, 597 <i>n</i>
literary property	647 <i>n</i>
mandatory, See below.	
mines	597-8
nuisance	598 <i>n</i> , 640 <i>n</i>
patents	598 <i>n</i> , 600 <i>n</i>
principle	600
public matter	595 <i>n</i>
waste	591
when granted	590-1
wrongful execution sale	593-5
irreparable injury, see INJURY.	632
jurisdiction expansive	588, 633, 642, 644 <i>n</i> , 649
limitation	668, 149
mandatory	27, 588, 12, 16, 138-63
form of	599 <i>n</i> , 654
interlocutory or temporary	598-600
perpetual	650-68
delay and acquiescence	657-9, 161
discretion	659, 160-1
altered circumstances	662
damages when given	661, 668
hardship to defendant	660
injury doubtful or trivial	663-4
plaintiff's motives	666
public benefit	665
safety	666
extent of jurisdiction	650-1
abuse of statutory authority	656, 164
breach of contract	655, 159
copyright	652, 158
easement, disturbance of	651, 159
joint property	654, 159
nuisance	652, 162
patent	652
trade-mark	652, 158
trespass... ..	653-4
waste	652
threatened injury	662, 160
'negative specific performance'	28, 614
operates <i>in personam</i>	613, 143
<i>in præsentì</i> and <i>in futuro</i> and not retroactively	614
perpetual	27-8, 590, 601-50, 145
extent of jurisdiction	
breach of confidence	648, 147, 156
contract	614, 146, 152
trust	628-30, 146, 147, 154, 156
civil wrong cognisable by municipal court	649
copyright	644-5, 148, 157
easement, disturbance of	642-4, 147, 150, 152
continuing tort	643
instances	644, 153, 157
substantial interference	643, 150, 155
use of real property	643, 153
See EASEMENT.	
labour and capital, conflict between	649
lease	617, 151
literary property	646, 148 158
negative agreements	120, 615, 620, 624, 152
coupled with affirmative	620-8, 168, 168-71, 71
American doctrine	625-6
Indian law	627, 169

	PAGE.
INJUNCTION—<i>contd.</i>	
plaintiff's conduct	627, 169, 170, 171
present English doctrine	624
damage not necessary	617
form positive	616
implied	617, 622, 170
part of contract	616
restrictive covenants	616
nuisance	639-42, 152, 165
instances	640-1, 147-8, 157
tenant's right	641
See NUISANCE.	
partnership	618-9, 16, 146-7, 156
dissolution of	618
patent	644-5, 148, 157
political wrongs	649
privacy, right of	647, 151
tort not affecting property	648, 151
See DEFAMATION.	
trade-mark	645-6, 148, 157
trade-name	645-6, 158
imposition upon public	646, 158
trespass	633-6, 147, 157
continuing	635 <i>n</i>
growth of jurisdiction	633-4
See TRESPASS.	
ward, custody, education and marriage of	648, 151
waste	636-9
by Hindu co-parcener	638, 147, 156
female	637, 147, 157
legal	637
not ameliorating	636
wilful	636
See WASTE.	
perpetual	
legislative bars	604-14
absence of plaintiff's interest	605, 168
act of State	610-1, 613, 164
application of legislature	611, 164
other equally efficacious remedy obtainable	608, 631, 166
criminal prosecution	608, 614
damages	609-10, 631-2, 165-6
plaintiff's delay	606, 666, 166
inequitable conduct	605, 167
proceedings in Court, civil	612-3, 163-5
criminal	613-4, 165
when granted	602-4
preventive relief, ordinary form of	27, 78, 143
primary remedy	28, 601
procedure, see SUFF.	668, 149-50
prohibitory	588
restrictive	27-8
scope of remedy	614, 159
substitutional remedy of damages	28, 602-4, 155
See DAMAGES.	
temporary, see INTERLOCUTORY above.	
and receiver	547

	PAGE.
INJURY,	
and fraud	243-4
apprehension of, reasonable	477, 663, 112
doubtful	663
irreparable	609, 632, 639, 648
material, see REVERSION.	78
serious	110
submission to	378
substantial	150, 153
threatened	663, 153, 162, 165
trivial	663-4
See DAMAGE.	
INNOCENT	
party, rescission against	460, 471
plaintiff, see PLAINTIFF.	
INSOLVENCY	
of defendant	129, 285, 557, 610, 632, 45
judgment-debtor	545
plaintiff	371, 407, 80
tenant in-common	688n
receiver in	545, 559n
See BANKRUPTCY.	
INSTALMENTS,	
payment or performance by	122, 354
INSTRUMENTS	101
alteration of, see DOCUMENTS.	261
cancellation of, see CANCELLATION.	
execution of	130-1, 158, 355, 432, 433
forged	123
meaning and language of	103
negotiable	481n
nullity	112
parts, valid and invalid, of	115
recovery of	74, 89
rectification of, see RECTIFICATION.	
registration of	158
return of	158, 159
surrender of, see CANCELLATION.	
void	110, 111
<i>ex facie</i>	480, 481n
voidable	110, 111
INSURANCE,	
contracts of, rescission of	109
fire, contracts of	114, 284
life	123
policy	124, 462
marine, policy, cancellation of	110
renewal of	303, 371
INTENTION,	
and expression, difference between	434, 103
fraudulent	646
in alternative contracts	366
parol evidence as to	197, 324n, 444
possible and real	346, 439
regarding restrictive covenants	392
representation of	190, 243
unlawful	465
without merit	386
See RECTIFICATION.	

	PAGE.
INTERDICT <i>undi vi</i> ... ..	...56-7, 60
juridical possession in plaintiff	59
INTEREST	
feeding estoppel	126, 54-5
on money and compensation	272-3, 115
rents and profits	422-3
successive	24
to deny title	508
INTERPRETATION,	
clause	19
reasonable, of vague and general expressions	291-2
See CONSTRUCTION.	
INTOXICATION,	
contract under	200, 297

J

JAMES, L. J.,	
on policy of fire insurance	284
JESSEL, Sir G.,	
on freedom of contract and public policy	140
restrictive covenants in equity	388
specific performance	79
JUDGMENT,	
error in	303-4
<i>in personam</i>	520-1
<i>rem</i>	520
mistake of	340
obtained by fraud, set aside	111
review of	67, 37
JUDGMENT-DEBTOR,	
default of	107

See DECREE-HOLDER, INSOLVENCY.

JURISDICTION,	
absence of, plea as to	396
inability to render or execute decree	160-2
legislative rules of	29
of court	170-2, 894, 46
pecuniary	396, 546, 36
plaintiff's valuation	113, 122
of court, territorial	395, 546
to appoint receiver	545, 581-3
grant declaratory relief	125-6
when seized of case to dispose of in entirety	468, 97
courts, civil and revenue	510-1, 527-8, 125-6
ouster of	143
High Courts in Presidency towns,	
ordinary original civil	172, 536, 544, 546n
to grant temporary injunction	590n
specific performance, see SPECIFIC PERFORMANCE.	78-80, 394
assumed where damages inadequate	
or impracticable, see DAMAGES.	88

	PAGE.
JURISDICTION—contd.	
ground of	20
historical grounds for restricting...	80-2
JURISDICTIONAL fact,	
leave of court in suit against receiver	563
Jus Civile	
of Rome, see ROMAN LAW.	28, 60
Jus Tertii	
cannot be pleaded by wrong-doer	70, 30
JUSTICE,	
aimed at by equity	80, 82, 3
municipal	141
natural	3

K

Kanungo,	
land purchased by	154
KEKEWICH, J.,	
on doctrine of mutuality	350
KENT, C.,	
on ignorance of law	340
stipulated payments in sale and mortgage	273
KINDERSLEY, V. C.,	
on constituents of contract	10
contracts by promoters	207
KNIGHT BRUCE, L. J.,	
on relation of master and servant	161n
KNOWLEDGE	
and acquiescence	81, 475
laches	381, 475

See VENDEE, VENDOR.

KNOWLTON, C. J.,	
on freedom of individual... ..	163
invasion of right in real estate	653

L

LABOUR

and capital, conflict between	649
right to dispose of	161-2
Laches	367, 375, 376, 378, 447, 448, 450, 474, 503, 607, 71
and acquiescence	378n
delay distinguished	376
knowledge	381
limitation	377, 379
of promisor and promisee	379
when no question of	380
LESIO FIDEI	18

LAND ACQUISITION

LANDLORD and tenant,	
agreements between	131
ejectment	165, 616
enhancement of rent	511
	127

	PAGE.
LANDLORD AND TENANT— <i>contd.</i>	
in the Central Provinces	34
Punjab	37
United Provinces	31, 106, 125
injunction	618, 637, 151
suit for rescission	438-70

See LEASE, RENT, TENANT-RIGHTS.

LANGDALE, LORD,	
on misrepresentations inducing contract	235
receiver in partnership cases	552 <i>n</i>
what is reasonable	294 <i>n</i>

LANGDELL, C. C.,	
on doctrine of equitable conversion	279
performance of affirmative and negative contracts	22
specific reparation of breach of contract	180

LAPSE OF TIME, see DELAY, Laches, LIMITATION, TIME.

LATENT,	
defect in quality, see DEFECT.	223
Indian law	226
Lord St. Leonard's view	224
present English doctrine	225

LAW

adjective	394, 75
aim and object to enforce promise literally and liberally	78
awarding compensation in lieu of performance	14
due course of, see COURSE.	
for purposes of specific performance, does not recognise agreement that is not a contract	77
maxims of, see MAXIMS OF LAW.	
mistake of, see MISTAKE.	
not series of arbitrary distinctions retained by memorizing	33
question of, title	360
race against	600
remedy at, and equity	80-1
respects possession even without title	57
resultant of conflicting social forces	114
substantive	2

See COMMON LAW, EQUITY.

LAW-BREAKERS,	
honour among	465
LEASE	98, 417, 418, 44, 54
assignment of	98
covenants of	193, 198, 369, 617
restrictive	385
execution of	130
expiry of term, after	170
forfeiture of	368, 371
of charity estates	320 <i>n</i>
renewal of	98, 197, 304, 369
surrender of	99
<i>ultra vires</i>	65, 66
under-lease	197, 299, 60
void	278 <i>n</i>
<i>zar-i-peshgi</i>	55

See CONTRACTS, LANDLORD, TENANT-RIGHTS.

	PAGE.
LECTURES,	
publication of, enjoined	647
LEGAL	
estate, and equitable, in India	84
representative, as defendant	408, 69
plaintiff	397, 400, 35, 78
See SUIT.	
LEGAL DEFENCES	
to suit for specific performance	
denial of breach of contract	286
question of costs	286
enforcibility of contract	249-63
document materially altered	261
not registered	251
remedy barred by time	260
formation of agreement	189-99
defendant's default	198
essential terms absent	195
no actual agreement, but honorary engagement	191
negotiation	189
representation of intention	190
qualified acceptance	192
revocation of proposal	195
validity of agreement	199-248
agreement illegal	203
in breach of trust	208
<i>ultra vires</i>	204
voidable, coercion	211
fraud	217
misrepresentation	242
undue influence	213
without consideration	210
parties incompetent absolutely or relatively	199
discharge from the contract	263-86
bankruptcy of promisor (<i>query</i>)	285
contingent contract, condition not performed	267
time of the essence	269-74
impossibility of performance	274
novation	265
rescission	274
waiver or abandonment	264
LEGISLATURE,	
application to, not enjoined	611, 164
corrupt influence on	141
intention of	138
LEGITIMACY	118
LETTER,	
property in	646, 38
LIABILITY,	
early forms of	4
future, present obligation to	505
LIBEL, see DEFAMATION.	
and injunction	648
receiver	573
LICENSE	60
to sell liquor or opium, agreements regarding	137

	PAGE.
LICENSEE,	
and restrictive covenants	410
LIE,	232, 239
appurtenant and in gross	231
half the truth	227
LIEN,	38
equitable	99,555,4 21
and declaration	496
specific performance	22n
prior and receiver	561-2
See VENPOR.	
LIFE	
estate	271, 295, 121
tenant, alienation by ... ..	...484, 116
contract by	403, 490, 91
waste by	637
See HINDU LAW.	
LIMITATION,	
agreement regarding, see AGREEMENT.	
and delay, see DELAY.	378-9, 607, 15, 71
laches, see LACHES. ... ..	... 377, 15
for suit for cancellation of instrument	483-4, 113
declaration	485, 532, 123
regarding adoption ... ..	... 532, 123
alienation by female ... ..	... 485, 123
enforcement of award... ..	261, 431, 99
injunction ... ..	... 668, 149
possession of immoveable property ... ..	... 260, 261,
rectification of instrument	430, 484, 534, 36
terminus a quo ... ..	... 450
relating to contract ... ..	... 450
rescission of contract... ..	... 260
specific performance of contracts ... ..	... 474, 104
terminus a quo	260-1, 378,
... ..	429-31, 45
remedy and right ... ..	... 431
... ..	... 260
LINDLEY, LORD,	
on equitable doctrine of undue influence	213
first principle of injunction law	28
LIQUIDATED	
damages	117
satisfaction	117
Lis Pendens	585, 90
and temporary injunction	592, 593, 597n
LITERARY, see PROPERTY.	
LITIGATION,	
gambling in... ..	143
risk of	309, 360, 490
LOAN,	
contract to advance	157
LOEC,	
verbal	481
LOT,	
one or more, sale in	356, 392
vacant.	423n, 424, 490
LUCID	
interval	200
LUNACY,	
of plaintiff	544
... ..	407

	PAGE.
LUNATIC,	
committee of	... 410, 89
contract by	... 199, 109

M

MACCLESFIELD, Lord,	
on stock	... 156
MAGISTRATE,	
award by	... 36
Presidency	... 538, 539, 27
MAHOMEDAN LAW,	
alienation by father	... 482
female	... 485, 123
religion and injunction	... 649
remainder and reversion	... 499n
specific performance in	... 14

See MARRIAGE.

Mahsul,	
or <i>batai</i> , levy of	... 125
MAINE, Sir H.,	
on contract and status	... 5
possession and property	... 47
MAINTENANCE	... 142, 123
<i>Mala fides</i> ,	... 477
presumption against	... 362

See BONA FIDE.

MALTHUS	... 148n
Malum	
<i>in se</i>	... 467, 467n
<i>prohibitum</i>	... 203n, 467, 467n
MAMLATDAR,	
orders by	... 31, 36
MANDAMUS,	
defined	... 535
suit for relief in nature of	... 545, 137
writ of, and decree for specific performance	... 536n
conditions for issue of	... 543, 138-40
formerly issued by Presidency High Courts	... 536, 137
peremptory	... 141
prerogative	... 535, 539, 5
specific legal right of applicant	... 543, 138
statutory	... 536
MANSFIELD, Lord,	
on illegal agreement and defendant	... 203
MAP,	
exhibition of, at time of contract	... 373
survey	... 33, 124
<i>thakbust</i>	... 33
MARGINAL NOTE,	
not part of enactment	... 539n, 18
MARRIAGE,	
articles	... 385
betrothal, see BETROTHAL.	... 163
brocage contracts	... 149

	PAGE.
MARRIAGE—Contd.	
contract for ...	163, 62
of, among Mahomedans ...	385
creates no disability in India ...	407
guardian's right to give in ...	125
of minor, enjoined ...	648, 144, 151
representation at ...	190
restraint of ...	149
settlement on, ...	125, 172, 210, 383, 404, 435, 436, 446, 479, 24
executed ...	210, 82
executory ...	383, 384, 82
See HUSBAND, LEGITIMACY, MATRIMONY, SETTLEMENT.	
MARRIED	
executrix ...	16
woman, contract by, in England ...	201, 14
MASTER	
and servant, see PERSONAL SERVICE.	
MATERIAL	
alteration of document, see DOCUMENT.	
inducement, see INDUCEMENT.	
injury, see INJURY.	
misrepresentation, see MISREPRESENTATION.	
mistake, see MISTAKE.	
Muth, see ENDOWMENT.	
declaration regarding succession to ...	518
shebait ...	594
lease by ...	66
MATRIMONY, see MARRIAGE.	
duty of ...	149
MAXIMS OF EQUITY,	
delay defeats equity ...	166
equity acts <i>in personam</i> ...	171, 546, 46
looks upon that as done which is agreed to be done ...	278, 402n, 89, 92
he who comes into equity must come with clean hands ...	32, 187, 243, 376, 448, 605, 662, 187, 243, 376, 102
seeks equity must do equity ...	32, 187, 287, 305, 367, 376, 424n, 470, 485, 74, 103, 114
MAXIMS OF LAW,	
<i>actio personalis moritur cum persona</i> ...	398
<i>aliud est celare aliud tacere</i> ...	230
<i>caveat emptor</i> ...	128, 225, 229, 441, 56
<i>de minimis non curat lex</i> ...	597
<i>ex dolo malo non oritur actio</i> ...	140, 203
<i>id certum est quod certum reddi potest</i> ...	196
<i>ignorantia juris haud excusat</i> ...	339
<i>in pari delicto potior est conditio possidentis</i> ...	465
<i>nemo debet bis vexari pro una et eadem causa</i> ...	81
<i>nemo potest praecise cogi ad factum</i> ...	19
<i>res perit domino</i> ...	281, 46
<i>salus populi suprema lex</i> ...	140
<i>sic utere tuo ut alienum non laedas</i> ...	635, 646
<i>simplex commendatio non obligat</i> ...	219n
MEANS	
of discovering truth ...	235, 336
information ...	238
MEDICINES,	
quack patent ...	607n
secret ...	161

	PAGE.
MERCHANTS,	
contracts of, time essential	271n
MESNE profits, see IMMOVEABLE PROPERTY.	
MINES	271, 304, 552, 558, 597, 634, 638n, 656
MINOR,	
cannot contract	135, 199, 349n
certificated guardian of	201, 66, 109
compensation awarded against	485-6, 109
contract by guardian of	200n, 201, 349n, 485n, 54, 71
when may be sued upon	408n, 88-9
custody and education of	648
declaratory suit by	118, 121
marriage of, injunction against	648, 144, 151
receiver for property of	556
specific performance against	200, 408n, 41, 91
MISAPPREHENSION	325, 326, 341, 342, 359, 86, 96
of effect of written agreement	245, 246, 345, 346, 85-6, 96
reasonable	348, 86, 93
See DOCUMENT, MISTAKE.	
MISAPPROPRIATION	
of property, receiver for... ..	516
MISCALCULATION	303-4
MISDESCRIPTION	
of property sold	326, 327
MISREPRESENTATION	
and damage	243
fraud distinguished	241, 87
elements of	453
explained	241
in obtaining written agreement	245, 247, 248, 434, 86, 88
innocent	242-3, 453, 459, 460, 476, 85, 88
material	244, 606, 56
of vendor	177
personal bar to specific performance	243, 94
See FRAUD, REPRESENTATION, RESCISSION.	
MISTAKE	
and estoppel, see ESTOPPEL.	336
ignorance, see IGNORANCE.	339n
means of knowledge	336, 463-4
negligence	441, 444
as to effect of contract	345, 96
nature of transaction	134
person of contracting party	134
quality	337
quantity	336
subject-matter of agreement	134, 323n, 405, 462, 68, 100
terms of contract	344
title	462
vital part of contract	336, 464
collateral	464
compensation for	96
described	323
family settlement, see FAMILY.	
ground for rescission	24, 461-4, 472, 473
in framing contract	345
internal	323
material	323, 336, 448, 68, 93
mutual 25, 324, 365, 437, 440, 442, 444, 446-8, 461-2, 473, 478, 483, 63 100-1	

	PAGE.
MISTAKE— <i>contd.</i>	
no general legal principle	134
object in giving relief for	346
of fact	133-4, 321, 337-8, 341, 374, 434-5, 461-4, 85, 88, 96
judgment	340
law	338-42, 346, 434-5, 439, 96
as medium of proof of other ground of relief	343
Indian law	340-2, 346
period when material	338
restitution, see RESTITUTION.	473, 108
unilateral	461-4, 68
defendant's	325-32, 96
due solely to defendant	330
induced or contributed to by plaintiff	325
known to plaintiff	328
due to negligence	335
English doctrine regarding, old	325, 331
modern	332
relief on ground of hardship	333, 464, 96
Indian doctrine	330, 333
plaintiff's	325, 440, 441

See CANCELLATION, EQUITABLE DEFENCES, RESCISSION, RECTIFICATION.

MISTAKEN	
impressions	230, 323, 329, 337
MONEY,	
claim	158
compensation, adequate	155-7
importance of	16
measure of value and loss	16, 81
when must be accepted	16

See COMMON LAW, COMPENSATION, DAMAGES.

MONOPOLY	91, 150, 151
'MORE OR LESS'	176, 292, 337
MORT D'ANCESTOR	
writ of	57
MORTGAGE	44
agreement for	99
and sale	273, 554
consequential relief	514, 515
contract to discharge	114
decree, sale of	56
foreclosure of	554
redemption of	526, 553
sale of property under	128-9
specific relief	30
subsequent	80
suits, receiver in	553-5
usufructuary	59

See AGREEMENT, EQUITY OF REDEMPTION, LEASE.

MORTGAGEE,	
and mortgagor, adverse possession	32
declaratory suit by	496
prior and subsequent, receiver between	554
MORTGAGOR, see MORTGAGEE.	
injunction against	638

	PAGE.
MOTIVE	
for contract	303
MOVEABLE property	
and immoveable	95-6, 45
defined	68, 38
lost, finding of	70, 38
non-existent, contingent right to	504
<i>pretium affectionis</i> of	72, 88, 43
rare and unique	73, 88, 39
specific recovery of	68, 70-5, 37-8
wrongful detention of	68, 70, 38
transfer	68, 39

See CHATELS.

MULTIPLICITY,	
of action, see ACTION.	
proceedings	612, 632, 634, 163

MUNICIPALITY	
and rights of citizens	151, 206n, 495, 598n, 120, 168
breach of trust	630
chairman of	588
commissioner of	539n, 138
discretion of	542, 164
mufassil, injunction against	544, 630, 137
receiving officer of	508

MUTUALITY,	
bilateral contract	348
equitable doctrine of	347, 349-50, 363
Indian law	348-9, 63
of obligation of contract	350, 628
remedy	350
optional contracts	351, 353
terminable contracts	352
time when tested	356
unilateral contracts	352
waiver	353

See EQUITABLE DEFENCES.

N

NAME,	
when misleading	646, 158

NAVIGATION,	
obstruction of	642
NEAR RELATION	211

NECESSARY	
articles	93

NECESSITY	
and convenience	92
legal, see under HINDU LAW.	

NEGATIVE	
agreements, contracts or covenants, enforced by injunction	120, 162, 163, 392

See INJUNCTION.

	PAGE.
NEGLIGENCE,	
and mistake ...	...441, 442
of law ...	... 341
consequences of ...	272 <i>n</i> , 273, 335, 376, 381
crass ...	... 326
failure to read ...	... 443 <i>n</i>
gross ...	... 380
of vendor ...	... 279 <i>n</i>
NEGOTIATION ...	189, 380, 438
course of, obligation to speak arising out of ...	... 226
NELSON, R.A.,	
on Injunction and Damages ...	... 603
NEW YORK,	
Civil Code, see CIVIL CODE.	
NON-TECHNICAL	
words used by the legislature ...	... 93
NOTICE ...	257 <i>n</i> , 82, 90
absence of equity of purchaser ...	...384, 393
actual ...	257, 23, 91
and registration ...	... 409, 91
constructive ...	237, 257, 23, 91
possession ...	... 91
doctrine of ...	... 408 <i>n</i>
inapplicable, where complete title has passed ...	... 257
of rescission ...	... 380
See PURCHASER, TRANSFEREE.	
NOVATION	
of contract, see CONTRACT. ...	...265, 451
NOVEL DISSEISIN,	
writ of ...	... 56, 57
NUISANCE ...	608, 609, 633, 650, 659 <i>n</i> , 662, 162, 165
and injunction, mandatory ...	...652, 159
perpetual ...	602 <i>n</i> , 630, 632 <i>n</i> , 639-42, 664, 152, 165
temporary ...	... 598 <i>n</i> , 640 <i>n</i>
by crowd ...	... 640
noise ...	589, 640, 148, 157
smoke ...	640, 148, 157
houses of ill-fame ...	... 640
physical comfort ...	... 639-41
public ...	...639, 642
water, abstraction, diversion, obstruction, pollution of ...	... 641

O

OBJECT	
of contract, lawful ...	... 136
OBJECTS	
and Reasons, see STATEMENT.	
OBLIGATION, ...	139, 146, 150, 151, 159
consensual ...	... 5
contractual ...	... 9 <i>n</i> , 393
defined ...	3, 76, 588, 19, 114
discharge of, by plaintiff ...	... 367
distinguished from duty ...	... 3 <i>n</i>
imperfect ...	... 230
agreements of ...	77, 438, 25
irrecusable ...	... 4 <i>n</i>
moral ...	...5, 243-4
and legal distinguished ...	...221 <i>n</i> , 19
paramount ...	... 3, 5
present, to future liability ...	... 505

	PAGE.
OBLIGATION—contd.	
recusable ...	4n
restrictive ...	393
to do and to forbear ...	76
speak or disclose ...	221-3, 455
antecedent wrong ...	222
course of negotiation... ..	226-8
fiduciary relation ...	221-2
statutory obligation ...	229-31
subsequent " ...	228
<i>uberrimæ fidei</i> " ...	223-6
OBLIGEE,	
disability caused by ...	367
OFFENCES,	
compounding of ...	142
OFFER,	
acceptance of ...	192
memorandum of ...	192
snapping at ...	328
withdrawal of ...	195
OFFICE,	
ouster from ...	516
remunerated by voluntary payments	507
right to, declaration regarding ...	497
OFFICIAL	
inaction, corrective of ...	535
OMISSION,	
deliberate ...	246, 257, 439, 102
fraudulent ...	239
to sue ...	501, 512, 104-5
Onus probandi	
in suit for declaration ...	493n, 533, 123
rescission ...	476
inversion of, possessory suit ...	58, 30
of acquiescence ...	659n, 161
<i>bona fide</i> purchase without notice ...	90
undue advantage ...	93
influence ...	213n, 112
when shifted ...	66, 36
OPPRESSION, see HARDSHIP.	302, 319, 466
OPTION	
bilateral contract ...	350
of defendant ...	345n
party ...	105
to purchase ...	269, 61
rescind ...	451, 452-3
unilateral contract ...	353
OPTIONAL	
contracts ...	117
construction of ...	117-8
'ORDINARY DILIGENCE' ...	237
OUSTER, see DISPOSSESSION, OFFICE.	130
OUTLAW	
contract by ...	201
OVERPRICE ...	316, 321
OWNERSHIP	
and possession... ..	47
possessory rights and remedies... ..	48
obligation annexed to ...	393

P

<i>Pardanishin</i>					
ladies	...	...	...	...	214 6, 476, 647
presumption	...	...	...	...	215
undue influence, issues of	...	...	...	...	216
See PRIVACY.					
PARLIAMENT,					
petition to, injunction against	...	...	...	...	...611, 164
PAROL					
agreement	...	...	...	...	346, 87, 88
assertion	...	...	...	...	524
evidence, see EVIDENCE.					
variation, see VARIATION.					
PART performance, see under PERFORMANCE.					
<i>Particeps criminis</i>	...	...	...	...	467n
PARTIES,					
array of, see under SUITS.					
competency of, to contract, see INCAPACITY.					
conduct of, see CONDUCT.					
privies of,	...	...	...	...	520
unequal position of	...	...	...	...	297, 319, 465
PARTITION, see HINDU LAW	...	...	...	...	517, 655n, 44, 88, 127, 129, 131
PARTNERS, see PARTNERSHIP.					
contracts between	...	...	...	...	119-20, 170n, 615, 618
fraud of	...	...	...	...	456
trust	...	...	...	...	629-30, 20
unfair conduct of	...	...	...	...	605, 167
PARTNERSHIP,					
accounts of	...	...	...	...	355n, 553
agreements relating to	...	...	...	...	152, 170, 65
creditor of	...	...	...	...	504
dissolution of	...	...	...	...	553
injunction	...	...	...	...	618-20, 147, 156
interest in, contract for sale of	...	...	...	...	94
receiver in	...	...	...	...	552-3, 537
specific relief	...	...	...	...	30, 170, 65
PATENTED					
articles	...	...	...	...	121, 606
PATENTS					
assignment or sale of	...	...	...	...	644
delay in disputing infringement of	...	...	...	...	123, 299n, 419
injunction, mandatory	...	...	...	...	607n, 658
perpetual	...	...	...	...	652
temporary	...	...	...	...	631, 644-5
					599n
PATWARI,					
purchase of land by	...	...	...	...	154
PAUPER,					
injunction against	...	...	...	...	610, 147
PAWN, see PLEDGE.	...	...	...	...	38, 40
PAY,					
judicial	...	...	...	...	142
military	...	...	...	...	141
PAYMENT					
of money, decree for	...	...	...	...	366
or performance by instalments	...	...	...	...	122
PEACOCK, SIR B.,					
on doctrine of laches	...	...	...	...	376

	PAGE.
PENAL	
law, not specifically enforced	5, 546, 27
PENALTY	
and liquidated damages	117
satisfaction	117
to secure performance of contract	116, 60
PENSION,	
assignment of	142
PERFORM, see ABILITY TO PERFORM.	
PERFORMANCE,	
by plaintiff	352
deferred, contracts of	121
literal, not insisted upon	272, 312, 365, 374, 48
part, of parol contract	198n
and Indian Courts	258-9
parol variation	267
equitable doctrine of	250-4
inapplicable in India	254
fraud, independent of doctrine of	256
generally question of fact	259
in contract of adoption	406
irrevocable change of position	252-3
may determine discretion of Court	
in case of reciprocal promises	259
partial, not generally enforced	174, 309n, 619, 53
exceptions to above rule	174, 48, 50, 51
for vendee	178-80, 407, 427, 50
and rights of third parties	180-1
vendor, with compensation	176, 426, 49, 50
jurisdiction delicate	8
principle artificial	177-8
when refused	177
piecemeal	172, 355
possibility of, condition of contracts in India	275
possible before decree	351, 364, 414, 82
relation back of	279
series of acts	62
specific, see SPECIFIC PERFORMANCE.	
substantial	47, 48, 51
See COMPENSATION, PROMISE.	
PERPETUITIES,	
rule against	384
and negative covenants	393
PERSONAL	
acts or proceedings	130, 44
bars to relief, see FRAUD, MISREPRESENTATION.	79-80
considerations	397-8, 412
qualification	161, 63
quality	76, 91
service, agreements for	151, 161-2, 277, 348, 624-5, 62
exception	163n
volition	161, 163, 63
See INJUNCTION, MASTER AND SERVANT.	
PERSONALTY	
and realty, contracts for sale of	95
contracts for sale of	97
PHOTOGRAPH,	
publication of, enjoined	647

	PAGE.
PICKETING, injunction against	649, 144
PILLARS of agreement	10
PLAINT, see RESCISSION, SUIT. amendment, of see SUIT.	
PLAINTIFF, ambiguous agreement by, construction of	370
benefit to	312, 393
conduct of, see CONDUCT,	
death of	533
default of, substantial	374
in <i>statu quo</i>	259
inability of	371
inconsistent positions taken by	370
innocent	465, 96
<i>locus standi</i> of	605
mistake of, see MISTAKE.	
not innocent	466
objection personal to	79
performance by	352
personal interest of	168
promptitude of	375, 166
status of	490-1
terms imposed upon	485
title of	482, 533
present	493
strength of	50, 493, 29
valuation of suit, see SUIT.	113
variation in favour of	428
wrongful acts or omissions of	301, 368, 605, 167
PLAN, see MAP.	
PLEADINGS, see SUIT.	
PLIDGE, see PAWN.	
for loan	38
of faith	18
goods	39, 40
PLUMER, Sir T., on compensation and partial performance	178
POLICE, Commissioner of	538-9, 138
POLICY and principle	341
POLITICAL wrongs and injunction	649, 151
POLLOCK, Sir F., on causes preventing true consent	23
construction of statute and void agreements	138
false statements	239
law of contract	78
public policy	140
POLLOCK, SIR F., and MAITLAND, F. W., on oldest common law actions	14
POMEROY, J. N., on building contracts	107n
cancellation of void deed	481
contract, as subject of judicial action	159
defendant's insolvency	129

	PAGE.
POMEROY, J. N.— <i>contd.</i>	
discretionary remedy in equity...	31-2, 185-7
features and incidents of enforceable contract	184
inadequacy of consideration	318
jurisdiction of specific performance	82-3
POSSESSION,	
actual and formal or symbolical	41
adverse	559, 32, 123
against wrong-doer	51
and juxtaposition	36
notice...	409
ownership or property	47
constructive	40, 61, 513, 517, 32, 130
continuing relation	37
continuous	52
degrees of, three	38
derivative	39, 40
elements of, <i>corpus</i> and <i>animus</i>	37
evidence of	33
ownership	48
exclusive by nature	42
follows the title	52, 33
joint	42, 518
and injunction	47
conflict in Allahabad decisions	43-4
decree for	45-7
Juridical or legal	60, 32
never acquired by wrong-doer	59, 495
legal and physical	40, 61
mediate and immediate	40, 61
mental relation	36, 38
nine points of the law	49
not sufficient in ejectment, except against wrong-doer	50, 52
objective realization of free will (Kant)	35
ownership (Ihering)	47
of co-sharers	45
receiver, see RECEIVER.	
physical power to exclude others	37
relation	36, 37
present right to	60, 38
distinguished from special property	69
presumption raised by	48, 50
prevails where good title not shown	50-1, 55
prior, see POSSESSORY SUIT, POSSESSORY TITLE.	
substantive right apart from true owner's title	54
symbolical	41, 517, 33, 130
tacking of	52
title or root of title, see POSSESSORY TITLE.	49
under defective title	423-5
without <i>animus domini</i> no true	39
POSSESSOR,	
<i>bona fide</i> , improvement by	424-5
POSSESSORY SUIT	59-60, 65 29-38
after six months of dispossession	54, 37
anterior juridical possession	60, 32, 33
common right	65
constructive possession	61, 32
custody	60, 32
decree, effect of	66, 36
finality of	67, 30, 36
not <i>res judicata</i> in title suit	67, 36
dispossession, extent of	62, 31, 33
facts to be proved by plaintiff	34

	PAGE.
POSSESSOR—contd.	
history of	56-7
immoveable property	64, 34
in India, under Act XIV of 1859, s. 15	53
I of 1877, s. 9	53, 30
inadmissible defences in	60, 35
incorporeal rights	63-4
injunction	66, 35
limitation	53, 54, 30, 37, 113
mesne profits	60, 36
no question of title	54, 67, 36
not against Government	67, 30
objects of	55, 57-8, 30
partial possession	62, 33
plaintiff, who may be	31
lessee and lessor	61, 32
mortgagee and mortgagor	61, 32
title suit treated as	67, 33
writ of novel disseisin	56
POSSESSORY TITLE,	
in ejectment	50
other cases	51, 52, 57
nature and extent of	50, 56, 29
suit on	54
when available	51
POSSIBILITY	
of performance, see IMPOSSIBILITY, PERFORMANCE	275
right, see RIGHT.	
POTHIER,	
on concurrence in contract	189
elements of contract	195
POVERTY	130, 366, 379, 610
of executor or trustee	556, 157
POWER,	
document executed in pursuance of, rectified	101
due exercise of	77, 91
informal instrument of, and charities	256
statutory	636
to perform contract, see ABILITY.	364
subsequently acquired	364
PREAMBLE	
of Act, shows scope	17
PRE-EMPTION,	
covenant of	393n
right of, enforcement of	130, 170n, 431, 618n, 44
not affected by notice	90
PRESUMPTION,	
regarding immoveable property	95, 45
See ILLEGALITY, PARDANISHIN.	
Pretium affectionis	7-8, 72, 88
PREVENTION,	
tru. specific performance	22
PRICE,	
abatement of	174, 175, 182, 426, 48, 49, 56
of property knowingly and deliberately fixed... ..	320
work of art	89
rectification of	483
uncertain	164
where fixed by Court	165
not so fixed	164

	PAGE.
PRIEST	
attached to temple, see TEMPLE .	497
not so attached	507
PRINCIPAL and agent, see AGENT .	397
fraud	231
right of suit between	400
PRIVACY ,	
right of, in America	647 <i>n</i>
India	647, 151
PRIVILEGE	644-5
exclusive	150
PRIZE-FIGHT ,	
injunction against	760
PROBATE ,	
receiver after grant of	551
PROCEDURE , see SUIT .	
English law of contract, and	9
injunction	668 148-9
legislation regarding	18
receiver, appointment of	581
PROCEEDINGS , see MULTIPLICITY .	
execution, and declaratory suit	126
stay of, in Court Civil	612
Criminal	613
thakbust	124
PROFESSIONAL	
man, breach of confidence by	628
PROFIT ,	
dependent on future events	121
PROFITS , see IMMOVEABLE PROPERTY , POSSESSORY SUIT , VENDEE .	
PROMISE ,	
absolute	267
conditional	267
defined	9, 189
performance by plaintiff of his	352
promisor's power to fulfil	17
reciprocal	259
PROMISEE ,	
right of, to damages and specific relief	185
PROMISOR ,	
bankruptcy of	285
death of, before performance	398
default of	275 <i>n</i>
misadventure of	277
repudiation by joint	106
PROMISSORY NOTE , see BILL OF EXCHANGE .	
endorsement of	44
PROMOTER	
of company, contract by	207, 402, 65-6, 70, 93
fiduciary position of	209, 66
when enjoined	646
See COMPANY , CORPORATION , DIRECTOR .	
‘ PROPER RATE ’	292
PROPERTY ,	
declaration regarding	121
encumbered, sale of	128
exoneration of, contract for	114
immoveable and moveable	95, 54, 82, 154

	See IMMOVEABLE and MOVEABLE.				PAGE.
PROPERTY— <i>contd.</i>					
<i>in custodia legis</i>	...	...	...	...	515, 551, 130
<i>medio</i>	...	...	...	...	...548, 551
<i>posse</i>	...	...	...	...	... 121
joint, receiver for	...	...	...	...	... 552
sale of	...	...	...	...	... 365
literary	...	...	...	...	... 646
not capable of enjoyment	...	...	...	...	... 310
of fluctuating or speculative value	...	...	...	...	...271, 379
which receiver may be appointed	...	...	...	...	... 550
rights of, and injunction	...	...	...	...	630, 27, 153
specific, contract relating to	...	...	...	...	... 94
trust, see TRUST.					
vexatious interruption to enjoyment of	...	...	...	...	... 597
	SEE CHATTELS, ESTATE.				
PROPOSAL,					
defined	...	...	...	...	... 8
memorandum of	...	...	...	...	... 192
revocation of	...	...	...	...	194 <i>n</i> , 195
PROSECUTION,					
stifling of	...	...	...	...	... 142
PROSPECT,					
building obstructing	...	...	...	...	... 665 <i>n</i>
PROSPECTUS,					
misrepresentation in	...	...	...	...	... 233
	...	...	...	...	... 460
PROTECTION, see SETTLEMENT.					
PUBLIC					
benefit	...	...	...	...	... 665
fraud upon	...	...	...	...	244, 646, 79, 158
inconvenience to	...	...	...	...	... 300
interest, and specific performance	...	...	...	...	...167, 300
offices	...	...	...	...	... 141
safety	...	...	...	...	... 666
PUBLIC DUTIES,					
enforcement of, by Presidency High Courts	...	...	...	...	536, 137-42
conditions of	...	...	...	...	...456, 138
not allowed against Crown	...	...	...	...	...538, 140
procedure	...	...	...	...	537, 140-1
	See MANDAMUS.				
PUBLIC POLICY					
and arbitration	...	...	...	...	... 68
illegal agreements	...	...	...	...	465, 466-7
individual freedom	...	...	...	...	... 169 <i>n</i>
classification of cases, against	...	...	...	...	... 140
touching external relations of State	...	...	...	...	... 141
freedom of individual action	...	...	...	...	...148, 389
internal government	...	...	...	...	... 141-8
legal rights of individuals	...	...	...	...	147-8, 106
described	...	...	...	...	...139, 476
doctrine not to be extended	...	...	...	...	... 153-4
grounds of	...	...	...	...	... 611
regarding affirmance of contract	...	...	...	...	... 471
	See TRADE.				
PUFFING, see ADVERTISEMENT, AUCTION-SALE.					
PURCHASE, see SALE, VENDOR AND PURCHASER.					
of one's own property	...	...	...	...	... 462-3
onus of proving <i>bona fides</i>	...	...	...	...	... 90

	PAGE.
PURCHASER, see TRANSFEREE, VENDEE, VENDOR.	
<i>bona fide</i> for value, may resist rectification	26, 449, 60
rescission	299n, 460, 105
specific performance	408, 90
rights of	375, 384, 424, 23
<i>pendente lite</i>	570
personality of	336
silence of, see CONCEALMENT.	230, 324, 455
under settlement	384

Q

Quia Timet,	
bills in equity	29, 489
and bills of peace	489, 117
principle of	26, 478, 545, 110, 134
QUIETING	
of doubtful title	520
QUIT,	
notice to	511
served by receiver	564, 570
Quo Warranto	539n

R

RAILWAY,	
trackage and operating contracts	111, 419
See CONTRACTS.	
RATIFICATION	471, 93
REAL	
contract of Rome	252
REALTY	
and personalty, contracts for sale of	95
contracts for sale of	97
savouring of	114
REASONABLE	
certainty	289
doubt	358-60
interpretation	292
misapprehension, See MISAPPREHENSION.	
what is	294n
RECEIVER	
accountability to court	459
accounts of	576-7
acknowledgment by	574
and corporation sole, analogy between	572
tenants	586n
application by...	567, 570
for appointment of	566
affidavit supporting	581, 583
by defendant...	582
appointment of, after decree	584
and temporary injunction	583
by decree	545, 547, 561
does not suspend limitation	579, 583
effect of	559
may change possession but not affect title	135
destroy adverse possession of trespasser	559
object of	29, 544
order of	584
collateral attack upon	585
strictly construed	564

RECEIVER - contd.

PAGE.

pending suit	...	...	...	545, 134
when made	...	...	...	583
takes effect	...	...	...	581, 585
contract by	...	...	...	571
costs, charges and expenses of	...	...	...	572, 136
court, discretion of	...	...	...	546, 579, 134-5
danger imminent, right clear	...	...	...	549
justice or convenience	...	...	...	551, 135
multiplicity of action	...	...	...	550
jurisdiction of	...	...	...	545-6, 135
over after discharge	...	...	...	577
default, wilful, of	...	...	...	575
defence by	...	...	...	566
defined	...	...	...	29, 544
delegation by	...	...	...	566
discharge of	...	...	...	578
disturbance of, contempt of court	...	...	...	560, 562, 135
duration of office	...	...	...	578, 585, 587, 134
duties and liabilities of	...	...	...	573-7, 136
impartiality of	...	...	...	577
improvements and repairs by	...	...	...	571
in suit for dissolution of partnership	...	...	...	583
ejectment	...	...	...	557
partition	...	...	...	584, 135
rescission of contract	...	...	...	558
specific performance of contract	...	...	...	557
lease by	...	...	...	570
lien of	...	...	...	572-3
limitation	...	...	...	572, 575
loans	...	...	...	571
loss, responsibility for	...	...	...	575-6
mortgage by	...	...	...	571
negligence of, gross	...	...	...	575, 580
officer of court...	...	...	...	558, 559
order of appointment, see <i>appointment</i> above.	...	...	...
payment of debt by	...	...	...	572
position of	...	...	...	558-9
possession of, subject to existing liens and prior charges	...	...	...	561-2, 135
taken by	...	...	...	567-8
powers of, defined by court	...	...	...	568-70, 136
practice regarding appointment of, under Act XIV of 1882	...	...	...	581
proceedings against, by stranger	...	...	...	585
property made over to	...	...	...	550
in foreign country	...	...	...	567-8
infant's	...	...	...	556
joint	...	...	...	551
life-tenancy	...	...	...	551
mortgaged	...	...	...	553
partnership concern	...	...	...	552
trust	...	...	...	556
protection by Court	...	...	...	573
provisional remedy	...	...	...	113
purchase of property held by	...	...	...	575
removal or change of	...	...	...	579-80, 136
remuneration of	...	...	...	572
retirement <i>pendente lite</i>	...	...	...	586-7
sale by	...	...	...	571, 136
setting aside of	...	...	...	571a, 586
security	...	...	...	560, 573
substitute for, appointment of	...	...	...	587

	PAGE.
RECEIVER—contd.	
suit against	562-4, 136
leave of court, no question of jurisdiction	562
by	564-6, 76, 136
surety for, discharge of	580n, 580
trustee	575
who may be appointed	560, 584
Collector	584
party	584
See PARTNERSHIP, PROBATE, PROPERTY, QUIT, SUIT, TRUST.	
RECIPROCAL	
promises	4
RECTIFICATION see RESCISSION.	
of instruments	25, 325, 428, 436-8, 5, 100
and specific performance	429
by way of defence	84
complete valid contract	438, 101, 102
documents executed and executory	446-7
essentials for	438, 102
evidence	437, 443-6, 102
fraud	436, 442, 443, 102
marriage settlements	446
mistake	434-5, 101-2
mutual... ..	440, 443, 100
of law	439
unilateral	441
not of contracts	437, 440, 101
when refused	447-8
See DISCRETION FRAUD, INSTRUMENT, MISTAKE, SETTLEMENT, SUIT.	
REDEDSALE, Lord,	
on equitable jurisdiction of specific performance	20, 208
mutuality	347
object of appointing receiver	29
RE-ENTRY,	
by grantor or vendor	369
right of	459
REFORMATION, see RECTIFICATION.	
REGISTERS,	
revenue	33, 124
REGISTRATION	
and notice	409, 26
compulsory	159, 43
conveyance	281
effect of	26
of document, when required	254-6
name	33
voluntary settlement	383
want of, plaintiff not in default	26
REGULATIONS,	
1810, XIX of (Bengal)	21
1817, VII of (Madras)	21
RELIEF,	
adequate	43
compensatory	2
consequential, see CONSEQUENTIAL.	
court grants all in its power	622
efficacious	608, 631, 166
equitable, not necessarily consequential	512, 516

	PAGE.
RELIEF—contd.	
further, see CONSEQUENTIAL.	
in plaint, see under SUITS.	
personal bars to	79
preventive	27, 143
suppressive	27
See RELIEFS.	
RELIEFS,	
alternative, see SUIT.	
inconsistent	428, 483
RELIGIOUS	
endowments, see MATH, WAKE.	21
feelings, and common law rights	666, 151
REMAINDER, see REMAINDERMAN, REVERSION.	
contingent	498
trust to preserve	504, 637
declaration regarding	498, 119
defined	401, 498, 78
REMAINDERMAN	78, 119
assignee of, suit by	522
injunction against waste	636
when may be sued for specific performance	411, 91
sue " "	402, 403, 77
REMEDIAL	
liability	19n
REMEDIES,	
Bentham's classification of	4n
two legal	527
REMEDY,	
effectual, in ordinary courts	535, 537
equitable and legal	631
legal specific	536, 540
preservative	27
RENEWAL,	
of lease, see LEASE.	80
RENT,	
agreement for enhancement of	52
arrears of, not consequential relief	515, 131
See IMMOVEABLE PROPERTY, LANDLORD, VENDEE.	
REPAIR,	
banks of river, contract to	130
in husbandry	165
vendor's duty to	422
See under CONTRACTS.	
REPARATION,	
specific	8, 22, 76, 160
REPLEVIN,	
action of	6, 7
REPORTS,	
flying, and notice	23
REPOSE,	
statute of	494n, 503
See LIMITATION.	
REPRESENTATION	190-1, 451
ambiguous	238
by conduct	220-1
doctrine of making good... ..	191n, 372, 456
in same transaction	233
intention	190, 191, 218, 244

	PAGE.
REPRESENTATION— <i>contd.</i>	
known to be false or not believed to be true ...	232-3
materially inducing contract ...	234-8, 372, 453
means of discovering truth ...	235-7
non-fulfilment of ...	371-3
not false to contractee's knowledge ...	239
of belief ...	219
fact ...	218-20
material fact ...	231
opinion ...	219, 220
party or agent ...	231 2
untrue ...	218, 95
vague and indefinite ...	237
See CONCEALMENT, FRAUD, MISREPRESENTATION, SILENCE.	
REPRESENTATIVE	
in interest, see under SUIT. ...	76, 100, 101
REPUDIATION, see under CONTRACT.	
and rescission distinguished ...	363
by joint promisor ...	106
REPURCHASE,	
agreement for ...	76
<i>Res judicata</i> ...	360, 408, 427, 520, 97, 133
<i>Res perit domino</i> , see MAXIMS OF LAW.	
RESCISSION	
of contract ...	24, 264-5, 265, 274, 427, 451, 480, 5, 104
and cancellation ...	110-1
rectification ...	438
specific performance ...	451, 104
breach by lessee or purchaser	
after decree ...	468-70, 106-7
coercion ...	457
conveyance ...	459
fraud ...	455-6
insurance contracts ...	109
misrepresentation ...	452-5
mistake ...	461-4, 107
prayers in plaint, alternative	108
restitution ...	470, 107
by compensation ...	472-3, 108-9
effect of fraud and mistake ...	473-4
impracticable ...	471-2
rights of innocent parties ...	460, 105
terminable agreement ...	452-3, 105
unlawful ...	465
undue influence ...	457
void agreement ...	461, 105
voidable ...	453-61, 105
See DISCRETION, SUIT.	
<i>Restitutio in Integrum</i> ...	470, 108
RESTITUTION,	
equitable doctrine of ...	7
for rescission, see RESCISSION.	
in kind ...	58
nature ...	19, 59
RESTORATION, see <i>Statu Quo</i> ...	4, 471
RESTRAINT	
of trade, see TRADE.	
RESTRICTIVE	
covenants, see COMPENSATION, COVENANTS.	

	PAGE.
RETALIATION	4
RETRIBUTION	4
RETROSPECTIVE	
effect, of legislation	18
REVERSION, see REMAINDER, REVERSIONER.	
declaration regarding	498
defined	401n, 498, 78
material injury to	78-9
sale of ... ..	...271, 315n, 320n, 42
REVERSIONER, see HINDU LAW.	
declaratory suit by	484-5, 500-4, 522, 116, 117, 120-1, 125
injunction against nuisance	641n
waste	687
next, consent of	501n, 120
remote	498, 120
REVISION	
by High Court... ..	67, 37
REVOCABLE	
contracts, see CONTRACTS.	
REVOCATION, see PROPOSAL.	
of agents' authority, see AUCTIONEER.	65, 96
probate	551
power of	350
RIGHTS,	
absolute or relative	4n
abstract	124
antecedent	4
arising from civil delicts	14n
chance or possibility of	493, 505, 119
civil, mistake as to	341
conjugal, see CONJUGAL.	
contingent ... ..	...503, 119
created by past transactions	355
customary	126
defined	3, 114
doubtful, see FAMILY.	404, 406, 439, 77
<i>in personam</i>	2-3, 19
<i>rem</i>	2-3, 255, 19
incorporeal	63
legal and equitable	32
personal	538
remedial	4
riparian	641-2
sanctioning	4
sleeping over ... ..	...375, 378
special or temporary	38-9
to damages and specific relief	184-5
vested	119
See MANDAMUS.	
RIPARIAN	
rights, see RIGHTS, WATER.	
ROMAN LAW,	
improvement by <i>bona fide</i> possessor	424
inadequacy of consideration	317
interdict <i>unde vi</i> , see INTERDICT.	56-7
'real' contract	252
specific performance not recognised in	19

	PAGE
ROMILLY, Lord,	
on loans	157
piecemeal performance	172, 355
representation at marriage	191
sale by vendor without title	358
substance and form	270
RULES	
of discretion and jurisdiction	481, 502, 628
Supreme Court, England,	
Or. 19, r. 14	414
25 5	111
42 30	438
S	
ST. LEONARDS, Lord,	
on latent defect of quality	224
partial execution of contract	354
performance of contracts	78, 621
SALARY, see PAY.	
SALE	83
and mortgage, breach of condition as to payment	273
in one lot	356
of debt	124
uncumbered property	56, 80
furnished house	95
goods	95, 96, 97, 156, 420
land... ..	95, 96, 97, 420, 43, 54
offices	141
water	168
proceeds	117
with all faults	224n, 456
See CONTRACT, VENDOR AND PURCHASER.	
SALMOND, J. W.,	
on possession	38n
and ownership	47-8
specific fulfilment of duty	19n
SANCTION	
of district Judge	201, 66, 109
SAVIGNY, VON,	
on elements of contract	10
intent in possession	36n, 39
mistake of law	341
SCHEDULED Districts,	
where Specific Relief Act is in force	17-8
SCIENTER	
and equitable relief	242
SCOTCH LAW,	
building contracts	107, 108
declarator	487, 117
implement	20
specific performance	20
SCRIVENER,	
mistake of	484, 435
SECRET	
commodities or medicines, agreements concerning	648n, 63
divulging of, enjoined	648, 158
SECURITY,	
mortgage	638
of receiver, see RECEIVER.	

	PAGE.
SEISIN, see POSSESSION.	
at root of title to land ...	58 <i>n</i>
generates heritable right ...	50
of court ...	97
SELBORNE, Lord,	
on contracts for work and labour ...	162 <i>n</i>
doctrine of part performance ...	251
executory contracts ...	21
SELDEN, J.,	
on equity ...	185-6
SELF-HELP,	
prohibited in interest of public order...	57
SERVICE.	
personal, see PERSONAL.	
unique ...	626
SERVITUDE, see EASEMENT. ...	494
SETTLEMENT,	
articles for ...	383, 384, 446
executed ...	383, 384, 630, 24, 81, 99
executory ...	383, 384, 24, 99
for value ...	383
injunction and... ..	630
of boundaries and lands ...	130
chattels and land ...	384, 14-5
property ...	382, 23-4, 91
consideration for ...	210
on marriage, see MARRIAGE. ...	125, 383, 77
protection of active and passive ...	384, 81, 84
record, correction of ...	123
specific relief respecting ...	384
voluntary ...	383, 384, 457, 10, 24, 81, 84
alteration in Indian law ...	10
SHAM	
deed ...	112, 113
SHARES,	
agreement to allot ...	419
in railway company, etc. ...	90, 91 <i>n</i> , 43
SHARP,	
practice ...	295, 94
<i>Sic utere tuo ut alienum non Laedas</i> , see MAXIMS OF LAW.	
SILENCE, ...	128, 221, 229, 73, 95
as to facts known to plaintiff-purchaser ...	384, 455-6
creating hardship ...	73, 95
equivalent to speech ...	227
See CONCEALMENT, LIE, OBLIGATION TO SPEAK.	
SLAVES,	
recovery of ...	72, 89
SLEEPING	
over or upon rights, see RIGHTS.	
SOCIETY,	
movement of progressive ...	5
repose of ...	377
SOLICITATION	
of business ...	623
SOLICITOR	
to blame ...	466
common ...	299
fiduciary relation ...	106
misrepresentation by ...	454
mistake of ...	434

	PAGE.
SPECIFIC	
performance and injunction ...	614
public interest, see PUBLIC.	
setting aside of contracts ...	334
claimed of executory contracts ...	21, 84, 260, 382, 41
class of contract and not individual case considered ...	159-60
conditions, elements and incidents necessary for ...	186n
contracts for personal acts and proceedings ...	180-1
decree for damages, adequacy of ...	20
defences to action for, see EQUITABLE DEFENCES, LEGAL DEFENCES.	
defined ...	21n, 76, 25, 41
equitable considerations against ...	155
head of equity jurisdiction, ancient ...	19n
in Hindu law ...	14
Mahomedan law ...	14
Scotland ...	20
insolvency of defendant ...	129-30
jurisdiction of ...	78-80, 87n, 173
limitation of doctrine in England ...	19
India ...	20
meaning of ...	83
of complete contract only ...	86, 164, 189, 41, 85
contract, three aspects of ...	22
with variation ...	244-8, 344-6, 373, 436, 84-8
prevention true ...	22
primary remedy ...	13
realty and personality ...	96, 45
required by nature of contract ...	87
resisted partially ...	84
turns executory into executed contract ...	21n
See CONTRACT, INJUNCTION, JURISDICTION, RESCISSION.	
relief,	
denial of, does not deprive party of legal remedy ...	186
explained ...	1-2, 17
forms of ...	4, 5, 30, 26-7
limited to civil injuries ...	5
no absolute right to ...	184-5
not granted for enforcing penal law ...	5
limited to executory contracts ...	283, 382
personal bar to ...	242-3
wider than specific performance ...	22, 395, 430, 616
reparation, see REPARATION.	
SPECIFIC RELIEF	
Act ...	34, 17
not exhaustive ...	30, 17
Bill, see STATEMENT.	1
SPECULATION, see DELAY.	
contract of ...	381n
court not moved by ...	507
SPELLING, T. C.,	
on injunction ...	27
Spes accessionis ...	500
transfer of, invalid ...	125
SPIRITUAL	
adviser, see ADVISER.	
privilege ...	507
tyranny ...	213

	PAGE.
SQUATTING	37
STAMP	
law, see COURT-FEE	126
STANDARD	
for ascertaining damage	42
Stanomdar	519
STATE, see CROWN, GOVERNMENT.	
act of	610, 164
external relations of	141
laws of foreign	141
STATEMENT	
of Objects and Reasons, specific Relief Bill	377, 13-6
Statu quo,	
matters in	378, 590, 591, 601n, 144
parties in	441, 589
plaintiff in	259, 68
property in	618
restoration to	471, 473, 604, 650, 74, 107
STATUS,	
adoption	525, 48
coverture	518, 117, 132
declaration of, see DECLARATION.	491, 520
defined	490
legitimacy, see LEGITIMACY.	519, 118
parol assertion of, see under PAROL.	524
to contract	5
STATUTE,	
construction of, see CONSTRUCTION.	138, 503
of repose, see REPOSE.	
privilege	644
relief against provisions of	27
STATUTE OF FRAUDS,	
and charities	256
implied trusts	257n
part performance	250-2
object of	312
STATUTES,	
English,	
32 Hen. VIII, c. 34	386
27 Eliz., c. 4	15
29 Car. II, c. 3	248, 7
s. 1	15
3	15
4	249, 251, 15
17	251n, 15
13 Geo. III, c. 63	137
21 Geo. III, c. 70, s. 8	141
3 & 4 Will. IV, c. 27, s. 36	59
40	572
8 & 9 Vict., c. 18	131
11 & 12 Vict., c. 21	285
s. 9	229
24	229
15 & 16 Vict., c. 86	487
s. 50	117
17 & 18 Vict., c. 125, s. II	145, 68
68	536
78	38

	PAGE.
STATUTES— <i>contd.</i>	
21 & 22 Vict., c. 27 ...	415
ss. 2, 3, 6 ...	58
c. 93 ...	132
c. 106, s. 65 ...	36
22 & 23 Vict., c. 61, s. 7 ...	132
24 & 25 Vict., c. 67 ...	1
c. 104 ...	137
25 & 26 Vict., c. 89 ...	461, 543
30 & 31 Vict., c. 48 ...	240
c. 131, s. 38 ...	229
31 Vict., c. 4 ...	315
36 & 37 Vict., c. 12, s. 2 ...	148
c. 66 ...	29, 416, 429, 450, 455, 613, 646, 648
s. 24(5) ...	612, 163
25(8) ...	585, 148
50(2)(6) ...	584
44 & 45 Vict., c. 68, s. 9 ...	132
45 & 46 Vict., c. 39, s. 3 ...	91
46 & 47 Vict., c. 49 ...	415
s. 3 ...	536
c. 52, ss. 30, 37, 56 ...	285
51 & 52 Vict., c. 52, s. 3 ...	656
52 & 53 Vict., c. 49, s. 4 ...	145, 68
53 & 54 Vict., c. 71, s. 3(12) ...	285
55 Vict., c. 9 ...	153
56 & 47 Vict., c. 71, s. I. (3) ...	175
ss. 13-5 ...	224
s. 24 ...	460
57 & 58 Vict., c. 12, s. 3 ...	629
63 & 64 Vict., c. 48, s. 10 ...	229
8 Ed. VII, c. 69, ss. 89, 91 ...	629
U. S. A., to remove cloud ...	489
STATUTORY	
obligation to disclose ...	229
powers, how exercised ...	636, 656, 164
STINNESS, C. J.,	
on delay and laches ...	376
STIPULATION,	
independent ...	374
insertion or omission of ...	437
material, inability to perform ...	371, 169
omission of, deliberate ...	374, 438
outside written contract ...	373
See CONTRACTS, COVENANT,	
STOCK, see SHARES.	
connected with business ...	90, 155, 271
corporate ...	94
in premises let ...	91n
steam-boat ...	93
STORY, J.,	
on building contracts ...	107
improvement by <i>bond fide</i> purchaser	
with defective title ...	424
injunction against trespass ...	633
preventive jurisdiction of equity ...	24
principle of <i>quia timet</i> ...	478
water-rights ...	641
STRANGE, R., see THIRD PARTY, TRUST.	
benefited by contract, may sue when	430
to arbitration ...	403
	98

	PAGE.
STRIKE	649
SUBROGATION	56
SUBSEQUENT	
events and hardship ..	313-4
SUBSTANCE	
and form	270, 374, 447n, 60, 103
SUCCESSION	
certificate...	496, 511, 511
SUFFIX,	
right to	498
<i>Suggestio falsi</i>	227
SUIT,	
barred by agreement to refer to arbitration ..	70
for cancellation of instrument :	
plaintiff, inconsistent claims of	483, 114
interest of ..	482
terms imposed upon	485
who may be	111
relief	484, 113
damages and for specific performance distinguished	286, 438
See DAMAGES.	
declaration:	
abatement of	533
appeal, objection in	531-2
array of parties ..	501n
defendant	508
dismissal of	512-3
effect of, on second suit	532, 129
plaint	530, 121
amendment of	530-2, 129
cause of action not disclosed	529-30, 128
plaintiff	492-3, 505, 118
injunction	668-9, 149
partition, receiver in	552, 135
possession, see POSSESSORY.	
rectification of instrument :	
parties	448-9
pleadings	102
rescission of contract,	468-70, 103
plaintiff	104
second suit on breach after decree	469-70, 107
specific performance of contract :	
decree, see DECREE.	
defences to, see EQUITABLE DEFENCES and LEGAL DEFENCES.	
defendant	408, 88
assignee of bankrupt vendor	410
beneficiary	413
committee of lunatic	410, 89
company	412, 92
amalgamated	411, 92
legal representative	408, 89
party to contract	408, 89
person likely to be affected by decree	412-3
with title displaced	410, 91
subsequent licensee	410
transferee	409, 89-91
plaintiff	397
who may be :	
agent	400, 76
assignee	398, 399, 78

	PAGE.
SUIT— contd.	
beneficiary under	
family arrangement	404, 77
marriage settlement	404, 77
<i>cestui que trust</i>	406
company	402, 79
amalgamated	402, 79
legal representative	397, 400, 76
party to contract	397, 398, 76
principal	400, 76
remainderman	402, 403, 78
reversioner	401, 78
who may not be :	
party holding decree for damages	408, 81
not entitled to damages	407, 80
under incapacity	407, 80
See THIRD PARTY.	
pleadings	414
not strictly construed in India	415
plaint	414-5
amendment of	58, 59
relief	415
alternative prayers	418, 427
damages and specific performance,	
See COMPENSATION, DAMAGES.	
rectification and specific	
performance	428-9
specific performance or rescission	108
written statement	429
interpleader, receiver in	569n
premature	112
testamentary	551
SUPERINTENDENCE	
by Court	162n, 166, 168, 62, 63
SUPERVISION, see SUPERINTENDENCE.	
SUPPLY,	
limited, articles of	91
SUPPORT,	
right to, see EASEMENT.	642, 644
<i>Suppressio Veri</i> , see FRAUD, REPRESENTATION.	227, 319, 334, 456
SURPRISE	303, 342, 345, 446, 73, 85, 86, 96, 112
SURRENDER, see HINDU LAW.	
fraudulent or mistaken relief against	
of instruments, see CANCELLATION.	486
SUSPICION,	
mere, Court acts not on	343, 346, 362, 476
T	
Tarwad	130
TAX,	
assessment of	516
TEMPLE, see Math,	
<i>patta</i> of	497
<i>patti mali</i> of	516
priest of	497, 518, 118
trust of	497, 515
TENANCY, see LEASE.	
by estoppel	570

	PAGE.
TENANT rights, see LANDLORD.	
exproprietary ...	137
for life, see LIFE.	77, 91, 156
in common ...	366n, 551, 638
joint ...	411, 551, 638, 91, 92
<i>lakhiraj</i> ...	497
<i>malguzari</i> ...	511
non-occupancy...	36
occupancy ...	137, 31, 52, 106
<i>Terminus a quo</i> , see LIMITATION.	
TERMS	
of contract, see CONTRACT, CONDITION, COVENANT, STIPULATION.	
TESTIMONY,	
perpetuation of ...	489, 520, 16, 117
THIRD PARTY, see STRANGER.	
and contracts <i>ultra vires</i> ...	205
concurrence or consent of ...	127, 163, 348, 358, 55, 83
fraud of ...	232
injury to ...	208, 299, 366, 378, 449, 460
intervening rights of ...	180, 475, 482
not joined in suit for specific performance ...	76, 89
THURLOW, Lord,	
on doctrine of specific performance ...	173
TIMBER, see TREES.	
TIME, see DELAY, LACHES.	
essence of contract ...	269-74, 457-8, 51, 80
direct stipulation ...	271
made by notice ...	273
necessary implication ...	271
question of intention...	270
essential, material, immaterial ...	269-70, 375
lapse of ...	392
waiver of condition as to...	274
TITLE,	
defect in, latent ...	228
denial of ...	507-8
displacement of ...	410
doubtful ...	360, 520, 522
as matter of fact ...	362, 84
law ...	360, 84
failure of ...	478n
free from doubt ...	358-60, 83
good ...	358, 359, 452
holding ...	357, 67
imperfect ...	126, 53-5, 56, 82
made good before suit ...	351, 365, 82-3
marketable ...	359, 83
paramount ...	562
right to ...	497
slander of ...	481n, 124
stranger to ...	482, 494, 528
want of ...	362-3, 53, 82-3
possessory ...	493
prescriptive ...	492
proprietary ...	492
See TRESPASS.	
TORT, see WRONGS.	6, 590, 614, 630
when enjoined ...	631n, 144, 152, 159
need not be in respect of property ...	648, 151
See INJUNCTION.	

	PAGE.
TRADE,	
agreements not in restraint of	151, 623, 627
and competition	311
contract not to	163
to	163
libel	648 <i>n</i>
of felony	142
restraint of	120, 150, 615, 170
partial	150-1
public policy	150
secret	648, 158
with alien enemy	141
TRADE-MARK, see INJUNCTION.	606, 631, 645-6, 652, 146, 148, 155
property	645, 146, 155
TRADE-NAME, see INJUNCTION.	631, 645-6, 157
TRANSFER	44
TRANSFEE	
and restrictive covenants...	386
gratuitous	393, 409
subsequent, right of pre-emption of	90
when should be pleaded, see SUIT.	90
with notice	210-1, 258, 391, 393, 409, 448-9, 616, 43, 44, 81, 90-1
bound by covenant in equity	388, 389, 390, 391
relief refused against	71
without notice, <i>bonâ fide</i>	299 <i>n</i> , 393, 408, 419, 449, 451, 472, 89, 100, 102
TREES,	152, 153, 160
injunction against cutting	617, 637, 638, 658
ornamental	80
TRESPASS,	124
action for	6
of	6
and conversion distinguished	6, 6 <i>n</i>
casual act of	31
defined	6
implies force	35
injunction against	630, 633-6, 643 <i>n</i> , 650, 653-4
on the case	6 <i>n</i>
technical	609
under colour of title	634
statutory powers	635
TRESPASSER,	
declaration against	517, 527
ejectment against	6
TRIBUNAL, see COURT.	
single, in India, advantage of	6-7, 15, 16
TROVER,	
action of	6
TRUST, see INJUNCTION, TRUSTEE.	
always enforced by court of equity...	71
and cancellation of instruments	479, 480
contract	84, 42
breach of	86, 208, 299, 423, 556, 589, 594, 610, 628-30, 65, 94, 146, 154, 156, 158, 162
by reason of notice	257
constructive	21, 22, 26
declaration regarding	522
defined	84, 628, 19-20
duty of disclosure	222

	PAGE.
TRUST, see TRUSTEE— <i>contd.</i>	
enforced by stranger	42
executed	384, 21
execution of	83
governed by statute in India	83-4
executory	384, 21
express	20
hereditary	506, 518
implied	21
in unilateral agreement to convey property	284
of chattels	84
realty	84
origin need not be enquired into	85
precatory	22
public	21
receiver	544 <i>n</i> , 556
repugnant claims not allowed	85 <i>n</i>
resulting	256, 21
TRUSTEE, see FIDUCIARY RELATION, TRUST.	146
contract by, in breach of trust or excess of power	208, 39, 65
declaratory suit against	508, 520
by	497, 116
defined	628
<i>ex maleficio</i> , in cases of fraud	256
malfeasance or misfeasance of	209, 457, 556
misappropriation by	8
not lightly displaced by receiver	556
of legal estate	55
temple, see TEMPLE.	
power of sale of	83
recovery of specific moveables from	70
represents beneficiary	520, 116
right to possession of	70, 37-8
to preserve contingent remainders	504, 509, 637
TRUTH, see LIE.	
half a	227
means of discovering, see FRAUD.	
TURNER, Sir G.,	
on marketable title	359-60
tenant for life cutting trees	637 <i>n</i>
U	
<i>Uberrime fidei</i>	223
<i>Ultra vires</i> , see CORPORATION.	
assessment of tax	516
doctrine of	204-5, 66
order of Government	130
two senses of	204-5
UNCERTAINTY,	196, 288, 291, 116
and fraud	293
as to consideration	290, 64
parties	291
price	164, 196
subject-matter	289
time of performance	290
not indefinitude	64
removed by subsequent conduct of parties	293
UNCONSCIONABLE	
advantage	302, 320, 323, 93-5
bargain	216-7, 334

	PAGE.
UNDUE influence ... ..	...213-5, 343, 457, 464, 476, 22, 94, 105, 112
and confidential relation distinguished ... ..	... 202
<i>pardanishin</i> ladies ... ..	... 216
burden of proof in cases of ... ..	... 213 <i>n</i>
elements of ... ..	... 213
restitution for ... ..	... 460 <i>n</i>
	See LEGAL DEFENCES, RESCISSION.
UNFAIR	
advantage ... ..	...295, 299
due to inadvertence ... ..	... 298
unequal position of parties ... ..	... 297
practices ... ..	... 95
UNIVERSITY ... ..	... 538
UNJUST,	
enrichment or impoverishment ... ..	... 263 <i>n</i>
UNREGISTERED	
sale-deed ... ..	... 158, 159, 255
V	
VAGUE	
apprehensions ... ..	... 663
commendation ... ..	... 219
expressions reasonably interpreted... ..	... 292
statements ... ..	... 237
VALUE,	
of a thing ... ..	... 316
statement regarding ... ..	... 232 <i>n</i>
VALUER,	
reference to ... ..	... 164
unfairness of ... ..	... 298
VAN FLEET, V.C.,	
on individual's right to labour ... ..	... 162
VARIATION,	
according to altered circumstances... ..	... 347
contemporaneous and subsequent ... ..	... 247
parol ... ..	...247, 267
specific performance with ... ..	... 244-8, 267, 84-8
VENDEE,	
mistaken impression of ... ..	... 228
refusal by, to perform ... ..	... 368
right to indemnity ... ..	... 180-1, 51
partial performance ... ..	...179, 181-2, 362, 365
affected by knowledge or notice ... ..	... 179, 359, 366
<i>mala fides</i> or misrepresentation... ..	... 182
negligence... ..	... 180
right to repudiate contract ... ..	... 363
take possession ... ..	... 421-3
when entitled to rents and profits ... ..	... 422-3
liable to account for rents and profits ... ..	... 469-70
wrongful possession of ... ..	... 469-70
VENDOR,	
decree in favour of ... ..	... 103 <i>n</i>
duty of, to repair ... ..	... 422
fraud of ... ..	... 228, 421 <i>n</i>
general laudation by, see ADVERTISEMENT. ... ..	... 219
ignorance of ... ..	... 455
imperfect title of ... ..	... 53

	PAGE.
VENDOR—<i>contd.</i>	
in occupation	423
inability of, to complete performance	174, 365
convey	365
damages for	420-1
inequitable conduct of	177, 369, 421
knowledge of, re want of title	358
loss from casualty borne by	278
mistake of, regarding title	359
obligation of, to make out title	181, 358
of chattels	101 <i>n</i>
right to purchase-money of	364
rights of, similar to purchaser's	101
unpaid, lien of, see LIEN.	496, 555, 591
when entitled to interest on purchase-money... ..	422-3
'wilful default' of	422
VENDOR AND PURCHASER,	
benefit of fire insurance	284-5
covenants and indemnity	305 <i>n</i>
court's duty to ascertain law	361
damages for deterioration	418, 423
doctrine of equitable conversion	279, 422
good faith between	228, 228, 237, 358
inadequacy of consideration	316
non-payment of consideration	112
rights and liabilities of	197, 421, 423
special purpose	380
See AGREEMENT, CONTRACTS, SALE, TITLE.	
Vis major	33
VOID, see AGREEMENT, CONTRACT, INSTRUMENT.	174
transaction	109
VOIDABLE, see AGREEMENT, CONTRACT, INSTRUMENT.	174
VOLUNTEER,	391, 448
and family settlements	404
under settlements	383, 404, 630
W	
WAGER, see GAMBLING.	
agreement by way of	152-3
WAIVER,	
of condition precedent	268 <i>n</i>
regarding time	274, 376, 381
contract	264-5
mutuality	353
plea as to irregularity of procedure	397
jurisdiction	396
right	378, 393, 453, 475, 120
Wakf, see ENDOWMENT, Math.	
declaration regarding	498, 506, 507, 528
mutwalli of	594
WALWORTH, C.,	
on suppression by buyer	334
WAREHOUSE-KEEPER,	
right to possession of	38
WARRANTY,	105
implied	224 <i>n</i>
of quality	224, 337, 338, 456
title	197, 357, 482 <i>n</i>

	PAGE.
WASTE,	544, 551, 556, 626, 633, 650, 658, 80
breach of covenant	401
by Hindu female, see HINDU LAW.	637
joint tenants	638
mortgagor in possession	638
tenant	368, 637
for life	636-7
in common	638
classified	636
injunction against	630, 636-8, 652, 157
<i>pendente lite</i>	590
<i>sans</i>	637
WATER,	
continuing contract to sell	168
division of, agreement for	114
rights, enforced by injunction	641-2, 656, 153
though damage nominal	641
WESTBURY, Lord,	
on contract relating to specific chattel	94
ignorance of law	339
the Statute of Frauds	250n
WIFE,	
concurrence of, in husband's conveyance	127, 181n
dower interest of	180
WIGRAM, V. C.,	
on mutuality	350n
WILL,	
cancellation of	111
compromise in probate case	137
construction of	496, 503, 521, 522, 116, 120
contract to devise land by	85, 410
declaration regarding	503, 517, 120, 126
defined	383, 23
directions in	261, 384, 98
rectification of	101
WILLIAMS, C.,	
on defences to action for specific performance	184
discharge by agreement	264
latent defect of quality	225
relative disability in equity	201
WILLISTON, S.,	
on alteration of conveyances and bonds	262
discharge of contract... ..	264n
WILLS, J.,	
on intention in restrictive covenants	392
WOODROFFE, J. G.,	
on excessive citation of case-law	581
WORD,	
property in	121
WRIT,	
of assize, <i>mort d' ancestor</i>	57
<i>novel disseisin</i>	57
abolished	59
mandamus, see MANDAMUS,	
WRITTEN	
contract, see CONTRACTS,	
statement, see SUIT.	

	PAGE.
WRONG-DOER,	
cannot plead <i>jus tertii</i>	70
WRONGFUL,	
detention, see DETENTION.	
dispossession, see DISPOSSESSION.	
WRONGS, see DELICTS, TORT.	
antecedent, duty of disclosure	222
committed by government servant	611
redressed by compensation or specific relief	6
to property, moveable and immoveable	6
Z	
ZABRISKIE, C.,	
on nuisance in different quarters of a town	639

